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Article

THE MONSANTO LECTURE ONLINE DEFAMATION, LEGAL CONCEPTS, AND THE GOOD SAMARITAN

Benjamin C. Zipursky*

I. INTRODUCTION

It was an honor to give the Monsanto Lecture at Valparaiso University Law School. Many prior Monsanto lecturers have utilized this opportunity to sketch important theoretical frameworks. I have chosen to go in a different direction, one that is studiously down-to-earth. The Article principally addresses questions regarding the publication element of the tort of libel and how the doctrine surrounding those questions ought to be applied to defamation cases that involve the Internet. Most of today's interesting problems in American defamation law involve a question about the interaction of a federal statutory provision, the Communications Decency Act ("CDA") § 230(c), with the common law of libel. I argue that the failure to take the doctrinal structure of libel law seriously has led courts to mangle Internet defamation law, effectively eliminating—for the Internet only—a fundamental principle called "the republication rule."¹ This interpretation is alien from what Congress intended, from any reasonable reading of the relevant statutory text and from plausible public policy choices in the age of the Internet. As Ninth Circuit Judge Ronald Gould cautioned:

Congress wanted to ensure that excessive government regulation did not slow America's expansion into the exciting new frontier of the Internet. But Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice. The CDA does not license anarchy. A person's decision

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¹ 47 U.S.C. § 230(c) (2012).

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to disseminate the rankest rumor or most blatant falsehood should not escape legal redress merely because the person chose to disseminate it through the Internet rather than through some other medium.²

This Article aims to set things right in a somewhat traditional way: it elucidates a legal problem by identifying the relevant doctrinal framework within tort law, and it applies that doctrinal framework to the real world of facts and statutes and politics. Its principal thesis is that § 230 of the CDA—which is called “Protection for ‘Good Samaritan’ blocking and screening of offensive material”—should be interpreted against the backdrop of both: (1) a variety of principles regarding the publication element of libel law; and (2) the numerous Good Samaritan statutes that have been enacted to modify the common law’s treatment of the “duty” element within state negligence law. Like certain parts of negligence law, CDA § 230 (“§ 230”) relates to whether a company or individual ever has a duty to protect persons against perils that it (the company or individual) did not itself generate. A striking decision by a single state trial court in the early 1990s caused a panic in the fledgling Internet industry because it seemed to create a common law Catch-22 for Internet service providers who try to protect families against obscenity on the Internet.³ Congress solved the problem with § 230 just the way that state legislatures have used Good Samaritan laws to eliminate the Catch-22 for physicians who volunteer to rescue roadside accident victims. Notwithstanding what seems to be a direct message from Congress in the very naming of the statute, it turns out to have been difficult for courts and commentators alike to grasp its main point. I am hopeful that, as a scholar who studies the range of tort law—from negligence to strict products liability to battery, fraud, and defamation—I may be able to shed light on this important question of statutory interpretation. The unjustifiable abandonment of the republication rule for Internet cases is a consequence of courts’ failure to grasp the “Good Samaritan” aspects of § 230 and the concepts of affirmative duty that such a framework imports into libel law.

While friends and colleagues will not be surprised by my decision to focus on libel law in this Article (defamation and privacy within tort law

² See *Batzel v. Smith*, 333 F.3d 1018, 1040 (9th Cir.) (Gould, J., concurring in part and dissenting in part), *rehearing denied*, 351 F.3d 904 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (holding that a republisher was immune under the Communications Decency Act (“CDA”) § 230).

³ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995) (treating the Internet service provider (“ISP”) as the publisher of a defamatory posting by a third party).

have long been a personal passion), some would be incredulous if I disclaimed all theoretical pretensions. They would be at least partially right, for the theoretical positions I have advocated over the past two decades do lie behind the interpretive arguments I put forward here. In the end, I shall suggest that the problems courts have faced in CDA interpretation are symptoms of larger shortcomings in the theoretical and methodological assumptions that many judges and lawyers today bring to their analysis of legal questions. Sorting out § 230 requires taking legal concepts seriously: publication, active/passive distinctions, Good Samaritan ideas, affirmative duties, republication, and so on. Twentieth century tort scholars gave American judges and lawyers one hundred years of *anti-conceptual* thinking, often contending that pragmatic thinkers should zip through the verbiage of the common law and get to the results that really matter. The larger point of this Article is that reasonable and pragmatic legal interpretations often require just the opposite—an authentic engagement with common law principles and an intelligent construction of the case law and statutory provisions that emerge from and complement those principles. In pointing out a wide range of tort claims that have been inadvertently snuffed out, I also aim to call attention to the importance of tort law as a mechanism through which individuals are afforded an avenue of civil recourse against those who wronged them. To some extent, then, the Article illustrates the pragmatic conceptualist and civil recourse views I have put forward over the past two decades, both individually and in conjunction with Professor John Goldberg.⁴ Nothing here depends on acceptance of those theoretical views, however.⁵

Part II provides the background of our topic.⁶ Part II.A briefly introduces the republication rule. Next, Part II.B describes the key case—*Stratton Oakmont v. Prodigy*—that led to the enactment of § 230. Then Part II.C describes a path of decisions interpreting the CDA, leading us to a

⁴ See, e.g., Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 458–59 (2000) [hereinafter Zipursky, *Pragmatic*] (introducing pragmatic conceptualism); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 82 (1998) (introducing civil recourse theory); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1746–50 (1998) (developing responsibility-based, pragmatic, and conceptualistic accounts of the common law of torts, in the spirit of Cardozo as opposed to Holmes); see also John C.P. Goldberg, *Ten Half-Truths about Tort Law*, 42 VAL. U. L. REV. 1221, 1256 (2008) (providing the Monsanto lecture touching upon pragmatic, conceptualistic, and responsibility-based themes in tort law).

⁵ Benjamin C. Zipursky, *Thinking in the Box in Legal Scholarship: The Good Samaritan and Internet Libel*, 56 J. LEG. ED. 55 (2016). In a recent essay for a symposium on the future of legal scholarship, I suggested that doctrinal and non-theoretical legal scholarship is too often overlooked. *Id.* That essay puts forward a highly condensed version of the CDA § 230 (“§ 230”) analysis offered below.

⁶ See *infra* Part II (reviewing multiple cases).

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strikingly laissez-faire approach. Finally, Part II.D sketches where we are today in Internet libel law.⁷ Part III explains that American courts have been interpreting § 230 without an adequate understanding of either the common law doctrines relating to the publication element of libel law or an adequate understanding of the *Stratton Oakmont* decision.⁸ These lacunae have led to a catastrophe in interpreting and applying § 230 since its passage.⁹

Part IV uses the framework developed above to explain what has gone wrong in the interpretation of the § 230 and why, and Part IV offers an account of how that statute should be interpreted moving forward.¹⁰ Part V concludes by returning to the more theoretical theme of the Article—that legal concepts matter.¹¹

II. ONLINE DEFAMATION AND THE DISAPPEARANCE OF THE REPUBLICATION RULE

A. *The Republication Rule*

For centuries, the common law of libel and slander contained a principle called “the republication rule.”¹² It says that a speaker who writes or speaks a defamatory statement made by another is liable as if he or she were the speaker herself.¹³ As a general matter, it is immaterial whether the second speaker is reasserting the defamatory statement in her own voice or attributing it to the earlier speaker.¹⁴ Imagine a newspaper that publishes an op-ed by a Mr. Jim Smith saying “Clint Williams is a child molester,” or a neighborhood gossip who says, “Jim Smith said ‘Clint Williams is a child molester.’” The newspaper and the neighborhood gossips are, as a general matter, on the hook as if they were Jim Smith.

The reasons for the republication rule are obvious.¹⁵ It is not simply that the same damage can be done to the plaintiff by the republisher

⁷ See *infra* Part II (detailing the background of the tort of defamation).

⁸ See *infra* Part III (analyzing the courts’ interpretations of § 230).

⁹ See *infra* Part III (noting the impact of various interpretations of § 230).

¹⁰ See *infra* Part IV (recommending a better method of interpretation).

¹¹ See *infra* Part V (discussing legal concepts and the common law).

¹² See, e.g., *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (stating republishing libel may create liability even when the statement is attributed to another publisher).

¹³ See RESTATEMENT (SECOND) OF TORTS § 578(b) (AM. LAW INST. 1977) (summarizing the liability of those repeating defamatory statements).

¹⁴ See *id.* (“It is not defense that the second publisher names the author or original publisher of the libel.”).

¹⁵ See *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (“[t]alebearers are as bad as talemakers”) (internal citations omitted).

(actually, often far greater harm is done by the repetition or the broad publication).¹⁶ It is that, absent such a rule, defamers could too easily sidestep any possible liability by putting words into another's mouth. And remember that speaking or writing—including republication—is an intentional act, so republishers are aware when they are making the damaging statements. An assailant does not avoid liability for battery because the idea was someone else's and he was merely carrying through another's intention.¹⁷

To be sure, common law courts and legislatures have crafted intelligent limitations on the republication rule in cases where, for example, a newspaper is carrying a report of what was said in a city council meeting or a court.¹⁸ And, under the inspiration of *New York Times v. Sullivan* and its progeny, federal and state courts interpreting the First Amendment have created defenses that, directly or indirectly, blunt the impact of the republication rule in a range of cases, too.¹⁹ But—for the most part—the republication rule has remained in place before, during, and after the *New York Times v. Sullivan* era, and it remains in place today.²⁰

B. *Cubby, Stratton Oakmont, and the Communications Decency Act*

Things have gone differently for Internet defamation, however. In New York, California, and several federal circuits, the republication rule has been eviscerated.²¹ A person who posts a defamatory statement that was originally written by someone else is typically said to enjoy complete immunity from a defamation claim, even if the poster had actual malice, and regardless of whether it is an issue of public concern.²² On the Internet, the law of defamation (and various other speech torts, as well) has been sheared away for republishers, regardless of culpability,

¹⁶ See *Cianci*, 639 F.2d at 61 (reasoning any different rule would generate expansive reputational harm without liability).

¹⁷ See *Flowers*, 310 F.3d at 1148–50 (emphasizing the amount of authority stating that republishers should be held liable like the originator of the defamatory statement).

¹⁸ See, e.g., *Swede v. Passaic Daily News*, 153 A.2d 36 (N.J. 1959) (recognizing the defense of fairly and accurately reporting statement made in town meeting); see also e.g., *Hahn v. Holum*, 162 N.W. 432 (Wis. 1917) (shielding the true and fair reporting of official proceeding).

¹⁹ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 710, 739 (1964).

²⁰ See, e.g., Matthew D. Bunker & Clay Calvert, “Defamation Live”: *The Confusing Legal Landscape of Republication in Live Broadcasting and a Call for a “Breaking News Doctrine”*, 39 COLUM. J.L. & ARTS 497 (2016) (recognizing the persistence of the republication rule and calling for revision of doctrine with regard to live broadcasts).

²¹ *Infra* Parts II.C and II.D.

²² See, e.g., *infra* Part II.D. (describing breadth of protection in today's Internet law).

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knowledge, intention, or effect, and regardless of whether the original defamer can be found.²³

Two cases from New York began the sequence of events that brought us to where we are. The first—*Cubby v. CompuServe*—was quite unremarkable.²⁴ A plaintiff sued an Internet service provider because one of the virtual periodicals carried in its online libraries allegedly contained a statement defaming the plaintiff.²⁵ Judge Peter Leisure, in the Southern District of New York, determined that CompuServe was more like a library, bookstore, or newsstand than a newspaper, and summed this up by saying CompuServe was more like a distributor than a publisher.²⁶ Distributors—unlike publishers—cannot be held accountable in libel for the contents of writings they lend, sell, or distribute, at least if they lack notice of its defamatory content.²⁷ Judge Leisure, therefore, granted CompuServe's summary judgment motion on the ground that it was not a publisher.²⁸

Two years later, a controversial securities brokerage firm sued the internet service provider ("ISP") Prodigy in a New York state trial court in Nassau County on Long Island.²⁹ An electronic bulletin board carried on Prodigy contained a pseudonymous posting asserting the securities brokerage was engaged in fraud.³⁰ The plaintiff's lawyers in this case were not deterred by *Cubby* because they had found overstated marketing material by Prodigy in which it touted its ability to filter and edit content,

²³ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328–30 (4th Cir. 1997) (refusing to hold an online publisher liable for defamation or negligence, even though the original defamer could not be found).

²⁴ See generally *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 135 (S.D.N.Y. 1991) (illustrating that an action was brought for libel, business disparagement, and unfair competition).

²⁵ See *id.* at 137–38 (describing the nature of the plaintiff's defamation claim).

²⁶ See *id.* at 139–40 (finding CompuServe was not a publisher).

²⁷ See *id.* at 139 (explaining the higher standard of liability for publishers as opposed to distributors).

²⁸ See *id.* at 135, 145 (holding CompuServe functioned more like a distributor than a publisher).

²⁹ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995) (noting the cause of action); see also Second Amended Verified Complaint at 2–3, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *2 (N.Y. Sup. Ct. May 24, 1995) (stating Stratton Oakmont's president, Daniel Porush, was also a named plaintiff, and the named defendants included: IBM, Sears Roebuck, alleged partners of Prodigy, and unidentified defendants, John Doe and Mary Doe). The allegations in this complaint included assertions that unidentified employees of Prodigy were the users of the pseudonyms through which the postings were made; these allegations had been abandoned by the time Stratton Oakmont made its motion for partial summary judgment. *Id.*

³⁰ See *id.* at 3 (claiming unidentified individuals made a pseudonymous posting asserting that Stratton Oakmont had committed fraud).

thereby declaring itself family-friendly.³¹ The firm aggressively characterized Prodigy as having admitted that it was – within the rubric of *Cubby* – a publisher, not a distributor.³² Moreover, Stratton Oakmont was able to point to the fact that Prodigy had actually hired someone to monitor the bulletin board on which the allegedly defamatory statement appeared, and that this person had failed to remove the statement.³³ So confident was Stratton Oakmont – notwithstanding a prominent federal court having ruled as a matter of law for the defendant in the only similar case – that it moved for partial summary judgment on the issue of whether Prodigy could be held liable if the statement was found defamatory.³⁴ Stunningly, the trial judge in New York State court granted partial summary judgment, ruling that Prodigy was a publisher, as a matter of law, of statements that had been anonymously posted on its electronic bulletin board.³⁵ Even though Prodigy hired new lawyers and moved for reconsideration, it was too late, for the trial judge was unwilling to change his mind.³⁶

It is, of course, not technically relevant that the controversial securities firm protecting its reputation in *Prodigy* was none other than Stratton Oakmont, best known today as the firm that was run by Jordan Belfort – the so-called “Wolf of Wall Street.”³⁷ We now know that public statements critical of Stratton Oakmont were sorely missing in 1994.³⁸ It is more than a touch ironic that Stratton Oakmont’s right to protect its reputation is the source of American Internet defamation law today.³⁹

The ISP industry rushed to Washington in the weeks after Justice Stuart Ain’s decision, energetically lobbying Congress for federal protection against state judges like Ain.⁴⁰ Congress devoted a provision

³¹ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4-5 (describing Stratton Oakmont’s ability to filter and edit content).

³² See *id.* at *4 (following the rubric of *Cubby*).

³³ See *id.* at *5-6 (explaining how Prodigy directed and controlled Epstein’s actions).

³⁴ See *id.* at *1 (moving for partial summary judgment).

³⁵ See *id.* at *4 (granting Stratton Oakmont’s motion for partial summary judgment).

³⁶ See *id.* at *1-2 (denying Prodigy’s motion for renewal).

³⁷ See *Stratton Oakmont*, 1995 WL 323710, at *1 (denoting Stratton Oakmont as the plaintiff in the case); *id.* (establishing Stratton Oakmont as a party to the lawsuit); see also JORDAN BELFORT, *THE WOLF OF WALL STREET*, 15 (2007) (detailing Jordan Belfort’s efforts in establishing the brokerage firm Stratton Oakmont). The film version of the book – *The Wolf of Wall Street* – was a Hollywood blockbuster starring Leonardo DiCaprio.

³⁸ See BELFORT, *supra* note 37, at 54-55 (implying Stratton Oakmont had a good reputation among many individuals in the early 1990s).

³⁹ See Conor Clarke, *How the Wolf of Wall Street Created the Internet*, SLATE (Jan. 7, 2014), http://www.slate.com/articles/news_and_the_stratton_oakmont_ruling_that_helped_wri_te.html [<https://perma.cc/HT2W-KG8D>] (reporting Stratton Oakmont initiated a lawsuit that laid the legal foundation for governing Internet content).

⁴⁰ See *id.* (describing the reaction to the *Stratton Oakmont* decision in Washington).

of its then-in-progress telecommunications bill to overrule this little New York case and to make sure it was not followed nationally.⁴¹ One of the concerns quite rightly raised was that it was unrealistic to expect ISPs to review all of the postings on all of its bulletin boards and to determine which were true or false, defamatory or non-defamatory, and published negligently or not.⁴² Another was that a pattern of massive filtering and taking down of messages by ISPs—particularly if done in a defensive spirit—would hold back the Internet from fulfilling its potential and would represent a move in the wrong direction from a First Amendment point of view.⁴³ Most specifically, Congress was profoundly troubled by the New York trial court’s willingness to treat the defendant as sort of “estopped” by its own partial censorship from pleading an inability to control what was online.⁴⁴ The problem was that companies would therefore make sure to refrain from any form of control of obscenity.⁴⁵ For all of these reasons, Congress inserted into the CDA what it called the “Good Samaritan” provision:

(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 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

⁴¹ See 47 U.S.C. § 230(c) (2012) (codifying the language of the bill’s final draft).

⁴² See Clarke, *supra* note 39 (expressing Congress’s concerns over the *Stratton Oakmont* ruling).

⁴³ See CDA 230: *Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> [<https://perma.cc/7LDY-T4LR>] (discussing additional concerns from Congress over ISP liability).

⁴⁴ See *id.* (referring to the Cox-Wyden Amendment to the CDA that was proposed in response to Congress’s concerns).

⁴⁵ See *id.* (noting the CDA was passed, in part, in the interest of children’s safety).

(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).⁴⁶

The CDA was passed into law in 1996. Although certain portions of it were struck down by the Supreme Court in *Reno v. American Civil Liberties Union*, § 230(c) remains good law.⁴⁷ In the past twenty years, it has been applied in scores of cases to undercut not only claims for defamation, but other common law tort speech claims—such as invasion of privacy—as well as a variety of state and federal statutory claims that sought to impose liability on an Internet provider for speech conduct by Internet users that violates some state or federal law.⁴⁸ The word “immunity” does not appear in § 230(c), but courts across the nation routinely say that it creates a federal immunity for Internet service providers and users with regard to content provided by others.⁴⁹ The U.S. Supreme Court has never issued an opinion interpreting the meaning, scope, or applicability of § 230(c).⁵⁰

C. *Zeran, Batzel, and Barrett*

The most widely cited opinion interpreting § 230 is *Zeran v. America Online, Inc.*, penned by Chief Judge J. Harvie Wilkinson, III of the United States Court of Appeals for the Fourth Circuit shortly after the CDA became law.⁵¹ *Zeran's* facts are remarkable.⁵² On April 25, 1995, an unknown person posted an advertisement on an America Online, Inc. (“AOL”) bulletin board for “Naughty Oklahoma T-Shirts,” indicating that those interested in acquiring such a T-shirt should call “Ken” at a phone number that was provided.⁵³ The phone number belonged to the plaintiff, Kenneth Zeran, who was incontrovertibly neither the person posting the advertisement nor a person in any way involved in making or selling such

⁴⁶ § 230(c)(1)–(2).

⁴⁷ See 521 U.S. 844, 979 (1997) (holding that certain portions of the CDA should be invalidated).

⁴⁸ See generally, JOEL R. REIDENBERG ET AL., SECTION 230 OF THE COMMUNICATIONS DECENTY ACT: A SURVEY OF THE LEGAL LITERATURE AND REFORM PROPOSALS 22–35 (2012) (surveying cases involving range of substantive causes of action for which § 230 protection has been sought).

⁴⁹ See Chi. Lawyers’ Comm’n for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669 (7th Cir. 2008) (citing several courts that have taken the “immunity” position).

⁵⁰ See § 230(c) (reflecting the absence of Supreme Court opinions on § 230(c)).

⁵¹ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997).

⁵² See *id.* at 328–29 (highlighting the facts of the case).

⁵³ See *id.* at 329 (summarizing the details of the hoax that plagued Ken Zeran).

T-shirts. The point of the anonymous poster's hoax was evidently to cause Zeran to be harassed by people believing him to be horrifyingly tasteless and insensitive.⁵⁴ The alleged T-shirt slogans were startlingly offensive: they made tasteless jokes about the Oklahoma City bombing of a federal building, which killed 168 persons (including nineteen children) less than one week earlier.⁵⁵ In essence, the posting characterizing Zeran as trying to make money by selling shirts with slogans such as "Visit Oklahoma . . . It's a BLAST!!!" "Putting the kids to bed . . . Oklahoma 1995," and "McVeigh for President 1996."⁵⁶ Zeran received hundreds of angry calls per day, including death threats.⁵⁷ He contacted AOL, demanding that the posting be taken down, but AOL refused to do so.⁵⁸ The problem was exacerbated when an Oklahoma City radio station learned of the posting (but did not learn that it was a hoax).⁵⁹ Zeran brought a tort claim against AOL for the reputational harm and emotional distress caused by its failure to remove the defamatory postings.⁶⁰ AOL asserted that the CDA protected it from liability, and the case went to the Fourth Circuit.⁶¹

Zeran argued as follows: even if one assumes that § 230 shields AOL from being treated like Prodigy was treated in *Stratton Oakmont*, his claim should still move forward because it is fundamentally different in kind from Stratton Oakmont's.⁶² Stratton Oakmont insisted that Prodigy be treated like the New York Times—as a publisher, and the trial judge had agreed to do so.⁶³ Section 230 forbids courts from following that lead, Zeran conceded, but that is irrelevant, because he wished to hold AOL responsible as a *distributor*, not as a publisher.⁶⁴ Recall that *Cubby* indicated that CompuServe could not be held liable as a distributor

⁵⁴ See THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 226 (2001) (speculating as to the goals of the hoax).

⁵⁵ See *Zeran*, 129 F.3d at 329.

⁵⁶ See *Zeran v. Diamond Broad., Inc.*, 203 F.3d. 714, 717 (10th Cir. 2000) (naming some of the offensive phrases advertised in the scam).

⁵⁷ See *Zeran*, 129 F.3d at 329 (describing the nature of Zeran's harassment).

⁵⁸ See *id.* (summarizing Zeran's interaction with America Online, Inc. ("AOL")).

⁵⁹ See *id.* (describing how Zeran's predicament worsened after KRXXO asked listeners to call his number, unaware of the underlying hoax).

⁶⁰ See *Zeran*, 203 F.3d at 335 (affirming summary judgment for the radio station on all of plaintiff's claims; defamation was classified as slander per quod, requiring proof of special damages).

⁶¹ See *Zeran*, 129 F.3d at 330 (summarizing AOL's CDA argument).

⁶² See *id.* at 331–34 (reiterating Zeran's rebuttal to AOL's argument).

⁶³ See *Stratton Oakmont v. Prodigy Servs.*, No. 31063/94, 1995 WL 323710, at *2, *4 (N.Y. Sup. Ct. May 24, 1995) (explaining how Prodigy commanded and controlled Epstein's actions).

⁶⁴ See *Zeran*, 129 F.3d at 331 (summarizing Zeran's argument against AOL).

because it lacked proper notice.⁶⁵ *Stratton Oakmont* shifted categories and demanded that Prodigy be held liable as a publisher. Zeran's principal argument was still on the distributor side. The CDA, Zeran argued, was silent as to distributor liability.⁶⁶

Judge J. Harvie Wilkinson rejected Zeran's argument, insisting that Congress was not using the term "publisher" so narrowly in the CDA.⁶⁷ Its point was that ISP's like AOL and Prodigy should be immune from lawsuits aiming to hold them liable for the defamatory comments posted by others.⁶⁸ When it prohibits courts from treating ISP's as "publishers" of information content provided by others, it is not simply saying that the newspaper-publisher or book-publisher doctrinal box shall not be used.⁶⁹ It is negating any doctrinal box that could be said to function under state (or federal) law to render ISPs liable for the harm inflicted by the defamatory posting of another.⁷⁰ Trying to use a state law distributor-box to generate ISP liability is, therefore, also preempted by § 230.⁷¹ At least as to defamation claims, *Zeran* is accepted by American jurisdictions today without exception.⁷²

In some ways the most important cases in my basic story are *Batzel v. Smith*, rendered by a panel of the Ninth Circuit in 2003, and *Barrett v. Rosenthal*, decided by the California Supreme Court in 2006.⁷³ *Batzel*, a California attorney, sued Tom Cremers, an Amsterdam-based expert in art museum security, for posting defamatory statements about her on a listserve and website.⁷⁴ The statements themselves were written by Smith, a building contractor and handyman who had worked for *Batzel* in her house.⁷⁵ Smith's e-mail suggested that he had evidence that *Batzel* was a

⁶⁵ See *Cubby, Inc. v. CompuServe, Inc.*, 766 F. Supp. 135, 141 (S.D.N.Y. 1991) (holding CompuServe was not a distributor).

⁶⁶ See *Zeran*, 129 F.3d at 331 (stating Zeran's argument).

⁶⁷ See *id.* at 334 (interpreting Congress's intended scope of the word "publisher").

⁶⁸ See *id.* (explaining the purpose of the CDA); see also 47 U.S.C. § 203(c) (2012) (providing the actual language of the act).

⁶⁹ See *cf. Zeran*, 129 F.3d at 331-32 (continuing to interpret the § 230(c) as it pertains to publishers).

⁷⁰ See *id.* at 331-34 (barring state and local claims of defamation under the § 230(c)).

⁷¹ See *id.* at 334 (reaffirming that a state claim cannot be brought under the distributor theory).

⁷² See *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (characterizing the converging position of the CDA); *but see Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (declining to extend immunity to a federal housing discrimination claim).

⁷³ See generally *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir.), *rehearing denied*, 351 F.3d 904 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

⁷⁴ See *Batzel*, 333 F.3d at 1018-26 (discussing the parties and nature of the defamation claim).

⁷⁵ See *id.* at 1021 (identifying Bob Smith as the originator of the defamatory comments).

descendant of the Nazi Heinrich Himmler and that Batzel possessed valuable art that was stolen from Jews during World War II.⁷⁶ Smith had (allegedly) sent his e-mail to art-security expert Cremers so that he could investigate these allegations, but Cremers (allegedly) believed that Smith intended him to circulate the allegations on the listserv.⁷⁷

Cremers asserted he was entitled to § 230(c) protection from Batzel's defamation claim on the ground that he was merely posting information provided by another content provider—Smith.⁷⁸ Batzel retorted that Cremers actually *circulated and posted* the defamatory e-mail letter; this was not a case of failure to remove another's statement from a website, for Smith had not posted his statement, but merely e-mailed it to Cremers.⁷⁹ Notwithstanding a strong dissent, the majority of the Ninth Circuit panel accepted Cremers's argument and applied § 230(c)'s protection to Cremers.⁸⁰ Writing for herself and one other member of the panel, Judge Marsha Berzon stated:

Such a distinction between deciding to publish only some of the material submitted and deciding *not* to publish some of the material submitted is not a viable one. The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance. A distinction between removing an item once it has appeared on the Internet and screening before publication cannot fly either.⁸¹

Although the panel technically remanded Batzel's case for a finding on what Cremers would reasonably have believed Smith's intent to have been, Cremers was ultimately granted summary judgment.⁸²

The plaintiff in *Barrett* was Dr. Timothy Polevoy, a Canadian physician and host of a website purporting to expose fraudulent claims about medicine and healthcare.⁸³ The defendant was Ilena Rosenthal, head of a women's healthcare foundation and operator of a website devoted to women's health, and her posting was an article by publicist

⁷⁶ See *id.* (highlighting the specific statements made in Bob Smith's email).

⁷⁷ See *id.* at 1022.

⁷⁸ See *id.* at 1034–35.

⁷⁹ See *id.* at 1035.

⁸⁰ See *Batzel*, 333 F.3d at 1035.

⁸¹ *Id.* at 1032 (emphasis in original).

⁸² See *Batzel v. Smith*, 372 F. Supp. 2d 546, 547 (C.D. Cal. 2005) (entering summary judgment for Cremers against Batzel on procedural grounds unrelated to the merits).

⁸³ See *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (introducing the plaintiff of the case).

Tim Bolen that criticized the plaintiff Polevoy.⁸⁴ The article asserted that Polevoy had engaged in the crime of stalking women, including the alleged repeated stalking of a prominent Canadian radio personality.⁸⁵ Rosenthal posted Bolen's allegedly defamatory article on two websites (neither was her own).⁸⁶ Before the California Supreme Court, she contended that § 230 shielded her from liability because she had posted information content that was wholly provided by another (Bolen).⁸⁷ In response to the plaintiff's argument that she was herself an active poster of a defamatory statement, not simply an ISP or website on which a defamatory post had been made by another, the California Supreme Court noted that the text of the CDA covers ISP "users" not simply ISPs.⁸⁸ And as to the argument that posting a message is different from failing to remove one, the Court followed *Batzel*, holding that "no logical distinction can be drawn between a defendant who actively selects information for publication and one who screens submitted material, removing offensive content."⁸⁹ More broadly, the Court determined that "[a] user who actively selects and posts material based on its content fits well within the traditional role of 'publisher.'"⁹⁰ Reasoning that "Congress exempted that 'publisher' role from liability," the Court concluded that Rosenthal was fully protected by § 230(c).⁹¹

D. Today's Online Libel Law

Before examining the legacy of *Batzel* and *Barrett* in particular, it is worth repeating that this Article directly addresses only a slice of § 230—that which relates to defamation law.⁹² Many of the most notable cases involve sexual assault, child prostitution, housing discrimination, and a variety of matters quite distant from libel law.⁹³ Just as ambitious plaintiffs have sought to hold ISPs liable for defamatory statements posted through the ISP, so they have sought to hold websites or apps liable for discriminatory housing or child prostitution advertisements placed through the website or fraudulent solicitations for sexual activity through

⁸⁴ See *id.* (describing the defendant in the case).

⁸⁵ See *id.* at 531 (describing the crime that the plaintiff had allegedly committed).

⁸⁶ See *id.* at 514 (providing that Rosenthal posted the article to two websites promoting the politics of medicine).

⁸⁷ See *id.* at 527 (expanding on the argument of § 230 granting her immunity from liability).

⁸⁸ See *id.* at 526 (defining the term "user" under § 230(b)(3)).

⁸⁹ *Barrett*, 146 P.3d at 528.

⁹⁰ *Id.*

⁹¹ *Id.* at 528–29.

⁹² See 47 U.S.C. § 230 (2012) (discussing how § 230 relates to defamation law).

⁹³ See generally, REIDENBERG ET AL., *supra* note 48 (discussing the cases where § 230 protection was sought).

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the website.⁹⁴ And just as ISPs and websites have inserted § 230 as a defense to libel claims, so they have asserted them as defenses to these other claims.⁹⁵ Defendants asserting § 230 under such circumstances have succeeded in a remarkably high proportion of such cases.⁹⁶

Returning to libel law, *Batzel* and *Barrett* have been followed by the New York Court of Appeals, the United States Court of Appeals for the Sixth Circuit, and numerous district courts.⁹⁷ In the past decade, not a single court has rejected *Barrett's* holding that, in the context of a defamation claim, § 230 shields a defendant from liability for posting a defamatory statement wholly written by another person. To this extent—at least in several prominent and populous jurisdictions—the republication rule is no longer operative for defamatory statements posted on the Internet.

The consequences of these rulings are remarkable. Anyone wishing to hurt another person by damaging her or his reputation is free to do so without accountability by finding a defamatory statement that someone else has made and broadcasting it to the world over the Internet.⁹⁸ Conversely, a person can anonymously plant seeds of defamation with numerous website owners, knowing the website owners will be free to broadcast these defamatory statements to the world. Those who are solvent and have a large Internet audience can stay free of liability by posting statements composed by others. Those who are insolvent and lack a large Internet audience do not stand much to lose by posting defamatory statements, and they can reach a large audience by feeding such statements to Internet republishers. Where an anonymous defamer feeds a libelous statement to a large website operator or member of a listserve,

⁹⁴ See, e.g., *Dart v. Craigslist*, 961 F. Supp. 2d 961, 961–62 (Ill. Cir. Ct. 2009) (explaining that the plaintiff alleged the defendant was guilty of solicitations for sexual activity through Craigslist.com); see also *Miller v. Fed. Express Corp.*, 6 N.E.2d 1006, 1006–07 (Ind. Ct. App. 2014) (providing the plaintiff alleged the defendant posted defamatory comments on the Internet about him).

⁹⁵ See, e.g., *Dart*, 961 F. Supp. 2d at 965 (discussing that the defendant was immune from liability pursuant to § 230(c)); see also *Miller*, 6 N.E.2d at 1013 (expressing that the defendant claimed he was immune from liability based on the grounds of § 230).

⁹⁶ See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (finding § 230 bars the plaintiff's claim of defamation against the defendant); see also *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *7 (N.Y. Sup. Ct. May 24, 1995) (entering judgment for the defendant in a defamation case).

⁹⁷ See, e.g., *Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 406–07 (6th Cir. 2014) (recognizing § 230 provides immunity from liability for defendants in defamation cases); see also *Shiamili v. Real Estate Grp. of N.Y. Inc.*, 17 N.Y.3d 281, 288–89 (N.Y. 2011) (stating the Court followed the *Barrett* national consensus).

⁹⁸ See, e.g., *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (discussing a situation in which a post on a website by an anonymous user was found not to be defamatory).

there is simply no accountability and massive reputational harm.⁹⁹ We are, as Judge Gould stated in his partial concurrence and partial dissent in *Batzel*, inviting an Internet “Old West.”¹⁰⁰

Jones v. Dirty World Entertainment Recordings LLC is representative of how Internet defamation law is now understood by a range of legal actors.¹⁰¹ The principal defendant in that case was Nik Richie, the owner and operator of the website *thedirty.com*.¹⁰² Members of the public are invited and encouraged to send him nasty and pornographic statements and pictures about whomever they wish to discuss.¹⁰³ Richie selects among them and then posts some prominently on his website, typically adding some kind of commentary.¹⁰⁴ The website, like many others of this nature, has been very popular.¹⁰⁵ The plaintiff was a major league football cheerleader who sued Richie and the LLC owning his website because of statements that she had a venereal disease and that she had slept with every single member of the Cincinnati Bengals.¹⁰⁶ The District Court rejected Richie’s argument that he was protected by the CDA, but the court did not consider relying upon an active/passive distinction to do so; rather, the argument was that Richie’s solicitation of materials and his

⁹⁹ See *id.* (concluding that the majority rules allow professional rumormongers and gossip-hounds to spread false and hurtful information with impunity).

¹⁰⁰ See *Batzel v. Smith*, 333 F.3d 1018, 1040 (9th Cir. 2003) (Gould, J., dissenting) (“Congress wanted to ensure that excessive government regulation did not slow America’s expansion into the exciting new frontier of the Internet. But Congress did not want this new frontier to be like the Old West: a lawless zone governed by retribution and mob justice.”). In his dissent from the denial of rehearing en banc (in which Judges Richard Tallman and Consuela María Callahan concurred), Judge Ronald Gould wrote:

I do not believe that Congress intended to make, or ever would consciously make, the policy choice made by the panel majority. Human reputations, built on good conduct over decades, should be not so easily tarnished and lost in a second of global Internet defamation. Under the panel majority’s rule, there might be a remedy against the initial sender, but there is no remedy against the person who willingly chooses, with no exercise of care, to amplify a malicious defamation by lodging it on the Internet for all persons and for all time. Unless this result was commanded by Congress, we should not create such a system.

Batzel v. Smith, 351 F.3d 904, 910 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (dissenting from denial of rehearing en banc).

¹⁰¹ See *Dirty World Entm’t Recordings LLC*, 755 F.3d at 407, 417.

¹⁰² See *id.* at 401 (introducing the defendant, Nik Richie, in the case).

¹⁰³ See *id.* (explaining how *www.thedirty.com* works).

¹⁰⁴ See *id.* (indicating the steps that Richie took to operate the website).

¹⁰⁵ See *id.* at 402 (expressing *www.thedirty.com* became nationally known).

¹⁰⁶ See *id.* at 403 (stating Sarah Jones had been spotted around town with several of the Cincinnati Bengals football players and that her boyfriend cheated on her with multiple women, resulting in her having chlamydia and gonorrhea).

commenting on them disqualified him from serving as a neutral republisher of the contributor's defamatory posting.¹⁰⁷

Following the great majority of courts, the Sixth Circuit ruled that the question was whether Richie's additions were themselves defamatory in an independent way; after answering this in the negative, the court ruled that Richie's CDA defense warranted summary judgment for the defendant.¹⁰⁸ A tacit premise of the Sixth Circuit's entire analysis was that under the CDA, Richie could not be held liable for the simple reposting of his contributors' defamatory statements.¹⁰⁹ In other words, the rejection of the republication rule was simply taken for granted. Jones's treatment by thedirty.com is but one example of a massive online industry that is profoundly misogynistic and invasive of women's ordinary lives.¹¹⁰

Notwithstanding my very dark picture of the current state of affairs, it is of course possible that *Batzel* and *Barrett* were rightly decided, in at least one important sense: it is possible that theirs is the more faithful reading of the CDA. Many commentators seem to think so, and have therefore called for revision of § 230.¹¹¹

My own view is that, regardless of whether § 230 was a good idea in the first place, *Batzel* and *Barrett* are wholly untenable as interpretations of it. Indeed, my principal forward-looking claim in this Article is that future courts interpreting § 230 should reject the *Batzel-Barrett* line of cases and embrace the active/passive distinction in CDA interpretation. That is the burden of Part IV, below.¹¹² But first, it is worth looking in a more sustained manner at the problems that § 230 aimed to address—how defamation law should apply to the Internet.

III. A DOCTRINALIST'S ANALYSIS

A. *The Publication Element and the Challenge of the Internet*

In enacting § 230(c), Congress was addressing a difficult problem for ISPs, bulletin-board operators, and related entities and individuals. They

¹⁰⁷ See *Dirty World Entm't Recordings LLC*, 755 F.2d at 405 (denying Dirty World's motion for summary judgment and finding Dirty World was not immune from liability under § 230, but clarifying that Dirty World was a neutral publisher of the defamatory post).

¹⁰⁸ See *id.* at 417 (disagreeing with the district court and granting summary judgment for Dirty World, finding immunity under § 230).

¹⁰⁹ See *id.* at 415–16.

¹¹⁰ See generally DANIELLE CITRON, *HATE CRIMES IN CYBERSPACE* (2014) (illustrating the impact of cyber harassment on women throughout the United States and arguing for an amendment to the CDA).

¹¹¹ See, e.g., Vanessa S. Browne-Barbour, *Losing Their License to Libel: Revisiting § 230 Immunity*, 30 BERKLEY TECH. L.J. 1505, 1555–57 (2015) (acknowledging the pitfalls of § 230 and advocating revisions).

¹¹² See *infra* Part IV (analyzing the court's view of the active/passive distinction in *Batzel*).

faced the possibility of speech-based tort liability for postings that somehow appeared *through the ISP*, but were not, in any traditional sense, speech *by* the ISP. Commentators began discussing this possibility long before *Cubby* was decided, and had escalated the discussion after *Cubby*.¹¹³ *Stratton Oakmont* proved it was not just hypothetical, and the fledgling industry went ballistic.¹¹⁴ The problem is that one can control whether one makes a defamatory or tortious statement—whether one speaks or writes, in the traditional sense—simply by refraining from making the statement. By contrast, when someone else is doing the speaking or writing, one has far less control. One may be able to remove the statement, or conceivably filter it, but otherwise shutting down the mechanism through which it appears is the most effective method. Both the potential liability and the free speech impact of protecting against liability for what others have said through one’s Internet service are dramatically different from that which attaches to what one has said. Section 230(c) was enacted to protect these entities by ruling out federal liability and expressly preempting all state law from imposing liability under such scenarios.¹¹⁵ If we wish to understand the statutory solution fully, however, we will need to know more about both the publication element of defamation law generally and the *Stratton Oakmont* ruling in particular.¹¹⁶ That is what this section provides.¹¹⁷

Legal commentators and the *Stratton Oakmont* court did not simply pull legal arguments and categories out of a hat. Roughly a century of (admittedly sparse) case law from common law jurisdictions had created

¹¹³ See, e.g., Matthew Goldstein, *Prodigy Case May Solve Troubling Liability Puzzle*, NAT’L L.J., B1 (1994) (commenting on legal theories discussed after *Cubby*); Edward V. DiLello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 210–11 (1993) (discussing the possibility of speech-based tort liability after the *Cubby* decision); Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1148–49 (1993) (addressing how the different characteristics of media affect the standards of free speech that are applied and discussing the *Cubby* decision); Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 89 (1993) (acknowledging not all communication through bulletin boards is the same); Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 123–24 (1987) (explaining the communication between the Internet mediums and the current libel law).

¹¹⁴ See Clarke, *supra* note 39 (describing industry reaction to *Stratton Oakmont*).

¹¹⁵ See 47 U.S.C. § 230(c)(1)–(2) (2012) (providing the purpose and meaning of § 230 in detail).

¹¹⁶ See *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *3, 6 (N.Y. Sup. Ct. May 24, 1995) (describing the publication element of defamation and that the court found Prodigy was a publisher due to the characteristics of the “Money Talk” computer bulletin board).

¹¹⁷ See *infra* Part III (discussing the publication element of defamation law).

a number of cross-cutting distinctions and categories that illuminated the background for the early 1990s discussion. Some of these were contained in the Restatement (Second) of Torts and the work of treatise writers in torts in general.¹¹⁸ However, neither courts nor commentators actually saw through the sensitive application of doctrinal categories to the Internet properly during that period, and *Stratton Oakmont* and the upheaval that followed it were in part a consequence of confusion and hazy legal thinking. In this context, § 230 will become much clearer, as will the errors of *Batzel* and *Barrett*.¹¹⁹

The common law torts of libel and slander, like the tort of trespass to land, are intentional torts. The intentionality of intentional torts has little to do with the mens rea filled intentionality of criminal law. The law does not require that the defendant have undertaken to bring about an injury of a certain kind, but that the defendant have voluntarily and intentionally performed a certain affirmative act. In the case of the defamation torts, it is the uttering, inscribing, displaying, announcing, or posting of certain defamatory statements about someone to a third party.

It is crucial to recognize that the common law of libel has never equated the requirement of an affirmative act of publication to a third party with the authorship of an assertion. This is true in both directions—authorship is neither necessary nor sufficient for publication.¹²⁰ An author of a defamatory statement who places it in a letter to the plaintiff herself has not published the libel, because she has not published it to a third party.¹²¹ Conversely, a newspaper that publishes a column or an advertisement written by another is a prototype of a publisher, regardless of whether the author of the column or the advertisement is an agent of the newspaper.¹²² Indeed, America's most famous libel case—*New York Times v. Sullivan*—concerns a paid advertisement published by the *New York Times*.¹²³ Notwithstanding nine Supreme Court Justices who

¹¹⁸ See, e.g., WILLIAM L. PROSSER & W. PAGE KEETON, *THE LAW OF TORTS* 797–802 (5th ed. 1984) (explaining the doctrinal categories of liability in defamation law).

¹¹⁹ See § 230 (describing the elements of the protection for private blocking and screening of offensive material); see also *Barrett v. Rosenthal*, 146 P.3d 510, 510–11 (Cal. 2006) (holding that the messages posted to a newsgroup on the Internet were defamatory); see also *Batzel v. Smith*, 333 F.3d 1018, 1018–19 (9th Cir. 2003) (ruling the operator was not able to take advantage of § 230 immunity from liability).

¹²⁰ See, e.g., *Hedgpeth v. Coleman*, 183 N.C. 309, 312 (1922) (noting that in libel, unlike slander, an act of inscription and an act of publication to a third party may be separate).

¹²¹ See, e.g., *Yousling v. Dare*, 98 N.W. 371, 371 (Iowa 1904) (holding that there is no libel claim where a written statement was sent only to the person defamed, not to a third person).

¹²² See *id.* (discussing that a person who has sent a defamatory statement to another is considered a publisher and is guilty of defamation).

¹²³ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 255 (1964) (explaining the respondent's claim that a full page ad had been run in the *New York Times*, resulting in him being libeled).

searched high and low for good arguments to shield the newspaper, not one of the Justices questioned whether the *New York Times* counted as a publisher of the advertisement, which was not written by an agent of the *New York Times*.¹²⁴

The basic point is this: an author's composition and utterance or inscription of a statement is one thing; the act of presenting that statement to a third party is another. Often the author performs both acts; indeed, in slander, a single utterance to a third party is typically both. But in most of what is litigated in the law of libel, the initial inscription and the presentation to the world are separate acts.¹²⁵ Libel suits against what, in non-legalese, are called "publishers" – newspapers, book publishers, and magazine publishers – are of course very common, even though these have typically performed the second kind of affirmative act – presenting something composed by another to the world – but not the first (composing the statement).¹²⁶

Unsurprisingly, over the centuries there has been some amount of interpretation and innovation in the history of defamation law surrounding some aspects of the rule requiring such an affirmative act of publication. The challenges, which are remarkably few and far-between in American case law, mainly come from two different sides. One side involves crafting inclusive notions of agency and joint liability. Assuming that a newspaper that printed a defamatory letter to the editor performed the affirmative act of libeling, what about the company that made the printing press or the news vendor that sold the newspaper? What about the telecommunications company that allowed one person to defame another over the telephone? What about the bookstore or the news vendor that makes the publications available to buyers by selling them? These are all questions about whether the making of the statement was in some sense an act of those who play a causal role in having the statement made public to third parties.

A different, and in some ways more profound, challenge to the affirmative act requirement does not aim to depict the defendant as part of the initial making or publishing of a statement, but aims to hold the defendant responsible for failing to remove a statement that someone else

¹²⁴ See *id.* (providing the complete analysis taken by the court to reach a decision).

¹²⁵ See RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977) (listing a statement and publication as separate elements of defamation).

¹²⁶ See Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 588 (2001) (listing what are considered primary publishers and explaining that they are not the original authors).

published.¹²⁷ This is quite a narrow exception to the rule that there must be an affirmative act of publishing a statement; before the Internet, most American lawyers had likely never even heard of a single libel case of this nature. As in nonfeasance doctrine within the law of negligence, it applies when a defendant is situated relative to the defamatory statement in such a way that there are special reasons for thinking there is a duty to remove it. Typically, the reason rests in significant part on the fact that the defamatory statement appears on, in, or at a physical space over which the defendant has possession and control, meaning that others do not have a right or power to remove it.¹²⁸ Overwhelmingly, courts require that the defendant space-owner knew that the defamatory statement was there.¹²⁹ Even with these two conditions satisfied, it is not clear that liability should or will lie.¹³⁰

I shall call these two different forms of liability *expanded-agency-based misfeasance* and *affirmative duty to remove*. Although American case law contains only traces of these ideas, the Restatement (Second) of Torts (like the Restatement (First)) actually contains a provision for each. Section 581 is written in a manner that appears limited, but in fact it contains quite a broad reach, allowing for notice to trigger liability.¹³¹

§ 581 Transmission of Defamation Published by Third Person

(1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.

(2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.¹³²

¹²⁷ See generally RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. LAW INST. 1977) (stating there is a duty to remove defamation when the owner of the property has knowledge of the defamation).

¹²⁸ See Annemarie Pantazis, *Zeran v. Am. Online, Inc.: Insulating Internet Service Providers from Defamation Liability*, 34 WAKE FOREST L. REV. 531, 547-48 (1999) (citing RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. LAW INST. 1977) and explaining the court used § 577 to support its notion).

¹²⁹ See *Hellar v. Bianco*, 244 P.2d 757, 759 (1952) (emphasizing the defendant's awareness of the existence of defamatory matter).

¹³⁰ See *Scott v. Hull*, 259 N.E.2d 160, 162 (1970) (holding the defendant was not liable for failing to remove defamatory graffiti because he did not invite the public to view it and did not perform a positive act).

¹³¹ See RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977) (permitting liability for a distributor who has notice).

¹³² *Id.*

Section 581(1) is typically cited as the source for distributor liability in the Restatement (Second).¹³³

Restatement (Second) of Torts section 577(2), by contrast, concerns liability for those who—while not actually publishing—will be subjected to liability for the reputational injury that is attributable to the defendant’s failure to remove a defamatory statement published by another person.¹³⁴ It states “[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.”¹³⁵

Initially, it is worth noting that neither of these routes captures a distinctive form of transmission that arguably fits an ISP the best—the common carrier. The rather sparse case law on common carriers quite defensibly takes the view that common carriers *are not publishers and are not liable as if they were publishers*.¹³⁶ And indeed, the New York Court of Appeals, in a case that came to it after *Stratton Oakmont* had been decided but before the CDA was in effect, plausibly ruled as a matter of common law that there was no liability for AOL because it was a common carrier.¹³⁷

Secondly, both the expanded-agency category and the affirmative-duty-to-remove category are remarkably underdeveloped and questionable in American law; the Restatement (Second) is highly misleading, in this respect, as today’s leading Torts treatise, Dobbs, Hayden and Bublick’s *The Law of Torts* now confirms.¹³⁸ The case law cited in the Restatement (Second) provision concerning distributors is overwhelmingly prior to the Restatement (First).¹³⁹ Given that the *New*

¹³³ See, e.g., PROSSER & KEETON, *supra* note 118, at 810 (citing RESTATEMENT (SECOND) OF TORTS § 581 for distributor liability).

¹³⁴ See RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. LAW INST. 1977) (stating a third party can be liable for defamation if the defamatory statement is not removed).

¹³⁵ *Id.*

¹³⁶ See *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974) (holding that the telephone company was not liable for defamation because it was a common carrier).

¹³⁷ See *Lunney v. Prodigy Servs. Corp.*, 723 N.E.2d 539, 543 (N.Y. 1999) (applying the common carrier category to the Internet and holding the publication element of libel was not satisfied).

¹³⁸ See DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 522 n.5 (2nd ed. 2011) (answering the question of whether a neutral distributor, such as a library, is liable even if the distributor knows of the defamation by suggesting that the English cases, which is the precedent for such liability, are “doubtful authority for American consumption” in light of “[c]ontemporary American ideas about liability for speech”).

¹³⁹ See RESTATEMENT (SECOND) OF TORTS § 581 (AM. LAW INST. 1977) (discussing the outdated cases in the Restatement). Of the twelve cases cited in the Reporters’ Notes on distributors, the majority were over one hundred years old. Reporters’ Notes to § 581, comments a-c. Only six were American, and of these six, only two were decided after *New York Times v. Sullivan*. *Cardozo v. True*, 342 So.2d 1053 (Fla.App.), *cert. denied*, 353 So.2d 674

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York Times v. Sullivan revolution occurred between the two Restatements, it is likely that such section 581-based libel suits against libraries would not survive a First Amendment attack, for the chilling effect argument would seem to be very powerful as applied to defamation law that requires distributors to engage in censorship.¹⁴⁰ It is more than a bit peculiar that scores of judges and law review authors since *Cubby* have contrasted publisher liability with distributor liability, given that Zeran's statements about distributor liability were almost entirely adventitious and without support in the applicable American law.¹⁴¹

The few section 577(2) cases that exist are questionable and peculiar. *Hellar v. Bianco* is the best known case. In 1952, an intermediate California court announced that it might be willing to hold a tavern owner liable to a plaintiff and her husband because its bartender did not immediately

(Fla. 1977); *Church of Scientology of Minn. v. Minn. Med. Ass'n Fed'n*, 264 N.W.2d 152 (Minn. 1978). *Cardozo v. True* is not a defamation case at all, but rather a personal injury products liability case against a book dealer, which failed as a matter of law. *Cardozo*, 342 So. 2d at 1056. It provides no support whatsoever for the statement that book dealers are liable with knowledge in a libel claim; in dicta it states that they are surely not libel without knowledge, which is a different point. *Id.* *Church of Scientology* is a libel claim; it holds only that lack of knowledge precludes a libel claim against a distributor, not that knowledge inculpates a distributor. *Church of Scientology of Minn.*, 246 N.W.2d at 154-55

Among the scholars asserting that it was established law in the United States, prior to § 230, that distributors face liability for libel if they have knowledge, few rely upon anything but *Restatement (Second) § 581*, criticized above. In a forceful and unusually well-researched article written in 2001, Professor Susan Freiwald did cite two post-*New York Times v. Sullivan* cases to support distributor liability under section 581. Freiwald, *supra* note 126, at 590 n.81; see also *Spence v. Flynt*, 647 F. Supp. 1266, 1272 (D. Wyo. 1986); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984). In the end, however, these cases only underline the remarkable dearth of support for knowledge-based distributor liability today. *Lerman* is not a libel case, but a misappropriation case, and, in any event, the distributor prevailed. *Spence* is a libel case in a federal district court that is interpreting Wyoming tort law on a motion to remand. The question there was whether the defendant non-resident magazine publisher seeking to remove a libel case from state court to federal court should succeed on a motion to remand. Flynt's argument was that the Wyoming distributor was fraudulently joined in state court to defeat removal. The District Court said *Hustler* could succeed only through demonstrating by clear and convincing evidence that there was no way the plaintiff could possibly win against the distributor of the pornographic magazine. With no apparent consideration of the First Amendment and no relevant precedent (other than section 581), the District Court declined to classify the cause of action against the distributor as fraudulent and remanded the case. *Id.*

¹⁴⁰ See *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) (outlining that "chilling effect" of strict liability or fault standard warrants "actual malice" rule); see also *RESTATEMENT (SECOND) OF TORTS § 581* (AM. LAW INST. 1977) (stating third-party liability for transmission of defamation).

¹⁴¹ See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991) (discussing the difference between publisher and distributor liability); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) (stating notice of a defamatory posting causes computer service providers to become traditional publishers).

erase some nasty graffiti about her from the men's room bathroom stall.¹⁴² Regardless of whether one agrees with Judge Frank Easterbrook's wry comment in *Tacket v. General Motors Corp.* (also imposing liability for failure to remove) that "the common law of washrooms is otherwise," the law of libel by failure-to-remove is extremely underdeveloped.¹⁴³ Indeed, even in the United Kingdom, where Internet service providers have indeed faced failure-to-remove liability, plaintiffs had to rely entirely upon *Byrne v. Deane*, an almost cartoonish Court of Appeal case in which the permissibility of failure-to-remove liability is pure dicta.¹⁴⁴

Notwithstanding the concerns raised above (or perhaps oblivious to them), thoughtful commentators (often law students writing Notes) in the early 1990s saw the possibility of holding ISPs liable for the postings of others under three-plus views. They are: (1) a full-fledged newspaper-

¹⁴² See *Hellar v. Bianco*, 244 P.2d 757, 758 (Cal. 1952) (providing the facts of the case and imposing liability for not removing defamation).

¹⁴³ See 836 F.2d 1042, 1047 (7th Cir. 1987).

¹⁴⁴ See *Tamiz v. Google, Inc.*, EWCA Civ. 68, 1 W.L.R. 2151 (2013) (rejecting liability based on the facts of the case, but recognizing, in principle, the possibility of liability for failure to remove, after notice, but not within publisher or distributor framework). Many of the common law categories and analyses (of libel on the Internet) that are discussed in this Article have been dealt with explicitly in other common law jurisdictions, which lack or did lack any statutory shield for ISPs. See generally Corey Omer, *Intermediary Liability for Harmful Speech: Lessons from Abroad*, 28 HARV. J.L. & TECH. 289 (2014) (describing treatment of ISPs and website hosts in non-American common law jurisdictions); see also *Byrne v. Deane*, 1 K.B. 818 (1937). Members of a private club at a golf course in rural England enjoyed the illegal gaming machines kept in their clubhouse. *Byrne*, 1 K.B. at 818. They were therefore distressed when the clubhouse was raided by public authorities and the tables were removed. *Id.* At the spot in the clubhouse room where the gaming tables had been, a verse was posted on the wall:

For many years upon this spot
You heard the sound of a merry bell
Those who were rash and those who were not
Lost and made a spot of cash
But he who gave the game away
May he byrnn in hell and rue the day.
"Diddleramus"

Id. The word "byrnn" in the last line was crossed out, and the word "burn" was scrawled over it. *Id.* A member of the club, Mr. Byrne, brought a libel claim against the proprietors of the clubhouse, arguing that this verse essentially communicated that it was Mr. Byrne who had secretly reported to the police on the existence of illegal gambling. *Id.* Byrne denied this and claimed that his reputation had suffered. *Id.* The clubhouse owners argued that a libel claim includes a publication element, which they did not satisfy since they neither wrote nor posted the anonymous verse. *Byrne*, 1 K.B. at 818. While the trial court accepted this argument, each of the three judges on the Court of Appeal panel that heard the case opined that the publication element could be met in this case. *Id.* Under the circumstances, the knowing failure to remove the verse from their own property could count as publication. *Id.* The decision as to the publication element was only dicta, because the Court of Appeal also ruled that it was not defamatory to say of someone that he reported a crime to the police. *Id.*

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publisher theory; (2) an expanded agency theory, treating ISPs as distributors and imposing liability under section 581; and (3-plus) an affirmative-duty-to-remove route, as in section 577(2) (which may depend on ownership or property or chattels, as in section 577(2) itself, or on an undertaking-to-protect theory). In each case, there was allegedly a doctrinal path under state defamation law for saying that *the publication element* of a libel claim was satisfied, and, in this sense, there was a doctrinal path for *treating an ISP as a publisher* of a statement that the ISP itself did not post.

B. Stratton Oakmont Revisited

Stratton Oakmont's lawyers drew upon this fledgling Internet-liability scholarship in crafting their complaint and in writing their briefs to Justice Ain.¹⁴⁵ Recall, however, that Judge Leisure had selected the distributor category only two years earlier in *Cubby*, and, on that basis, had granted the defendant summary judgment.¹⁴⁶ Understandably, then, Stratton Oakmont was driven to argue that theirs was not a distributor case; indeed, of the three routes above—publisher, expanded-agency based distributor liability, and affirmative-duty-to-remove—the middle category is the only one Stratton Oakmont did not argue.¹⁴⁷ Its complaint and its brief were committed to the first and third categories.

A bit more detail about Prodigy's history will be illuminating. From its inception, Prodigy played to the family-values mantra that had taken a major foothold in the Reagan 1980s and the first Bush Presidency. The company boasted of its commitment to filtering and censoring materials with a "family-oriented" mindset.¹⁴⁸ It hired individuals to monitor its

¹⁴⁵ Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment at 11 n.3, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (No. 94-031063) (on file with the Valparaiso University Law Review) (citing Robert Charles, *Computer Bulletin Boards and Defamation: Who Should Be Liable? Under What Standard?*, 2 J.L. & TECH. 121, 122 (1987)); *id.* at 12 n.4 (citing Philip H. Miller, *New Technology, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147 (1993)); *id.* at 13 n.5 (citing Eric Schlachter, *Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM. & ENT. L.J. 87, 89 (1993)); *id.* at 13 n.6 (citing Edward V. DiLello, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 210-11 (1993)).

¹⁴⁶ See *Cubby, Inc.*, 776 F. Supp. at 141.

¹⁴⁷ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3 (arguing Prodigy is not a distributor).

¹⁴⁸ See Defendant Prodigy Services Company's Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment at 9-18, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (No. 94-031063) (on file with the Valparaiso Law Review) (recounting history of Prodigy and changes in Prodigy filtering).

bulletin boards and remove obscene or otherwise offensive materials. In the early 1990s, it made an effort to review – or to have its hired monitors review – everything that users posted. It also used software with algorithms for discovering obscene or offensive materials and filtering them out. This was a marketing ploy and a company goal. During this period, Prodigy’s marketing director went so far as to analogize Prodigy explicitly to a “newspaper” publisher.¹⁴⁹

Within a few years of functioning in this manner, however, the growth of the Internet and the growth of Prodigy itself made clear that its aspirations for total monitoring were wildly unrealistic. For one thing, algorithms were not up to the task of discovering obscene, pornographic, or inappropriate materials. And for another, the rate and number of postings, starting to be in the tens of thousands daily, were far beyond what could be checked thoroughly – either in advance, or even in an ongoing way. Nonetheless, Prodigy’s marketing materials, strategy, and structure from its earlier years remained public, and it had not yet fully recognized how it would have to change.

Stratton Oakmont’s litigation strategy, as displayed in its complaint and its briefs, prudently took advantage of Prodigy’s marketed self-image. The most obvious line of argument, and the one Stratton Oakmont placed front and center, was simply that Prodigy was virtually the same as a newspaper publisher. After all, Prodigy had said this expressly about itself:

We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.¹⁵⁰

Prodigy’s admission is undoubtedly part of what gave Justice Ain comfort in his unusual grant of partial summary judgment to the plaintiff.¹⁵¹ The lawyers for Prodigy pointed out that the admission was

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at *2 (quoting Exhibit J to Plaintiffs’ Affidavit).

¹⁵¹ The court was remarkably unclear on why it was granting plaintiff partial summary judgment on publication, rather than treating publication as a fact issue and giving the publication issue to the jury to decide – which would itself have been a remarkably pro-plaintiff decision. *Id.* at *1. The court stated the following:

Again, [Prodigy] insists that its former policy of manually reviewing all messages prior to posting was changed “long before the messages complained of by Plaintiffs were posted.” (Schneck affidavit, par. 4.) However, no documentation or detailed explanation of such a change,

stale and that the Internet business was changing dramatically in the early 1990s. However, Stratton Oakmont had anticipated such arguments and was prepared with several additional points, which relied upon the budding legal scholarship on libel law and how it would apply to the Internet. One of its key arguments – again based on Prodigy admissions, but current ones – was that Prodigy actively engaged in censorship and filtering of online communications of others.¹⁵² In this way, Prodigy exercised control of what appeared through it, and, in this respect, was much more like a traditional newspaper publisher than Compuserve. Indeed, Prodigy tried to gain market advantage over competitors like Compuserve by engaging in such editorial functions. Stratton Oakmont rightly argued that Prodigy’s exercise of editorial functions was a factor that counted in favor of treating it like a newspaper publisher. All of this was channeled into an argument that Justice Ain should grant partial summary judgment on the issue of whether Prodigy was a publisher.¹⁵³

Crucially, however, Stratton Oakmont had a quite different argument, too; indeed, Stratton Oakmont’s partial summary judgment motion was divided into two parts, and its second argument occupied the second part of its brief.¹⁵⁴ Stratton Oakmont pointed out that Prodigy had hired an individual, Charles Epstein, to serve as what it called a “Board Leader” for its bulletin board, “Money Talk.” As Board Leader, Epstein’s job was

and the dissemination of news of such a change, has been submitted. In addition, [Prodigy] argues that in terms of sheer volume—currently 60,000 messages a day are posted on [Prodigy] bulletin boards—manual review of messages is not feasible. While [Prodigy] admits that Board Leaders may remove messages that violate its Guidelines, it claims in conclusory manner that Board Leaders do not function as “editors”. Furthermore, [Prodigy] argues generally that this Court should not decide issues that can directly impact this developing communications medium without the benefit of a full record, *although it fails to describe what further facts remain to be developed on this issue of whether it is a publisher.*

Id. at *3 (emphasis added). The italicized sentence is hard to comprehend, given that the court had just described the need for documentation and more information on “feasibility.” *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3. Relatedly, it is bizarre that the court stated that “the critical issue to be determined by this Court is whether the foregoing evidence establishes a *prima facie* case that [Prodigy] exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.” *Id.* (emphasis added). A *prima facie* case is what a plaintiff needs to withstand a defendant’s summary judgment motion, not what a plaintiff needs to prevail on (partial) summary judgment. *Id.*

¹⁵² See *id.* at *2.

¹⁵³ See *id.* at *1.

¹⁵⁴ See Plaintiffs’ Memorandum of Law in Support of Motion for Summary Judgment at 14–19, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (No. 94-031063) (arguing that Epstein served as Prodigy’s agent by editing “Money Talk”).

to monitor the electronic bulletin board on which the defamatory statements were posted and to remove some when appropriate.¹⁵⁵ Stratton Oakmont alleged that Epstein had failed to remove these postings, even though such postings violated policies of not publishing offensive material.¹⁵⁶ Prodigy responded that Epstein was an independent contractor, rather than an employee; therefore, Prodigy could not be held vicariously liable for Epstein's failures.¹⁵⁷ To this, Stratton Oakmont argued that, independent contractor or not, basic principles of agency law required that Stratton Oakmont be deemed potentially liable for Epstein's failures in monitoring the Prodigy bulletin board and that partial summary judgment was also warranted on this agency issue.¹⁵⁸

As mentioned above, when we step back from *Stratton Oakmont* and see it within the framework of libel law's doctrinal categories—true publisher, extended agency (distributor, etc.), and affirmative duty to remove—it is clear that the plaintiff was interested in two parts: the *true publisher* part (involving Stratton Oakmont's admissions) and the *affirmative-duty-to-remove* part (involving Epstein's alleged failures).¹⁵⁹ The distributor theory was left out—not only because there was nothing about Prodigy that made it seem like a distributor in this context, but also, and more importantly, because the distributor argument had worked on summary judgment for CompuServe and Stratton Oakmont's aim was to distinguish Prodigy from CompuServe.¹⁶⁰

Justice Ain's grant of plaintiff's partial summary judgment motion actually addressed both of Stratton Oakmont's arguments.¹⁶¹ And it awarded partially summary judgment on both: on the *true publisher* argument *and* on the *affirmative-duty-to-remove* part (pertaining to the agency relationship).¹⁶² "Based on the foregoing, the Court holds that Epstein acted as [Prodigy's] agent for the purposes of the acts and omissions alleged in the complaint."¹⁶³

¹⁵⁵ See Second Amended Verified Complaint at 5, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (No. 94-031063) (alleging Prodigy breached duty of care).

¹⁵⁶ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1.

¹⁵⁷ See *id.* at *5.

¹⁵⁸ See Plaintiffs' Memorandum of Law in Further Support of Motion for Partial Summary Judgment at 14, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (No. 94-031063) (asserting Epstein was Prodigy's agent).

¹⁵⁹ See *id.* at 2.

¹⁶⁰ See *id.* at 9–10 (contrasting the facts in this case from those in *CompuServe*).

¹⁶¹ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1, *5 (stating Epstein's capacity as a publisher and the duty to censor).

¹⁶² See *id.*

¹⁶³ *Id.* at *7.

To be sure, the relevance of Justice Ain's "agency" ruling was not rendered pellucid in the decision itself.¹⁶⁴ One can read the opinion and believe there is simply one legal theory in the case—that Prodigy's role is that of a newspaper publisher.¹⁶⁵ Note, however, that if that were true, whether Epstein was an agent would be irrelevant to Prodigy's liability.¹⁶⁶ Since the posting was plainly on a Prodigy bulletin board and there was no allegation that Epstein put it there, a finding that Prodigy was the publisher of what was posted in its bulletin board would suffice for publisher-liability. It would be irrelevant whether Epstein was at fault for failure to remove it. Part of the point of treating an entity as a true publisher is that there is essentially strict liability for the publishing of it. In that event, Epstein's acts and omissions would be irrelevant. Epstein's conduct was relevant to Stratton Oakmont's claim because Stratton Oakmont contended that Board Leaders, like Epstein, had a duty to remove defamatory statements, and Epstein breached that duty by negligently omitting to remove the statement.¹⁶⁷

The second issue of *Stratton Oakmont* related not to the newspaper/distributor connection as such, but rather to the question of whether liability could be imposed for the negligent failure to comply with a duty to remove defamatory statements. This was a sensible and difficult debate presented by the facts of *Stratton Oakmont*, but it was not really about whether Prodigy was like a newspaper publisher in the sense of actively placing statements by others out into the world for third parties. However, this does not necessarily end the important debate; it leads to another one: whether Prodigy could be held responsible for the reputational harm suffered by virtue of its (or its agents) having breached an affirmative duty to filter or delete others' postings. For one thing, its bulletin boards were closely analogous to the bulletin boards, chattels, or property that are referred to in section 577(2).¹⁶⁸ And for another, it arguably undertook to screen and delete.

Once this affirmative duty framework is seen, Prodigy's repeated assertions that it was capable of filtering, selecting, editing, and deleting

¹⁶⁴ See *id.*

¹⁶⁵ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) ("The Stratton Oakmont court reasoned that Prodigy's decision to perform some voluntary self-policing made it akin to a newspaper publisher . . .").

¹⁶⁶ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *6 (discussing Epstein's agency relationship).

¹⁶⁷ See Second Amended Verified Complaint at 5, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

¹⁶⁸ See RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. LAW INST. 1977) ("One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.").

take on a whole different light.¹⁶⁹ Prodigy had undertaken to remove, then failed to live up to its undertaking.¹⁷⁰ Moreover, it had created in readers an expectation of removal, and therefore, added to the perception of endorsement.¹⁷¹ Finally, it had undercut the credibility of protestations of lack of control.¹⁷² In this context, the argument for an affirmative duty to remove was powerful.¹⁷³ Relatedly, the argument that the injury was suffered due to the failure to remove or filter out was also quite strong.¹⁷⁴

This was one of Stratton Oakmont's principal arguments.¹⁷⁵ While Stratton Oakmont's first argument was that Prodigy was simply like a newspaper publisher, the larger picture put forward by Stratton Oakmont was that Prodigy had an affirmative duty to remove defamatory postings because of its undertaking.¹⁷⁶ Indeed, Stratton Oakmont's reply brief uses language emphasizing the undertaking basis of the affirmative duty: "having undertaken a duty to edit, Prodigy cannot now complain that its [sic] too difficult for it to do so properly," "[t]he law is settled in New York that one who assumes a duty to act, even though gratuitously, may thereby become subject to the 'duty of acting carefully.'"¹⁷⁷ And these undertaking-based arguments by Stratton Oakmont were, ultimately, key to the basis of Justice Ain's ruling: "[Prodigy's] conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."¹⁷⁸

¹⁶⁹ See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3 (contending Prodigy knew about the Board Leaders' ability to remove messages in violation of the guidelines).

¹⁷⁰ See *id.* at *5 (stating Prodigy had in fact benefitted by undertaking editorial control).

¹⁷¹ See *id.* at *5 (arguing that undertaking editorial duties gave Prodigy a family-friendly image).

¹⁷² See *id.* at *4 (distinguishing the case from *Compuserve* in part because Prodigy had control over the content of its bulletin boards).

¹⁷³ See Second Amended Verified Complaint at 14–15, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (alleging Prodigy intentionally marketed the fact that the bulletin boards were controlled by editors, leading to the breached duty of care).

¹⁷⁴ See *id.* at 16 (contending Prodigy knowingly refused to take the libelous content off the bulletin board).

¹⁷⁵ See *id.* at 14–15 (arguing Prodigy undertook a duty by having editors filter content).

¹⁷⁶ See *id.* at 15–16 (basing more argumentation on the duty to remove).

¹⁷⁷ Plaintiffs' Reply Memorandum of Law in Further Support of Motion for Partial Summary Judgment at 2, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1994); *id.* at 12 (citing *Florence v. Goldberg*, 375 N.E.2d 763, 766 (N.Y. 1978) and quoting *Florence's* quotation of Chief Judge Benjamin Cardozo's statement, in *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896, 898 (N.Y. 1928) that "the hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all").

¹⁷⁸ *Stratton Oakmont, Inc.*, 1995 WL 323710 at *5.

C. CDA § 230 and the Good Samaritan

On this interpretation of *Stratton Oakmont*, Congress's effort to overrule the case with something called a "Good Samaritan" statute makes perfect sense. More precisely, § 230(c) becomes clear when interpreted as a statute aimed at preempting "failure-to-remove" based arguments for ISP liability that were founded in an undertaking to censor and delete.¹⁷⁹

(c) Protection for "Good Samaritan" blocking and screening of offensive material . . .

(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 objectionable¹⁸⁰

This section basically reverses Justice Ain's statement that an ISP's choice to restrict, filter, remove, delete, and edit creates an affirmative duty to do so and liability concomitant on that affirmative duty; it states that an ISP's choice to filter or delete material posted by others *shall not be* a basis for holding an ISP civilly liable for negligent failing to do so.¹⁸¹ But this of course forces us to ask the question: why would it be a basis for holding them liable, and this quite naturally leads us to ask why was it a basis for holding Prodigy liable?

The answer is now clear: in the context of an effort to hold a defendant liable for failure to filter out or remove a defamatory statement from a place over which the defendant has special control, a practice of restriction and censorship can be a basis for holding them liable for failure to filter or remove.¹⁸² Section 230(c) proclaims that courts may not make this

¹⁷⁹ See H.R. REP. NO. 104-458, at 208 (1996) ("One of the specific purposes of this section is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated [] providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

¹⁸⁰ 47 U.S.C. § 230(c)(2)(A) (2012).

¹⁸¹ See § 230(c)(2)(A) (negating potential publisher liability for Internet providers).

¹⁸² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997) ("under [*Stratton Oakmont's*] holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of the publisher").

inference from a practice-of-removal-and-restriction to liability for failure to filter or remove.¹⁸³

We are, of course, familiar with exactly the same pattern of argument in the law of negligence.¹⁸⁴ At the common law, strangers do not, in the first instance, have duties to help those in need.¹⁸⁵ If, however, a stranger has undertaken to help someone, she may be held liable for the injuries resulting from her failure to help effectively.¹⁸⁶ State legislatures across the country have been alert to a pathological set of incentives in this common law structure: a person may be disincentivized from being a Good Samaritan because such volunteering is treated by the common law as a basis for inferring a duty of care where none existed before.¹⁸⁷ In response, every American state legislature has passed a Good Samaritan statute to eliminate the common law disincentive: these statutes provide a shield to defendants who do make efforts to rescue by ensuring that such efforts will not be utilized as a basis for overturning the basic rule that there is no affirmative duty to help.¹⁸⁸

On my account, it is no coincidence that the § 230(c) is actually expressly named “Protection for Good Samaritan blocking and screening of offensive materials.”¹⁸⁹ It is, in fact, a parallel to state Good Samaritan statutes that protect those who voluntarily provide emergency aid.¹⁹⁰ Its aim is to shield (from tort liability) those who voluntarily protect individuals from Internet speech that would harm them; removing such speech or filtering will not generate civil liability; courts will not be allowed to convert an ISP’s affirmative undertaking into a basis for liability.

The legislative history unambiguously confirms the importance of the Good Samaritan idea that is explicit in the text.¹⁹¹ Representative Chris

¹⁸³ See § 230(c)(2) (granting immunity for online publishers who voluntarily make a good faith effort to patrol user posts).

¹⁸⁴ See *Jackson v. Mercy Health Ctr., Inc.*, 864 P.2d 839, 842-43 (Okla. 1993) (describing duty-of-care-based counterincentives to voluntary aid at common law as a basis for Good Samaritan statute).

¹⁸⁵ See *id.*

¹⁸⁶ See RESTATEMENT (SECOND) OF TORTS § 324A(b) (AM. LAW INST. 1965) (illustrating that undertaking to rescue, and doing so negligently, can trigger liability to a third party).

¹⁸⁷ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (West 2013) (shielding good faith rescuers from tort liability).

¹⁸⁸ See DAN B. DOBBS ET AL., THE LAW OF TORTS § 312 (2d ed. 2011) (noting that every American state has a Good Samaritan statute).

¹⁸⁹ See 47 U.S.C. § 230(c) (2012) (titled the section, “Protection for ‘Good Samaritan’ blocking and screening of offensive material”).

¹⁹⁰ Compare *id.* (providing immunity for publishers who undertake to patrol the content on their websites), with TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (providing immunity for traditional rescuers in emergency situations).

¹⁹¹ See H.R. REP. NO. 104-458, at 194 (1996).

Cox of California, who (along with Representative Ron Wyden of Oregon) spearheaded § 230, testified to Congress as follows:

... Ironically, the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.

I will give you two quick examples: A Federal court in New York, in a case involving CompuServe, one of our on-line service providers, held that CompuServe would not be liable in a defamation case because it was not the publisher or editor of the material. It just let everything come onto your computer without, in any way, trying to screen it or control it.

But another New York court, the New York Supreme Court, held that Prodigy, CompuServe's competitor, could be held liable in a \$200 million defamation case because someone had posted on one of their bulletin boards, a financial bulletin board, some remarks that apparently were untrue about an investment bank, that the investment bank would go out of business and was run by crooks.

Prodigy said, "No, no; just like CompuServe, we did not control or edit that information, nor could we, frankly. We have over 60,000 of these messages each day, we have over 2 million subscribers, and so you cannot proceed with this kind of a case against us."

The court said, "No, no, no, no, you are different; you are different than CompuServe because you are a family-friendly network. You advertise yourself as such. You employ screening and blocking software that keeps obscenity off of your network. You have people who are hired to exercise an emergency delete function to keep that kind of material away from your subscribers. You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face higher, stricter (sic) liability because you tried to exercise some control over offensive material."

Mr. Chairman, that is backward. We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door

of our house, what comes in and what our children see. . . .

. . . [O]ur amendment will . . . protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem.¹⁹²

As indicated, the express language of “Good Samaritan” endured all the way into the text of the statute.¹⁹³ Section 230 plainly constitutes an Internet version of the traditional Good Samaritan statute.¹⁹⁴ To incentivize voluntarily protecting those who are at peril of injury, it negates the common law principle that voluntarily protecting others creates an affirmative duty where none existed before.

Attending to the affirmative-duty, or Good Samaritan, part of *Stratton Oakmont* illuminates two other important features of the text of § 230(c).¹⁹⁵ First, consider § 230(c)(2)(b)’s reference to “enabling”:

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

(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).¹⁹⁶

Plainly, the statute is no longer contemplating a defendant in a libel suit who is acting like a newspaper publisher; it is contemplating an actor (ISP or IS user) who has undertaken to provide others with means to restrict obscene materials.¹⁹⁷ Why *would* a jurisdiction ever impose liability for such enabling conduct? It has nothing to do with supplying the medium of publication or contributing to the action of publication; to the contrary,

¹⁹² 141 CONG. REC. H8460-01 (1995).

¹⁹³ See § 230(c)(2)(A).

¹⁹⁴ See *supra* note 190 and accompanying text (comparing Texas’s Good Samaritan statute with § 230(c)).

¹⁹⁵ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (assessing Stratton Oakmont’s liability as a publisher).

¹⁹⁶ § 230(c)(2)(B) (emphasis added).

¹⁹⁷ See *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1174–75 (9th Cir. 2009) (“[S]ection 230(c)(2)(B) . . . covers actions taken to enable or make available to others the technical means to restrict access to objectionable material.”).

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it is about undertaking to restrict material. The answer is that the statutory framework contemplates affirmative duties to restrict successfully that are acquired by virtue of having undertaken to restrict or to enable others to restrict.¹⁹⁸

Second, *Stratton Oakmont*'s discussion of the "Board Leader" and the putative consequences of his negligent failure to remove is critical in illuminating the place of the word "user" in § 230.¹⁹⁹

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 . . .²⁰⁰

The idea is that not only the ISP directly (*Prodigy*) but also the individual person engaged in deleting or restricting (*Board Leader Epstein*) cannot be held liable for the defamatory content of what makes it through, simply by virtue of having engaged in the undertaking. We are well outside of the domain of contemplating liability for extended agency, for newspaper publisher or distributor; what is contemplated is liability for failure to remove, predicated upon something akin to a commenced rescue. That is why the actor protected by the statute need not be an ISP, but could be simply a user.

D. *Zeran Revisited*

It is illuminating to revisit *Zeran* with this background understanding in place.²⁰¹ *Zeran* was a tricky case and not simply because of its powerful facts or because the plaintiff chose to make a "distributor" argument, rather than a section 577(2), failure-to-remove argument.²⁰² It was a tricky case because it fell into what might be have been perceived as a textual gap in § 230. The doctrinal, historical, and statutory analysis above

¹⁹⁸ See § 230(c)(2)(B) ("[A]ny action taken to enable or make available . . .").

¹⁹⁹ See James P. Jenal, *When is a User not a "User"? Finding the Proper Role for Republication Liability on the Internet*, 24 LOY. OF L.A. ENT. L. REV. 453-54 (2004) (identifying who counts as a "user" as an important CDA issue and arguing that the CDA's shield should not apply to *Rosenthal* (in *Barrett v. Rosenthal*) because being a non-moderating poster should not count as a "user").

²⁰⁰ § 230(c)(2)(A).

²⁰¹ See *supra* Part III.A-C (discussing the differing approaches to how a plaintiff might try to satisfy the publication element of a libel claim).

²⁰² See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329-32 (4th Cir. 1997).

indicated that—in retrospect—there were really *three* promising ways for Stratton Oakmont to have argued that Prodigy should face liability. The first was to depict an ISP, like Prodigy, as closely analogous to a newspaper publisher, and as a publisher by virtue of its misfeasance-like involvement in doing things that bring an original author’s inscriptive utterances to the eyes of a third party. Both Prodigy’s evidentiary admissions and its allegedly editorial activities stood as support for this view.²⁰³ A second was to view Prodigy as a property owner with special control over a surface and notice of the defamatory content on it; under section 577(2), such persons arguably have affirmative duties to remove defamatory statements made by others, and the failure to do so can subject one to defamation liability—in effect, substituting failure to remove for active publication, and thereby fulfilling the publication element.²⁰⁴ Third, even assuming there is, in general, no duty rooted in section 577(2), for an ISP to remove postings on its bulletin board, one could argue that undertaking to censor, remove, and protect the reputational victims itself generates an affirmative duty to do so.²⁰⁵

Section 230(c)(1) is most plainly understood as a rejection of the central *Stratton Oakmont* idea that ISPs are like newspaper publishers, as Mr. Zeran contended. Section 230(c)(2), as I have argued and as the “Good Samaritan” textual language makes amply clear, is at least in part about the impermissibility of inferring affirmative duties to delete from undertakings to censor and control.²⁰⁶ But an argument can be made that

²⁰³ See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (discussing Prodigy’s admissions).

²⁰⁴ See *supra* Part III.A (referring to a property owner’s affirmative duty to remove defamatory content).

²⁰⁵ My post-230, backward-looking enumeration of promising arguments for Stratton Oakmont here, is somewhat different from the enumeration offered in Part III.B, purporting to occupy Stratton Oakmont’s strategic perspective. There, I suggested there were “three-plus” routes to argue for publication: (1) newspaper publisher; (2) distributor; and (3 plus) affirmative duty, either as land/chattels owner or based on an undertaking to protect. I suggested that the distributor argument was ruled out for Stratton Oakmont as strategically unappealing, because of *Cubby* (and because the facts did not support a distributor-like role, as they had in *Cubby*) and that Stratton Oakmont seems to have succeeded by a combination of the newspaper argument and the affirmative duty/undertaking argument. In my post-230 analysis, looking backwards at *Stratton Oakmont*, I arrive at the three “promising” routes by omitting the “distributor” argument—leaving the newspaper and the affirmative duty/undertaking argument, but breaking the latter into two. Thus, the three routes are: (1) newspaper; (2) affirmative duty based on property/chattels ownership; and (3) affirmative duty based on special undertaking to protect or filter.

²⁰⁶ For this reason, there is a powerful argument that *Blumenthal v. Drudge* was correctly decided in favor of AOL. 992 F.Supp. 44 (D.D.C. 1998). The United States District Court for the District of D.C. interpreted § 230(c)(1) to state that courts may not treat ISPs (like AOL, the defendant) as if they were newspaper publishers. In *Blumenthal*, AOL was behaving exactly like a newspaper publisher with respect to a syndicated columnist. It had a monthly

Zeran was about neither of these categories; it was about the second, special-control-over-chattels-based argument for an affirmative duty to remove. That path to recovery at first appears not to have been addressed by (c)(1) or by (c)(2). Because Mr. *Zeran*'s lawyer chose to frame his argument in terms of distributor-liability, rather than affirmative duty to remove, and because scores of scholars have followed *Zeran*'s parsing of the issues, courts and commentators in the United States have not addressed head-on the section 577(2) affirmative duty argument that does not depend on an undertaking.²⁰⁷ In other words, reading the two parts of § 230(c) separately seems to lead to the conclusion AOL has no defense against pre-Internet case law saying that there is a duty to remove, with notice, because one is the owner of the chattels or the property.²⁰⁸

But, of course, there is no reason to read each of the two clauses separately; there is reason to read them together, in context, as Justice Antonin Scalia and a generation of textualist scholars have made clear.²⁰⁹ They are both part of the same law, passed at the same time, in response to the same case, and dealing with a large and difficult question.²¹⁰ As this Article has argued at length, both the text and the history of (c)(2) demonstrate that it says: a failing affirmative duty argument for removal

deal with the gossip columnist, Matthew Drudge, to carry his website-based gossip column on AOL for AOL subscribers. The court in *Blumenthal* was arguably confronting an ISP that took an active step to post the column. Nonetheless, *Stratton Oakmont*'s entire first half is so plausibly understood as a ruling that ISPs should be treated as newspaper publishers, that it is difficult to deny that § 230(c)(1) (expressly aimed at overruling *Stratton Oakmont*) is at least partially an effort to preempt the newspaper publisher analogy.

²⁰⁷ *But see Doe v. Am. Online, Inc.*, 783 So. 2d 1010 (Fla. 2001). The majority of the Florida Supreme Court fended off a critique of *Zeran* on textualist grounds by reasoning that all of Restatement (Second) § 577 pertained to the "publication" element, plausibly reasoning that the Restatement understands failure to remove (under section 577(2)) as one way of satisfying the publication element. In this response – and especially in light of the dissenting justice's "distributor"-based argument – the *Doe* court is among the few that takes seriously the failure-to-remove category, rather than the distributor category. Nonetheless, *Doe* predates *Batzel* and other courts' debates about the active/passive distinction and simply does not address the relevance of the affirmative duty categories for § 230 analysis. Additionally, because *Doe* involves asserted liability for harm caused by the posting of child pornography – and not libel – it is not clear whether the § 230 should apply at all. Relatedly, there is reason to wonder whether the First Amendment arguments that might undercut notice-based distributor-based liability for libel (even absent § 230(c)) would, under common law and constitutional law, shield ISPs against distributor-liability in connection with child pornography.

²⁰⁸ *See Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

²⁰⁹ *See, e.g., John F. Manning, Textualism and Legislative Intent*, 91 VA. L. REV. 419, 434–36 (2005) (explaining the nature of textualists); *see also* Gregory Bassham, *Justice Scalia's Equitable Constitution*, 33 J.C. & U.L. 143, 144 (2007) (describing the reading process for constitutions and statutes).

²¹⁰ *See Manning, supra* note 209, at 434–36 (discussing the reasoning as to why statutory language is read by textualists).

will not be converted into a successful affirmative duty argument by adding that there was an undertaking to restrict or censor. The starting assumption of that argument appears to be that there is no affirmative duty of ISPs (or their Board Leaders or hired monitors) to remove defamatory statements from their own websites; the failure to remove them cannot be taken as a basis for liability under section 577(2) (affirmative duty of owner or property or chattels to remove defamatory statement). And so, one is led to ask whether there is anything in the text of § 230 that can be read as expressing that proposition.

The answer is simply that the text of § 230(c)(1) is very naturally read as expressing that point: “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.”²¹¹ The question presented by *Zeran* is *if a court imposes liability for reputational injury on an ISP for failure to remove a defamatory statement posted through its bulletin board, will that court count as having “treated” the ISP as a “publisher or speaker” of that statement?* Judge Wilkinson got the right answer to that question in *Zeran*: a court that imposed liability under such circumstances *would be violating* § 230, and, therefore, state law is preempted to the extent that it does so.²¹²

It is therefore most plausible to read § 230(c)(1), when it demands of courts that they not “treat” an Internet service provider or user “as a publisher or speaker” of someone else’s posting, as meaning that it not hold them liable for failure to remove postings from their websites or bulletin board.²¹³ That is part of what § 230(c)(1) forbids. Because such a bald statement of no affirmative duty to protect, like tort law’s basic principles of no affirmative duty, leaves open the question of whether an undertaking to censor and monitor could generate an affirmative duty (and concomitant liability), § 230(c)(2) shuts the door on the undertaking-based affirmative duty, too. The Good Samaritan component of the legislative effort received top billing, presumably because the ISP industry rationally viewed *Stratton Oakmont’s* almost deliberate punitiveness toward “family-values” ISPs as the most powerful magnet for Congressional reform.²¹⁴ Lobbyists for the industry prudently led with

²¹¹ 47 U.S.C. § 230(c)(1) (2012).

²¹² *Zeran*, 129 F.3d at 335.

²¹³ *See id.* at 330 (explaining that § 230 protects service providers from lawsuits if they should act as publishers).

²¹⁴ *See* 141 Cong. Rec. H8460-01 (1995) (quoting Representative Christopher Cox’s testimony).

the Good Samaritan part, presumably aware that the more basic protection against liability for failure to remove would come in tow.²¹⁵

There is, arguably, a textual advantage to the reading of § 230(c)(1) as this Article is suggesting, even when the text of § 230(c)(1) is taken on its own. Notwithstanding the preliminary interpretive hypothesis, the text of this section is *not* perfectly interpreted as a simple prohibition on classifying ISPs as “publishers” akin to newspaper publishers. If that had been its sole point, it would have been more felicitous simply to state that an Internet service provider should not be treated as a “publisher.” Instead, it states that an ISP (or user) should not be treated as “the publisher or speaker [of any information provided by another information content provider].” The latter two words—“or speaker”—appear extraneous. If, however, the point of § 230(c)(1) is to block courts from saying that the “publication” element of a defamation claim is satisfied by an affirmative duty of a chattels owner to remove statements, then the phrase “publisher or speaker” makes sense. That is because the publication element of a defamation claim is nicely captured by the requirement that the defendant have “written *or spoken*” defamatory words. It is *the element as a whole* that § 230(c)(1) insists is unsatisfied by Internet service providers and users failing to remove a defamatory statement on a site over which they have control. The point is that, in situations where such defamatory statements appear on a site over which they have control, the defendant’s control over the site does not provide a sufficient basis for treating the defendant as “the publisher or speaker” of the statements posted on it by third parties—in other words, *as fulfilling the publication requirement of a defamation claim against the ISP or user, notwithstanding that the defamatory statements were actually made (posted) by third parties.*

Let us return to *Zeran*. In his opinion, Judge Harvie Wilkinson reasoned that if ISPs were subject to notice-based liability for failure to remove defamatory statements:

[T]hey would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot

²¹⁵ See Melissa A. Troiano, *The New Journalism? Why Traditional Defamation Law Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1463 (2006) (explaining the lobbyist’s position on the Good Samaritan clause in regards to liability).

editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.²¹⁶

An interpretation leading to this result would frustrate Congressional purpose, he argued. Judge Wilkinson's statement is true, but it understates the strength of the interpretation and its fidelity to the text; as this Article has argued, *the text* of § 230 is best understood as ruling out the treatment of ISPs as having affirmative duties to filter or remove defamatory matter.²¹⁷ Congress's statement that ISPs should not be treated as publishers or speakers of statements by other content providers expresses the idea that the failure to filter or remove the other content, the provider's statement shall not warrant treating the defendant *as if she or he were the publisher or speaker of that statement in the traditional sense*.

On this account, then, section 1 of the Good Samaritan statute is broad because it prohibits: (1) treating an ISP the same as courts would treat the publisher or speaker in-the-traditional-sense of a defamatory (or otherwise tortious) statement on the Internet; and (2) imposing liability on an Internet service provider or user by virtue of the failure to comply with an affirmative duty to remove others' statements. Section 2 is in one way narrower and in one way broader. It is narrower because it relates only to the "undertaking" line of plaintiff argument, and it is broader because it goes beyond the phrase "publisher or speaker," and simply asserts that *liability should not be imposed* on this basis. In this way, section 2 makes especially clear that a particular kind of argument for generating an affirmative duty is preempted.

It is understandable that Mr. Zeran's lawyer ran a distributor argument against AOL in *Zeran*, because § 230(c)(1) (if one overlooks the words "or speaker") appears to overrule *Stratton Oakmont* by declaring that ISPs are not to be treated like newspaper publishers. Because distributors were distinct from publishers and were allegedly deemed to have some duties to remove postings, and because § 230 does not address distributors, it was palatable to suggest that § 230 leaves open the possibility of distributor liability. Judge Wilkinson was inclined to regard this argument as wrongheaded, believing that the legislation should be understood as having done more than eliminate pure publisher liability.

²¹⁶ *Zeran*, 129 F.3d at 333.

²¹⁷ See *supra* Part III.C.

Judge Wilkinson's pro-ISP inclination was sound, as was his actual decision in *Zeran*, but the distributor argument was a distraction. *Zeran* was asking the District Court to impose liability upon AOL because of its failure to remove the post defaming him from AOL's bulletin board. Nothing about what AOL did was like the action of a distributor; AOL provided the substratum or chattels through which another person posted, but it did not itself choose to post anything. *Zeran* was effectively asking the court to apply failure-to-remove liability, as in Restatement (Second) of Torts section 577(2). As we have seen, § 230(c)(1) should be read as denying the existence of a quasi-property-based affirmative duty to remove postings. Not only does the text of (c)(1) support that reading, it is *only* against that backdrop that the Good Samaritan provision of § 230(c)(2) makes sense. It would make no sense to say that undertaking or volunteering to filter does not alter the background rule of no-affirmative duty, unless it was first established that there was no baseline affirmative duty to remove or basis of liability involved in being a provider or user of the Internet service through which the defamatory statement was posted by another.

It appears, however, that Judge Wilkinson did not see this argument. He therefore read the statute according to his understanding of its broader purpose of enhancing free speech, as preempting tort claims against those who engage in the act of distributing defamatory statements. The distinction between distributor-based liability with notice and chattels-owner based liability for failure to remove was immaterial for the purposes of *Zeran*; the Fourth Circuit reached the right result. But the distinction came to be important because subsequent cases forced courts to confront the question of what—in light of the statute—was defective about a claim like *Zeran*'s. The correct answer, this Article has argued, is that Congress wished to deny that failure to remove from one's property (or chattels or space) should count as fulfilling the publication element of a libel claim, in the context of the Internet. Lacking this answer, subsequent courts have been drawn to the idea that because someone else was the author of the content, the ISP or user cannot be held liable for publishing the content. This ultimately led courts down the path of thinking that § 230 repeals the republication rule.

IV. BATZEL REVISITED

A. *The Active/Passive Distinction*

Both the Ninth Circuit in *Batzel* and the California Supreme Court in *Barrett* were required to deal with the fact that the key defendants in their

respective cases were individuals, not ISPs or even websites.²¹⁸ Both rightly noted that the CDA refers to “internet service providers and users,” and in so doing, rules out any interpretation limited to ISPs.²¹⁹ Because § 230 appears to address a targeted problem relating principally to ISPs and website hosts, the generality is a bit puzzling.²²⁰ *Batzel* pointed out that a non-ISP (e.g., a website owner or, as in *Stratton Oakmont*, a putative independent contractor hired to monitor the ISP) might engage in censorship or screening or take-down efforts, and, therefore, find herself being treated by the jurisdiction as a publisher, were the statute worded only to shield ISPs.²²¹

The larger question in both cases is whether the posting on bulletin boards or listserves by the individual defendant is shielded from liability by § 230. *Batzel*’s argument for liability was simple: Cremers libeled her by e-mailing and posting around a letter stating that she was Himmler’s descendant who secretly possessed art that Nazis had looted from Jews.²²² Under the law of libel, given the republication rule, the fact that the letter was composed by Smith does not undercut *Batzel*’s claim that Cremers libeled her, for Cremers in fact published Smith’s letter (in the traditional sense of “publish”) by circulating it and posting it.

Cremers successfully argued that § 230 preempted *Batzel*’s claim on the ground that imposing liability here would be treating an Internet service user as a publisher of information provided by another information content provider (Smith), and, therefore, contravening § 230(c)(1). Here is how the majority—which adopted Cremers’s position—characterized the dissent’s position and responded to it:

The partial dissent . . . simultaneously maintains that 1) a defendant who takes an active role in selecting information for publication is not immune; and 2) interactive computer service users and providers who screen the material submitted and remove offensive content are immune. These two positions simply cannot logically coexist.

²¹⁸ See *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006) (establishing the defendant Rosenthal as a director for the Humanities Foundation for Woman and operator of an Internet discussion group); see also *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003) (introducing the defendant, Cremers, as a specialist in museum security).

²¹⁹ See *Barrett*, 146 P.3d at 515 (referring to the text used by § 230(c)(1)); see also *Batzel*, 333 F.3d at 1037 (discussing the language used in § 230 (c)(1)).

²²⁰ See § 230 (underscoring problems that may arise with website hosts and the like).

²²¹ See *Batzel*, 333 F.3d at 1029.

²²² *Id.* at 1021.

Such a distinction between deciding to publish only some of the material submitted and deciding *not* to publish some of the material submitted is not a viable one. The scope of the immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.²²³

For several reasons, the majority is too quick to accept Cremer's critique. First, the court's framing of the issue actually begs a key question: whether a defendant's failure to remove a defamatory posting can itself count as publishing. "Such a distinction between deciding to publish only some of the material submitted and deciding *not* to publish some of the material submitted is not a viable one."²²⁴ The problem is in the parallel phrases "deciding to publish only some" and "deciding *not* to publish some . . ."²²⁵ Those phrases—and the entire sentence—are implicit versions of the following: *Such a distinction between deciding to publish only some of the material submitted (and not to publish the remainder) and deciding not to publish some of the material submitted (but to publish the remainder) is not a viable one.* The argument, in other words, presupposes that both sides of the comparison involve publishing some and declining to publish the remainder. It therefore seems preposterous to think that there is a difference in the order of how it is phrased.

The problem is that the dissent is not arguing for *this* distinction, but for a different one—a distinction *between choosing to post (some, but not all, of the material written by third parties) and declining to remove (some, but not all, of the material written by third parties)*. The majority simply assumes that "declining to remove" what is posted on one's website is a form of publication and that what both sides of the majority's supposedly false contrast are assumed to be forms of "publishing" third party content. Since there is, as the dissent recognizes, no liability under § 230 for the second side of the contrast (what the majority describes as "deciding *not* to publish some of the material submitted," and implicitly deciding to publish the remainder by failing to remove it), there cannot be liability on the first side of the contrast: deciding to publish some (by posting).

Now we are at the nub of the difficulty. This Article's central interpretive claim is that § 230(c) specifically rejects the idea that declining to remove a posting *shall count as publishing*. Yet the majority in *Batzel* begins with *the assumption* that declining to remove is publishing. That is

²²³ *Id.* at 1032 (internal citation omitted) (emphasis in original).

²²⁴ *Id.* (emphasis in original).

²²⁵ *Id.* (emphasis in original).

why courts employing broadly pro-defendant interpretations are inclined to speak of a § 230 “immunity” as if there is a special sort of affirmative defense or shield against what otherwise is a well-formed prima facie claim. The plaintiff’s whole point is to argue against that equivalence. Perhaps the argument does not succeed, but the majority needs to show that it does not succeed; to begin by merely assuming that failure to remove is a form of publication is viciously circular. That is what the Ninth Circuit majority does (and then says there is immunity for publishing something if it was penned by someone else originally).

Second, the court is making plain its contempt for an active/passive distinction and suggesting that it is sort of a fabrication of the dissent.²²⁶ But active/passive distinctions are all over the law — for better or worse — and they are indeed central to the black letter law of libel, especially regarding the publication element.²²⁷

Third, the account the Article offered above — stretching from *Cubby* to *Stratton Oakmont* and § 230’s enactment to *Zeran* — of course suggests that preempting passive, affirmative-duty-based liability was precisely what § 230 was aimed at doing and it explains why. The common law for very basic reasons holds those who publish defamatory statements liable for their intentional acts of defaming, and it sweeps in actors as part of the agency of publishing. No communication happens and no defamation occurs without the voluntary act of publishing. For powerful reasons relating to responsibility, choice, and freedom, the common law does not treat failure to remove what someone else has published, or failure to screen out what someone else has published, as a general basis for liability (although, as discussed, there can be exceptions). These are the same reasons that we treat shooting someone differently from failing to stop the bullet or failing to rescue the victim. To be pluralistic about it, some reasons relate to basic notions of agency and responsibility; some relate to libertarian notions of freedom; some relate to floodgates concerns; some relate to compliance costs.²²⁸

The lawyers for *Stratton Oakmont*, picking up on a line of thinking in the legal literature and on overly aggressive marketing statements by *Prodigy*, crafted an interesting common law argument for changing the default rule of no liability for failure to remove without notice; the undertaking of screening and removal creates an actionable duty to screen

²²⁶ See *id.* at 1038.

²²⁷ See *supra* Part II.A.

²²⁸ Cf. Myriam Gilles, *The Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 65 GA. L. REV. 845, 857 (2001) (discussing qualified immunity and distinguishing negligence torts, which have high compliance costs, from intentional torts, which have low compliance costs).

or remove. Combined with a Restatement section 577 argument that property or chattel owners have duties to remove when they are aware of the defamatory content of what they are publishing, plaintiffs seemed poised to convince courts around the country to elide the active/passive distinction and hold ISPs liable for failure to screen or failure to remove. As demonstrated in Part III, the very point of the CDA was to preempt state courts who wished to elide this distinction in this clever manner. To do so would be to obliterate the massively important distinction between monitoring oneself so that one does not utter or write defamatory statements, on the one hand, and monitoring the statements of everyone else in the world to decide whether their statements must be blocked or removed. Congress saw not only that such an obliteration would be unfair to ISPs, but also that it would incentivize massive overscreening, and therefore, be a free speech problem.²²⁹

Batzel was mistaken in supposing the active/passive distinction illogical; mistaken in supposing it fabricated, mistaken in supposing it unmotivated, and mistaken in thinking the distinction alien from Congress's intentions.²³⁰ Section 230—as its name “Good Samaritan protection” indicates—is all about telling states that they may not recognize liability predicated on breach of a duty to screen or remove; ISP screening and removing is incentivized by rendering it a no-liability activity. It has nothing to do with active posting of materials online.

B. Some Causes of the *Batzel* Error

Assuming for the moment that this Article is correct in its critique of the *Batzel* majority, how could it be that nearly all of the serious federal and state judges to have addressed the same issue continue to get it wrong, and why has the problem not been exposed? Possibly, the deepest causes of the error are jurisprudential; indeed, that will be the topic of Part V of this Article, but at least three other facets of the legal setting deserve discussion: one relating to the statutory language of § 230(c)(1), one relating to a kind of screening issue that arises in some § 230 cases, and one relating to the republication rule and the common law background.

1. Statutory Language

The language of § 230(c)(1) is mandatory and categorical, and *Cremers*'s argument appeared to fit it perfectly: “No provider or user of

²²⁹ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (providing that Congress implemented § 230 to reduce infringement on freedom of speech).

²³⁰ See *Batzel*, 333 F.3d at 1032 (explaining Congress did not require the distinction in § 230 to be present).

an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²³¹ Cremers was a “user of an interactive computer service”; if the Ninth Circuit had permitted the District Court to hold him liable for libel, that court would have been treating him “as the publisher of information provided by” Smith, who was indeed another information provider. Therefore, a textualist argument seems to be a clean winner for Cremers.

The problem with this argument form is that it proves too much—far too much. No one would have argued that Cremers would be immune if he had published the contents of Smith’s letter in the *New York Times’s* hard copy version, but all of the above statements would still be true. The overbreadth of this interpretation is not cured by saying that it involves only putative publication on the Internet. There is another problem, which is that the word “information” is quite naturally interpreted as meaning the factual content of what the other said, not whether the other said it, and nothing in the statute requires any attribution to the other content provider in order to obtain freedom from liability. If Cremers, going on the information provided by Smith (but with no express attribution), had written on the Internet “Batzel is Himmler’s descendent and owns a great deal of Nazi looted art,” he still would have come within the text of § 230(c)(1), so interpreted, for the information would still have been *provided by another information content provider*. Therefore, the seemingly straightforward textual reading suggested in the prior paragraph cannot be right.

It is tempting to suppose—based on these examples—that the statute is simply poorly drafted. But there is a much more plausible way to understand it, which lies in the word “treated”; indeed, how courts are and are not to “treat” ISPs is the central focus of this section of the Article. The basic idea was that ISPs—which are not in fact publishers in any straightforward sense, but more like common carriers—should not be treated as if they were publishers. If an ISP—Google, Inc., for example—were to make a false and defamatory public statement about one of its executives based on information a private detective had revealed to it, Google could certainly be held liable in a libel claim (notwithstanding § 230), even if doing so would involve treating Google, Inc. as a publisher or speaker. That would be because Google, Inc. *is* a publisher or speaker in conventional terms, in that hypothetical. Section 230(c)(1) contemplates a state or federal court that treats an ISP as a publisher or speaker, notwithstanding its not being one in conventional terms. Doing that is what a court “shall not” do under § 230(c)(1).

²³¹ 47 U.S.C. § 230(c)(1) (2012).

It is a truism that certain legal problems that legislatures might wish to solve end up leading to drafting that has the capacity to mislead seriously. Here are two similar, hypothetical, examples:

Consider a statute that reads a certain way (in italics) and an apparently sound but actually fallacious textual argument in quotation marks:

(1) No medical radiologic technologist shall be treated as an expert for the purposes of giving testimony on the standard of care in a medical malpractice case.

“Jones is a medical radiologic technologist, and therefore may not serve as an expert witness on the standard of care in this case, which is a medical malpractice case.” The argument is fallacious if Jones is also a licensed physician with expertise on the standard of care pertinent to the case at bar.

OR

(2) No automobile rental company shall be treated as a product-seller for purposes of products liability law.

Hertz is an automobile rental company, and therefore cannot be held liable in a products liability case based on a rental car that injured the plaintiff. The argument is fallacious if Hertz has created a subsidiary that is actually a retailer of new automobiles, and the plaintiff was injured by such an automobile.

The general form is:

No member of class C shall be treated as having the attribute Alpha for the purposes of body of law Beta.

Such statutes can be interpreted in a range of ways. At one end of the range is: Sufficient for exclusion: *If a person or a company is a member of class C, then, for that very reason, courts interpreting the body of law Beta may not treat that person or company as having the attribute Alpha, under body of law Beta.* At the other end of the range is: Rejection of inclusion criterion: *Body of law Beta shall not be interpreted in such a way that membership in class C is grounds for treating a person or company as having attribute Alpha, under body of law Beta.*

In both examples (1) and (2) above, it would very likely be wrong to read the statute as containing a criterion that is, in and of itself, sufficient for exclusion from treatment as having Alpha, and it would much likelier make sense to see the statute as rejecting a certain kind of criterion as a

primary basis for inclusion in treatment as having Alpha. These examples are quite simple, and I am of course assuming that there was context in each of my examples – textual, historical, or otherwise that would make clear why the “rejection of inclusion criterion” reading was better (in (1), I imagine a doctor’s lobby persuading a state legislature that the barrier for counting as an expert in medical malpractice cases was getting too low and insufficiently attentive to norms of care among physicians; in (2), I imagine a trend of plaintiffs’ lawyers trying to circumvent negligence law standards in litigation against rental companies who rent defective cars and a legislature blocking the trend).

Taken to the CDA, the point is as follows: there is no basis for interpreting the statute to read that *being an Internet service provider or user is sufficient to exclude a defendant from being potentially liable for republishing someone else’s statements*, rather than reading it to say that *being the service or medium through which it was posted (or having control over the service or medium through which it was posted by another) shall not be a basis for treating the ISP (or user) as a publisher – i.e., deeming the publication element satisfied*. The name and repeated usage of the phrase “Good Samaritan,” the express reference to *Stratton Oakmont*, the common law background, the legislative history, and the canon of reading narrowly statutes in derogation of the common law – all cut in favor of the second reading and against the first.

Here, as elsewhere, courts must interpret the statute as a whole.²³²

2. Screening Protection

According to § 230(c)(2):

[N]o 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 objectionable²³³

In *Donato v. Moldow*, the New Jersey Appellate Division confronted a claim against the operator of a website who edited a third party’s defamatory content in such a way as to diminish its profanity, then

²³² See *Utility Air Reg. Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442–43 (2014) (establishing when interpreting text, the statute must be read as a whole); see also *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011).

²³³ § 230 (c)(2).

reposted the edited post.²³⁴ The defendant operator argued that to hold him liable for reposting what was done in the service of screening out profanity was to violate § 230(c)(2), which seems to be devoted to encouraging web users to do some censoring or editing of profanities.²³⁵ Although *Batzel* was decided before *Donato*, and relied upon within it, an aspect of the decision contemplated that Smith had sent Cremers his e-mail for the purpose of having it posted, and that Cremers simply served as an intermediary who did some good faith editing.²³⁶ Indeed, the Ninth Circuit actually remanded *Batzel*'s claim to the District Court to ascertain whether this was true, in other words, whether Cremers was simply an intermediary who performed a good faith editing function.²³⁷ The case lost on summary judgment because of unrelated procedural difficulties faced by *Batzel*.²³⁸

In the end, this line of argument – which also appears in *Shiamili* and *Jones* – is largely unpersuasive in the vast majority of cases in which it appears (including *Batzel*, *Donato*, and *Shiamili*), and is probably quite irrelevant in any event to the current state of the law.²³⁹ The California Supreme Court's decision in *Barrett* simply did not carry this "editor" feature; Rosenthal was not using her own website, and the unanimous court did not even notice the difference.²⁴⁰ In *Batzel*, it was clear that even if Cremers did post the Smith letter on his own website, in edited form, he

²³⁴ See *Donato v. Moldow*, 865 A.2d 711, 713–15 (N.J. Super. 2005).

²³⁵ See § 230(c)(2) (permitting editing and restricting materials on a good faith basis without implication of liability).

²³⁶ See *Batzel v. Smith*, 333 F.3d 1018, 1031–34 (9th Cir. 2003) (concluding the publisher should be potentially liable because he published defamatory statements made by third parties and "a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other 'interactive computer service'"); see also, e.g., *Donato*, 865 A.2d at 718 (showing state courts should give considerable weight to federal decisions when interpreting federal statutes).

²³⁷ See *Batzel*, 333 F.3d at 1035.

²³⁸ See *Batzel v. Smith*, 372 F. Supp. 2d 546, 546 (C.D. Cal. 2005) (granting summary judgment on res judicata, because of dismissal for failure to prosecute in parallel North Carolina action).

²³⁹ See, e.g., *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 396, 415–17 (6th Cir. 2014) (holding that immunity is triggered when a service provider exercises a publisher's traditional editorial functions); *Batzel*, 333 F.3d at 1031 (concluding no provider or user of an interactive computer service can be treated as the publisher provided by another content provider); *Donato*, 865 A.2d at 718 (reiterating that state courts should give regard to federal decisions when interpreting federal statutes); *Shiamili v. Real Estate Grp. of N.Y. Inc.*, 17 N.Y.3d 281, 286–87 (N.Y. 2011) (explaining that a publisher of defamatory material authored by a third party is generally subject to tort liability, but there is an exception in which the defendant is an information content provider).

²⁴⁰ See *Barrett v. Rosenthal*, 146 P.3d 510, 526, 528–29 (Cal. 2006) (reiterating that Congress intended active users on the Internet to be immune from tort liability because of their freedom to actively post material on the Internet).

also passed the email and the email's information to other persons via other means, so the conduit argument fails.²⁴¹ Finally, and perhaps most importantly, the statutory language follows typical Good Samaritan statutes by including a "good faith" requirement.²⁴² Plausible and evidence-backed contentions that the website operators intentionally, recklessly, maliciously, or knowingly made defamatory and false statements quite easily create an issue as to "good faith," notwithstanding the *Donato* court's dismissive comments to the contrary.²⁴³

3. Established Modes of Cabining the Republication Rule

In the third place, a common misreading of § 230 appears to draw from the fair reporting privilege and other sources of legal doctrine unrelated to the CDA.²⁴⁴ The rule sometimes appears harsh, unjust, and indefensible—a point most eloquently and powerfully expressed by the Second Circuit's famous decision in *Edwards v. National Audubon Society, Inc.*²⁴⁵ *Edwards* utilized the First Amendment to fashion what it called the "neutral reportage privilege," which essentially created a space of no liability when a responsible speaker accurately conveyed the gist of a defamatory statement by another person, perhaps a public figure, at least where the fact of the third party's utterance was itself a matter of legitimate public concern.²⁴⁶ Although *Edwards* has never been endorsed by the Supreme Court and has received a mixed reception, nationally, it

²⁴¹ See *Batzel*, 333 F.3d at 1022 (observing that Cremers included the message in emails to several persons).

²⁴² See 47 U.S.C. § 230(c)(2) (2012) ("No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith") (emphasis added).

²⁴³ See *Donato*, 865 A.2d at 727 (addressing the "good faith" requirement of the good Samaritan provision). The Court addressed the appellant's argument based on the following:

In our view, appellants' argument rests on a misconception about the purpose of the good samaritan provision. It was inserted not to diminish the broad general immunity provided by § 230(c)(1), but to assure that it *not* be diminished by the exercise of traditional publisher functions. If the conduct falls within the scope of the traditional publisher's functions, it cannot constitute, within the context of § 230(c)(2)(A), bad faith.

Id. The failure of the New Jersey court to take seriously the role of "good faith" in Good Samaritan statutes generally is quite striking.

²⁴⁴ See ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS, 1 § 7.3 (4th ed. 2014) (explaining "Limitations on and Exceptions to Liability" under republication doctrine).

²⁴⁵ See 556 F.2d 113, 122–23 (2d Cir. 1977).

²⁴⁶ See *id.* at 120 (explaining that personal attacks against a public figure will not be able to be immune under neutral reportage).

echoes a common law or statutory privilege that exists in many jurisdictions: the fair-and-accurate reporting privilege.²⁴⁷ The privilege typically states that a newspaper or news source may publish “fair and accurate reports of certain defined judicial, legislative, and executive proceedings.”²⁴⁸ Both neutral reportage and fair reporting are very limited, and each requires an accurate and balanced report, as well as many other features.²⁴⁹ Anything beyond the accurate and balanced report will normally defeat the privilege.²⁵⁰ As a matter of practice, however, courts adjudicating such cases are typically going to focus on what differences exist, if any, between the statement by the third party and the statement by the defendant. For the reasons explained below, a defamatory-difference-in-content test seems to have caught on in CDA case law.

Section 230(f)(3) states that “[t]he term ‘information content provider’ means 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.” Following Judge Frank Easterbrook in the Seventh Circuit, many jurisdictions have taken § 230(f)(3) in conjunction with § 230(c)(1) to entail that an ISP or user is not the publisher of a statement made by a third party unless the defamatory content was provided in significant part by the ISP or user herself.²⁵¹ That is, whatever was provided in whole by the third party is something of which the ISP or user cannot be considered a “publisher.”²⁵² With this argument in mind, a thoughtful line of cases now looks at whether the republisher has added independent content; in this case, there can be liability that is not for information content supplied by a third party, but

²⁴⁷ See SACK, *supra* note 244, at § 7.3.5.D.3, at 7-50 (“lower state and federal courts, the reception has been generally favorable but not unmixed”); *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 611 (AM. LAW INST. 1976) (providing that a publication of defamatory matter is privileged if “the report is accurate and complete or a fair abridgement of the occurrence reported”); *Edwards*, 556 F.2d at 120.

²⁴⁸ RODNEY A. SMOLLA, *LAW OF DEFAMATION* 2 § 8:66 (2d ed. 2010).

²⁴⁹ See *id.* at 2 § 8:67 (explaining the fair reporting privilege is more often than not considered an exemption to the common law republication rule).

²⁵⁰ See *id.* (expanding on the concept that the neutral reporting privilege and fair reporting privileges are exceptions to the normal common law position of the republication rule because of the public’s interest to know about fair and accurate reporting).

²⁵¹ See § 230(f)(3) (establishing the definition of who is considered an information content provider); § 230(c)(1) (explaining the treatment to publishers and speakers); *Chi. Lawyers’ Comm. for Civil Rights under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-70 (7th Cir. 2008) (describing the limitations on how someone can be immune from tort liability).

²⁵² See *Craigslist, Inc.*, 519 F.3d 666 at 671-72 (stating the stipulations of § 230(c)(1), which provide that a messenger cannot be sued simply because a message depicts a third party’s plan related to unlawful discriminatory practices).

supplied by the defendant independently.²⁵³ In my view, part of the success of the mistaken interpretation of the CDA is that it does provide courts with a cogent and comprehensible test in an Internet libel case, one that is accompanied by the perhaps familiar sense that one is doing a fair and accurate reporting type of analysis.²⁵⁴

The central error in this argument is the one that Part IV.A identifies and Part IV.B.1 deepens. Section 230 is *not* about the impermissibility of treating speakers as publishers when they are in fact simply acting as publishers in the traditional sense. To think otherwise is to suppose that the CDA was put forward to undo the republication rule for the Internet at a wholesale level. There is simply nothing in the statute's text or legislative history that suggests that it has anything to do with an effort to eliminate liability for *re*publishing. Indeed, we have seen that taking the statute in this way is something of a blunder, for the real issue is not whether an ISP will be on the hook as a republisher, but whether the original publication by a third party will somehow be a publication for which the ISP is held responsible by virtue of providing the medium or failing to remove it. Republication liability is certainly an interesting, important, and potentially controversial topic, but it is not what § 230 is about.²⁵⁵ The fact that § 230 expressly aimed to change the result in

²⁵³ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (declining to extend immunity to a federal housing discrimination claim). *Roommates.com* famously declines to interpret § 230 as undercutting a federal housing discrimination claim, finding that the website's involvement was sufficient to overcome the statutory shield. See *id.* (analyzing a website's immunity under § 230). By contrast, while the District Court in *Jones* found that the website owner's involvement and commentary were sufficient to overcome § 230, the Sixth Circuit reversed the District Court as a matter of law on this issue. See *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 415–17 (demonstrating why Dirty World and Richie did not materially contribute to the illegality of the defamation statements towards Jones).

²⁵⁴ See *Roommates.com*, 521 F.3d at 1169 (explaining a website operator who changes user-created content holds onto his immunity for anything illegal in the user-created content, as long as the edits are unrelated to the illegality).

²⁵⁵ See *Craigslist*, 519 F.3d at 669–70 (explaining the controversies and issues that have influenced § 230(c)). Judge Easterbrook's well-known *Craigslist* opinion expressly draws from his own influential opinion in *Doe v. GTE Corp.* See *id.* at 669 (citing *Doe v. GTE Corp.*) That opinion surprisingly fails to take seriously the odd structure of duty-to-rescue/nonfeasance law that lies behind Good Samaritan statutes:

If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the “Communications Decency Act”—bears the title “Protection for ‘Good Samaritan’ blocking and screening of offensive material”, hardly

Stratton Oakmont simply does not entail that it addressed the question of republication; it did not. To abrogate a common-law principle, the statute must “speak directly” to the question addressed by the common law.²⁵⁶

Indeed, the Internet is such an amazing tool for broad dissemination that it would be a particularly bizarre policy judgment to eliminate the republication rule for the Internet, but for no other medium. Do we really think Congress meant to say that, while republication of defamatory material in print or by word of mouth remains actionable, any republication over the Internet is not? If this were the best reading of § 230, we would find a way to live with it or perhaps amend it, but it is not the best reading; it is a reading that relies upon a reductive and incomplete picture of the legal domain into which § 230 was expressly placed.

V. LEGAL CONCEPTS AND THE COMMON LAW

Beyond the considerations mentioned above, *Batzel* perhaps displays a tendency to suppose that distinctions like active/passive and concepts like that of “publication” have no real normative work to do – that, in the end, it is a question of whether we value free speech more than protecting reputation in a given context. Tort law – including libel law – is not so blunt. It does not simply weigh one person’s demand for compensation against expected policy results. It looks at who has done what to whom, but there is nuance in the “who,” in what they have “done” to someone, and to “whom,” and in what sense they have “done” that. All of this goes into whether the legal system is willing to allow an aggrieved person to hold another accountable for wronging her or him. The who, the how, and the whom are not of course decided as a one-shot deal; they are

an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services. Why should a law designed to eliminate ISPs’ liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?

Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003).

The account I have provided in the text answers Judge Frank Easterbrook’s question. The point of Section 1 is to confirm the baseline nonfeasance/misfeasance rule for defamation and the Internet, and to ensure that there is no duty-to-remove based on the capacity to remove, the ownership of the chattels through which it is posted, or the common carrier function. Section 2 is designed to ensure that the default no-duty/no liability rule is not changed by a practice of censorship. Section 230(c)(2) is not about liability to those whose postings are removed, but about liability to those who are defamed (or otherwise injured) by virtue of what a third party posted.

²⁵⁶ See *United States v. Texas*, 507 U.S. 529, 534 (1993) (arguing that the terminology used in the statute must adhere to common law standards to be utilized with common law standards).

decided according to a set of categories and principles in the legal system that, roughly speaking, coalesce into a set of rules. The system is not clear-cut, however, and the rules are changeable, both by courts and by legislatures.

Part of what might be called, if somewhat pretentiously, “the normative theory of adjudication in the common law,” is stating what sort of approach judges should employ when trying to adjust the common law to new circumstances, including new technologies. In the twentieth century, a certain brand of Legal Realism derived from one version of Holmes has clearly led the way in torts. On this view, legal categories and concepts are overwhelmingly likely to be convenient instruments for pursuing policy goals more effectively and efficiently. Indeed, on this view, which is sometimes referred to as “Reductive Instrumentalism,” legal concepts are best understood by grasping how they directly and indirectly serve the goals the law is seeking. A good judge trying to decide how to extend a legal concept or principle will mainly be aiming to see what impact that concept has on the basic policy aims of the law, then applying the concept in a manner that faithfully pursues those policy aims under the new circumstances.

A person who saw legal actors making reductive instrumental choices would see things this way: In *Stratton Oakmont*, the question of whether Prodigy was a publisher was essentially equivalent—for Justice Ain—to the question of whether the prevention of reputational harm and the compensation of those reputationally harmed would be effectively pursued by holding Prodigy responsible as publisher. The alleged unfairness of imposing such liability and responsibility on Prodigy was, in effect, blunted by Prodigy’s own boasting about its capacities to monitor.²⁵⁷ It was as if Prodigy set itself up to be selected as the cheapest cost avoider.²⁵⁸ The questions of whether *Stratton Oakmont*’s suit fulfilled the publication requirement and whether Prodigy was a publisher, are essentially answered by reverse engineering from this set of policy preferences.

On this instrumentalist understanding, Congress weighed in with the CDA, and because, as an institutional matter and a constitutional matter, Congress’s preferences trump, its evaluation displaced the rule in *Stratton Oakmont* and other courts applying state law. And its evaluation was that the compensation and deterrence values are outweighed by the free speech values. Therefore, ISPs and users are not to be held liable for the defamatory statements of others. In *Batzel*, there is a formal difference

²⁵⁷ *Supra* notes 148–50 and accompanying text.

²⁵⁸ Cf. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) (setting forth cheapest-cost-avoider theory of tort law).

between whether the defendant placed or removed others' defamatory statements, but the difference is neither here nor there from a compensation, deterrence, and incentives point of view, as Justice Ainsworth thought, and the free speech trumping announced by Congress is still the biggest value out there.

Needless to say, I think this chronology is at once accurate and self-condemning. It was quite aggressive and counterintuitive to hold that Prodigy would be liable for Stratton Oakmont's reputational injury, because it made no sense to say that Prodigy was the publisher of those reputational attacks, especially as a matter of law. Conversely, Congress may have gone overboard when it explained that ISPs and their users may *never* be held responsible for the statements that third parties have posted and may never be liable for the damage caused by such statements. Certainly, *Zeran's* result was harsh, and AOL's conspicuous failure to take responsibility for an ongoing character assassination that it could have stopped was disconcerting, but it is plausible that the statute meant to foreclose that sort of liability.²⁵⁹ Yet, by *Batzel* and *Barrett*, we have come full circle. The defendants in those cases were actually posting defamatory statements about the plaintiffs—spreading reputational harm by voluntary intentional actions of communication to third parties.²⁶⁰ The thing *Stratton Oakmont* pretended that Prodigy was doing—actually publishing something negative about it—is exactly what Cremers and Rosenthal *were* doing in those cases.

There is a jurisprudential lesson to be drawn from this story.²⁶¹ Legal concepts and legal principles have content. They are not always rightly used and they are not always comfortable, but they aspire to track perfectly sensible moral concepts and principles that are largely workable in daily life. We hold other people responsible for what they have done, for ways they have hurt us, and we act with the understanding that others may hold us responsible, too. The common law developed in tandem with

²⁵⁹ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330, 333 (4th Cir. 1997) (emphasizing there would be public policy concerns if service providers were subject to distributor liability).

²⁶⁰ See *Batzel v. Smith*, 333 F.3d 1018, 1021–22 (9th Cir. 2003) (noting that Smith emailed the Director of Security at Amsterdam's Rijksmuseum about Ellen Batzel having hundreds of European paintings that were looted during World War II, and then Cremers published Smith's email to the Museum Security Network); *Barrett v. Rosenthal*, 146 P.3d 510, 513–14 (Cal. 2006) (discussing Rosenthal republished various messages about the plaintiffs, even after Rosenthal was told they were false).

²⁶¹ See Zipursky, *Pragmatic*, *supra* note 4, at 458–59 (explaining how conceptualistic analysis of law is consistent with philosophical pragmatism and the rejection of formalism).

these non-legal concepts of responsibility, and these non-legal concepts of responsibility continue to evolve.²⁶²

Of course, the CDA cases we have reviewed are not exactly cases in the common law of torts; they are statutory interpretation cases, rightly rooted in text and purpose more than in common law concepts. We have already seen, however, that untutored textual interpretation and simplistic, goal-centered purposive interpretation can easily go awry. A statutory idea that is inserted into an area of state common law should of course be read with a background framework for the common law, and that is what I—as a scholar of the common law of torts—have tried to provide. When we understand the affirmative duty and ‘commenced rescue’ ideas that come from the common law of negligence, the Good Samaritan statutes used to adjust that law, and the analogous misfeasance/nonfeasance that arise in libel law, we arrive closer to the common law sophistication that being a good interpreter requires.

VI. CONCLUSION

The task of a common law judge crafting legal concepts and principles is to get the hang of what they mean and also to think sensibly and pragmatically about how the legal concepts and principles can be applied moving forward. But thinking pragmatically does not mean thinking instrumentally in a manner that simply contemplates a reductive conception of social goals. Rather, the common law judge must think pragmatically without losing a grip on the concepts and principles; indeed, thinking pragmatically is typically an integral part of deploying the concepts and principles well. And—as cases from *Zeran* to *Barrett* indicate—an understanding of how statutory law fits with the common law will typically require a supple and pragmatic grasp of the concepts within the common law, too.

The common law of torts is in principle, available to protect individuals against every level of injury, and—as *New York Times v. Sullivan* and its progeny have shown—can be ratcheted up and down depending on our perceptions of the social costs of liability. Twenty-two years ago, a patently criminal enterprise—Stratton Oakmont—filed a silly libel suit in a Long Island state court, and a local judge threw caution to the wind and let the case proceed. Fortunately, the United States Congress inserted a protective provision into federal law that ensured such decisions would not chill the development of Internet speech by rendering

²⁶² See JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORT LAW AND RESPONSIBILITY*, IN *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* (J. Oberdiek ed., 2014) (analyzing place of responsibility in tort law).

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ISPs' deep pockets for a million slights per hour. But, nothing in that law said "all speech tort law stops here," and Congress knew then what we all know now – that the world of the Internet would develop in ways then unimaginable. This is just the sort of change that calls for thoughtful interpretation, not total immunity.