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ARTICLES

Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas

ANTHONY CIOLLI†

I. INTRODUCTION

The popularization of the Internet has ensured that, for the first time in human history, speech is in a position where it can become truly “free.”¹ Over the course of the past two decades, “speakers and publishers from all walks of life and from every corner of the world” have “flocked to the Internet,”² resulting in “the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen.”³ The Internet, unlike broadcast and print media, “has the potential to facilitate a true marketplace of ideas, one that is not dominated by the few wealthy speakers who are able to express themselves effectively via traditional media.”⁴ As one district-court judge summarizes, “individual citizens of limited means” may use the Internet to “speak to a worldwide audience on issues of concern to them,” with modern-day Martin Luthers able to post their theses on online message boards, regardless of their economic or social class.⁵

But are such Luthers truly free from oppression by modern-day Pope Leo Xs? Unlike the physical world, the Internet lacks any true town squares or other public forums, with virtually all websites, message boards, blogs, and other online media owned by private individuals and organizations. Such private forums not only fall outside the scope of the First Amendment,⁶ but may potentially face lawsuits for a wide variety of speech-related causes of action, such as defamation. Congress, declar-

† I would like to thank Wendy Seltzer, Charles Nesson, Dawn Nunziato, and Eric Goldman for providing helpful feedback throughout the writing process. I am also grateful to Gideon Parchomovsky, Nancy Rapoport, Jim Chen, Marc Randazza, Eugene Volokh, Kermit Roosevelt, Dave Hoffman, Jarret Cohen, and Gary Clinton for their continuing support and inspiration.

1. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 285 (2003).

2. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1119 (2005).

3. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

4. Nunziato, *supra* note 2, at 1120.

5. *Reno*, 929 F. Supp. at 881.

6. Nunziato, *supra* note 2, at 1121.

ing that “[i]t is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,”⁷ included a provision in the Communications Decency Act of 1996 (CDA) to alter centuries of common-law precedent to grant the owners of such private online forums unprecedented immunity from liability for defamation and related torts committed by third-party users.⁸

Yet despite this broad immunity, many of America’s economic and political elites—including elected officials as well as wealthy individuals, corporations, and law firms—have successfully silenced citizens of limited means through economic coercion and threats of frivolous litigation.⁹ Why has this been the case? Congress’s failure to foresee an imminent change in the nature of the Internet—namely, the gradual transition from “walled garden” Internet service providers such as America Online and Prodigy to people-powered media such as blogs¹⁰—resulted in § 230 of the CDA failing to contain a provision authorizing the recovery of attorneys’ fees and court costs in litigation where § 230 was successfully used as a defense. Furthermore, Congress’s inability to predict the hegemony of Google’s algorithm-based search engine and the increasingly popular practice of “googling” potential employees, friends, and dates have hindered the development of an efficient mechanism for individuals to rebut untruthful information about themselves that has been preserved in perpetuity in Google and other search engines, and thus further encouraged the filing of frivolous lawsuits against immunized Internet intermediaries as a method of clearing one’s name.

This Article proposes that Congress resolve the problems created by its lack of foresight in 1996 through amending § 230 to include a fee-shifting provision and passing additional legislation to create the statutory tort of no-fault defamation. It also argues that the tension between the values of compensating defamation victims and promoting a free marketplace of ideas on the Internet are largely artificial, and that it is possible to compensate victims of Internet defamation who have suffered tangible economic loss or irreparable harm without shifting the costs to Internet intermediaries.

The first half of the Article establishes the background necessary to understand the current problem. Part II provides a brief overview of the historical development of defamation law from the Middle Ages to the present day. Part III examines the issue of establishing the limits of vica-

7. 47 U.S.C. § 230(b) (2000).

8. *Id.* § 230(c)(1).

9. See discussion *infra* Part VI.

10. See discussion *infra* Part V.

rious liability for the defamatory statements of third parties in the Internet context, beginning with the first Internet defamation cases, continuing to the passage of § 230, and concluding with a summary of the most notable cases interpreting § 230. Part IV considers the problem of Internet defamation that causes § 230 to remain a controversial statute and discusses the tension between the values of compensating defamation victims and free speech. Part V delves into the history of Internet intermediaries and the transition from the era of the “walled garden” Internet service providers to the present age of Web 2.0, a transition that resulted in a demographic shift that precipitated many of the problems currently associated with § 230.

The second half of the Article examines the three most significant problems relating to § 230 and formulates independent solutions to each that are superior to the status quo. Part VI proposes a fee-shifting provision as a method of deterring frivolous defamation lawsuits against immunized intermediaries. Part VII argues for the creation of a statutory no-fault-defamation cause of action as a cost-effective alternative to traditional defamation that meets the needs of Internet intermediaries, Internet speakers, and most defamation victims. Part VIII addresses the issue of how to compensate the minority of Internet defamation victims who have suffered tangible economic harm or irreparable damage, demonstrating that merely imposing liability on Internet intermediaries is insufficient to compensate these individuals and proposing a mandatory insurance scheme as a potential method of furthering the goal of victim compensation without undercutting the online marketplace of ideas. Finally, Part IX reviews prior literature to identify four proposed alternatives to § 230 and discusses why each idea is not only inadequate relative to the proposals discussed in Parts VI through VIII, but inferior to maintaining the status quo.

II. HISTORICAL DEVELOPMENT OF DEFAMATION LAW

The law of defamation has evolved over the centuries. This Part will provide a brief overview of the most significant changes to the doctrine.

A. *Initial Purpose and Origins*

The tort of defamation has been generally defined as “a public communication that tends to injure the reputation of another.”¹¹ Defamation law, as we generally conceive it today,¹² dates back to ecclesiastical

11. Bonnie Docherty, Note, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 264 (2000).

12. While some scholars have correctly observed that defamation law “developed from the

courts in the Middle Ages¹³ and typically was invoked in cases involving personal insults.¹⁴ The ecclesiastical courts, which originally claimed exclusive jurisdiction over all defamation actions,¹⁵ were considered the appropriate venue for resolving such disputes because "an assault on a person's reputation was considered an assault on the entire community."¹⁶

Although the defamation tort did not originate in the common law,¹⁷ the English church "courts' failure to deal satisfactorily with defamation"¹⁸ forced the English Parliament and the Crown to gradually shift the resolution of defamation disputes from Church courts to other forums, such as mercantile courts and the Court of the Star Chamber.¹⁹ This change, though "part of a wider shift of jurisdiction that occurred during the sixteenth century,"²⁰ was intended to provide defamation victims with more appropriate remedies than those provided by the ecclesiastical courts.²¹ The ecclesiastical courts, while having the authority to order "a public apology from the person guilty of making the false allegation"²² and, in certain cases, to order excommunication (for defamation was considered a sin), did not have the ability to award monetary damages to defamation victims.²³ Secular courts, however, were equipped to provide defamation victims with the opportunity to receive adequate remedies for the damage done to their reputation²⁴ and also

Roman *actio injuriarum*, which focused on the 'intentional and unjustified hurting of another's feelings,'" this ancient rule was concerned with hurt feelings and not damage to reputation. *Id.* at 265 (quoting *Die Spoorbond v. S. Afr. Rys.* 1946 A.D. 999 (A) at 1010 (S. Afr.) (Schreiner, J., concurring)).

13. See Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 41 (1985) ("Initially, defamation was the province of the ecclesiastical courts, where there were no juries and where a judge decided relevant issues of fact such as publication and the recognized defense of truth.").

14. R.C. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 100-03.

15. David J. Blythe, *Workplace Defamation: Public Policy, Compelled Self-Publication, and the Vermont Constitution*, 16 VT. L. REV. 341, 343 (1991).

16. Kate Silbaugh, Comment, *Sticks and Stones Can Break My Name: Nondefamatory Negligent Injury to Reputation*, 59 U. CHI. L. REV. 865, 866 (1992).

17. See R.H. Helmholz, *Canonical Defamation in Medieval England*, 15 AM. J. LEGAL HIST. 255, 257, 261-62 (1971); Colin Rhys Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1051, 1052, 1058 (1962).

18. Docherty, *supra* note 11, at 265.

19. See Lovell, *supra* note 17, at 1058-71 (summarizing the early history of defamation law).

20. R.H. Helmholz, *The Mitior Sensus Doctrine: My Search for Its Origins*, 7 GREEN BAG 2D 133, 134 (2004).

21. See Donnelly, *supra* note 14, at 110.

22. Lovell, *supra* note 17, at 1052.

23. See HAROLD POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 420-21 (3d ed. 1948).

24. See KENNETH CAMPBELL, THE ORIGINS AND DEVELOPMENT OF A PHILOSOPHY FOR THE PROTECTION OF OPINION IN DEFAMATION LAW 39 (1992) (stating that church courts' inability to

provided a greater deterrent against making defamatory statements that have the potential to drive the most "virtuous," or "best," men out of politics or public life.²⁵ By 1676, defamation became the province of common-law courts.²⁶

The common-law courts, hoping to avoid a flood of defamation lawsuits, initially limited recovery to four situations, which were "(1) imputations of an indictable offense, (2) imputations of diseases which tended to exclude the person affected from society, (3) imputations of lack of skill or ability in a trade, profession or business, and (4) any defamatory statement actually causing damages which was alleged and proved by the plaintiff."²⁷ But over the centuries, the courts have gradually shifted the outer limits of the defamation tort to allow recovery in a wider variety of situations. The following section will examine how modern American courts treat defamation, with a particular focus on how the medium of a defamatory statement impacts a plaintiff's ability to recover monetary damages.

B. *The Role of Medium*

Historically, the medium of a defamatory communication has played a significant role in assessing liability. The following sub-sections will examine the role of medium.

1. THE SLANDER/LIBEL DISTINCTION

The ecclesiastical courts that originally decided defamation cases did not distinguish between defamatory statements that were spoken and those that were written, for at the time virtually all communication was oral.²⁸ Courts began to distinguish libel from slander, however, after the Star Chamber was abolished in 1641 and common-law courts began to have jurisdiction over defamation cases.²⁹ Why such a distinction based on the medium of the defamatory statement? The courts believed that certain words and statements, while not causing any damage to an individual's reputation if spoken, would cause harm if they were committed to print and published.³⁰ Common-law courts, then, held that in cases

provide adequate remedies to defamation victims encouraged duels and other violent acts, which Parliament sought to avoid by granting secular courts greater authority over these matters).

25. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 11 (1986).

26. See CAMPBELL, *supra* note 24, at 46.

27. John Bruce Lewis et al., *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 MO. L. REV. 797, 804 n.40 (1989).

28. See RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

29. *Id.*; Blythe, *supra* note 15, at 344.

30. See RESTATEMENT (SECOND) OF TORTS § 568 cmt. b; Blythe, *supra* note 15, at 344.

where defamatory statements were published in writing, known as libel, damages for the plaintiff would be assumed, whereas damages would not be assumed in situations where defamatory statements were only made orally, known as slander.³¹

Most jurisdictions in the United States continue to acknowledge this distinction between slanderous statements and libelous statements. The *Second Restatement of Torts* succinctly summarizes the distinction between libel and slander in U.S. courts:

(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words.

(2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).³²

The *Restatement* also provides guidelines for determining whether a court should treat a defamatory communication as slanderous or libelous: "The area of dissemination, the deliberate and premeditated character of its publication and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander."³³

The distinction between slander and libel remains important in American courts today. Just as early English common law considered libelous statements more harmful to one's reputation than slanderous statements, American courts share the view that victims of slander deserve lower damages awards relative to victims of libel, since slander's destructive power is still generally considered "fleeting."³⁴ Thus, in most courts, defamation plaintiffs "must meet the substantial burden of pleading and proving special damages."³⁵ While certain defamatory statements, such as a claim that an individual has syphilis, usually fall into the category of "slander per se" where reputational damages are presumed, most slander plaintiffs must prove that they experienced "specific economic losses flowing from the defamation, such as lost profits,"³⁶ in order to recover special or general damages.³⁷ In contrast, libel plaintiffs in most jurisdictions do not have to prove that they actually experienced harm due to the defamation in order to recover general

31. Blythe, *supra* note 15, at 344.

32. RESTATEMENT (SECOND) OF TORTS § 568(1)-(2).

33. *Id.* § 568(3).

34. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 375 (3d ed. 2007).

35. *Id.* at 376.

36. *Id.* at 375.

37. *Id.* at 375-76.

damages, although a plaintiff would have to demonstrate harm in order to also recover special damages.³⁸ Thus, in situations where there is a dispute as to whether a defamatory statement is slanderous or libelous, defamation plaintiffs will generally benefit from having the communication treated as libel, while defamation defendants will prefer that a court treat the statement as slander.

This continuing distinction between slander and libel has spawned a certain amount of criticism from American jurists and scholars. For instance, one court has stated that the current "schism between the law governing slander and the law governing libel" was the result of a "historical accident" that no one can "sensibly defen[d] today."³⁹ Others have questioned whether "a letter read by one person [is] that much more harmful than a speech heard by a thousand."⁴⁰

Some jurisdictions have responded to these criticisms and others by adopting rules that differ from the *Restatement's* conception of libel and slander. A few states, for example, have tried to minimize or eliminate the practical effects of the distinction between libel and slander by distinguishing between libel per se ("libel on its face") and libel per quod ("libel that requires extrinsic evidence such as inducement or innuendo").⁴¹ While victims of libel per se may continue to receive general damages without proof of economic harm, victims of libel per quod cannot recover general damages unless they meet the standard for special damages, or the libelous statement "falls into one of the per se categories."⁴² However, even under such minority rules, it is still to a plaintiff's advantage (and a defendant's disadvantage) to have a defamatory statement treated as libel when there is doubt.

2. RADIO AND TELEVISION

The new technologies of radio and television posed difficulties for the slander/libel distinction. Though English and American common law treated orally transmitted defamatory statements as slander because the spoken word had a limited reach and was likely to only cause fleeting damage,⁴³ the popularization of radio and television media outlets forced courts to reconsider certain aspects of the slander/libel distinction. Radio and television broadcasts, though containing oral statements, are instruments of mass communication and thus have a significantly wider reach than other forms of oral communication, for millions of individuals may

38. *Id.* at 376.

39. *Matherson v. Marchello*, 473 N.Y.S.2d 998, 1001 (App. Div. 1984).

40. *DIAMOND ET AL.*, *supra* note 34, at 375 n.19.

41. *Id.* at 376.

42. *Id.* (emphasis and internal quotation marks omitted).

43. *See id.* at 375.

hear such programs. Because of radio and television's "wide dissemination," as well as their greater "prestige and potential effect upon the public mind as a standardized means of publication that many people tend automatically to accept as conveying truth," the *Restatement* treats defamatory statements made as a part of radio or television broadcasts as libel,⁴⁴ a view that has been accepted by most American jurisdictions.⁴⁵

C. *Third-Party Liability for Defamatory Statements of Others*

Under the common law, an individual or entity is not just liable for defamatory statements it has created itself. Rather, the common-law rules have evolved to allow one to be held vicariously liable for the defamatory statements of third parties when certain circumstances arise. Liability standards for defamatory statements originally made by third parties have historically been determined based on perceptions regarding an individual or firm's level of control over the communications medium that transmits or contains the third-party defamation. Prior to the popularization of the Internet, the common law generally classified vicarious liability for third-party defamatory speech into three groups: publisher liability, distributor liability, and common-carrier non-liability.

1. PUBLISHERS

Under the common law, entities treated as publishers may be found liable for defamation whether or not they are the original author of the defamatory statement, for "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."⁴⁶ Such publishers include those who own and operate print media, such as newspaper and book publishers, as well as owners of broadcast media, such as radio and television stations.⁴⁷

Why did the common law evolve in a way that held print- and broadcast-media owners liable for repeating defamatory statements of third parties? Traditionally, newspapers, book publishers, and broadcasters possess a significant amount of editorial control and discretion over their content, and frequently devote a significant amount of time and expense in vetting stories for publication or broadcast, which often con-

44. RESTATEMENT (SECOND) OF TORTS § 568A cmt. a (1977).

45. Some jurisdictions have rejected the *Restatement's* view. Texas, for example, treats a defamatory radio or television broadcast as libel if the program is scripted and as slander if it is not scripted. *See, e.g., Brueggemeyer v. Am. Broad. Cos.*, 684 F. Supp. 452, 454 n.5 (N.D. Tex. 1988).

46. *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (quoting RESTATEMENT (SECOND) OF TORTS § 578).

47. RESTATEMENT (SECOND) OF TORTS §§ 578 & cmt. b, 581(2).

veys a sense of authoritativeness to readers or viewers.⁴⁸ Consistent with this perception of the print and broadcast media, courts treat these publishers as having “adopted the [defamatory] statement as [their] own.”⁴⁹

2. DISTRIBUTORS

Distributors, unlike publishers, are considered passive conduits of information, and thus an individual, such as a book seller or newsstand owner, “who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.”⁵⁰ Thus, passive conduits that still maintain some control over the dissemination of information after publication, such as through the ability to sell or not sell a defamatory book, still face liability if they choose to continue to disseminate defamatory information after being made aware of the defamatory content.

3. COMMON CARRIERS

Common carriers, such as telephone and telegraph companies, have traditionally been immunized from liability for defamatory statements relayed over their networks. Since common carriers have no control over the statements transmitted over their networks, and since they are required by regulations to serve all customers, courts have generally held that they are not liable for the defamatory statements of others.⁵¹

III. THIRD-PARTY LIABILITY IN THE INTERNET AGE

The Internet medium did not fit neatly into the three liability categories established by the common law. Like newspapers and other publishers, virtually all Internet intermediaries seem to have the ability to pre-screen third-party content, even if they do not choose to do so. But unlike publishing a newspaper or broadcasting a television show—both of which inherently require significant financial resources and a non trivial time commitment—the monetary and time costs of publishing online are virtually non-existent. Internet intermediaries, like bookstore owners, are in a position to remove content after they have received notice that it is defamatory. However, unlike other distributors, many Internet intermediaries—particularly Internet service providers—allow

48. *See id.* § 568A cmt. a.

49. MADELEINE SCHACHTER, *LAW OF INTERNET SPEECH* 275 (2d ed. 2002) (internal quotation marks omitted).

50. *Dworkin v. Hustler Magazine, Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986) (quoting *RESTATEMENT (SECOND) OF TORTS* § 581(1)).

51. *See, e.g., Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974) (Gabrielli, J., concurring).

their users to access literally billions of pages of Internet content, with millions of new web pages, message-board posts, Usenet postings, e-mails, and other online content being created every day.⁵² But while granting such access resembles the function of a common carrier, Internet intermediaries, unlike common carriers, can—and often do—terminate or refuse service and have no obligation to accept all transmissions.⁵³

This Part will examine how courts and Congress have shaped defamation law to address liability for defamatory speech by third parties transmitted via the Internet.

A. Early Cases

Perhaps the most significant early legal issue relating to defamatory Internet speech by third parties was whether courts should treat interactive computer services, such as Internet service providers, as publishers or distributors.⁵⁴ Such distinctions were highly important, for in many cases they would have determined whether a service was liable for a third party's defamatory statement.

Two early Internet defamation cases resulted in two contradictory rulings as to the status of Internet service providers as publishers or distributors of third-party defamatory statements. In *Cubby, Inc. v. CompuServe, Inc.*, the first defamation case against an Internet service provider to reach a final judgment, a federal-district-court judge rejected the plaintiff's claim that CompuServe fulfills the requirements of a publisher of defamatory statements because CompuServe, like a bookstore owner, did not exercise editorial control over its content.⁵⁵ "While Com-

52. One judge has summarized this phenomenon as follows: "In cyberspace, the 'publisher' label becomes more difficult to apply because a third-party can unilaterally post content on another's website." *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *6 (D. Ariz. Oct. 10, 2007).

53. Neil Fried, *Dodging the Communications Decency Act when Analyzing Libel Liability of On-Line Services*: *Lunney v. Prodigy Treats Service Provider like Common Carrier Rather than Address Retroactivity Issue*, 1 COLUM. SCI. & TECH. L. REV. 1, 38–39 (1999), <http://www.stlr.org/html/volume1/dodgecda.pdf>.

54. Most Internet service providers, such as Prodigy, have consistently denied that they are common carriers. See Edward V. Di Lello, Note, *Functional Equivalency and Its Application to Freedom of Speech on Computer Bulletin Boards*, 26 COLUM. J.L. & SOC. PROBS. 199, 210 (1993). Furthermore, the Federal Communications Commission has consistently held that Internet service providers are not common carriers. See 47 C.F.R. § 64.702(a) (2007). Courts have also held that Internet service providers are not common carriers. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995) (rejecting an Internet service provider's argument that it is a common carrier). But see *Lunney v. Prodigy Servs. Co.*, 683 N.Y.S.2d 557, 561–63 (App. Div. 1998), *aff'd*, 723 N.E.2d 539 (N.Y. 1999) (shielding an Internet service provider from defamation liability by applying a qualified, common-law privilege traditionally applied to common carriers like telegraph companies).

55. 776 F. Supp. 135, 139–40 (S.D.N.Y. 1991).

puServe may decline to carry a given publication altogether,” the court reasoned, “in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication’s contents,” particularly when “CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.”⁵⁶ Because it “would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so,”⁵⁷ the court treated CompuServe as a distributor rather than a publisher and dismissed the plaintiff’s case since it was undisputed that CompuServe “had neither knowledge nor reason to know of the allegedly defamatory . . . statements.”⁵⁸

However, a New York state court, in a subsequent Internet defamation case, reached the opposite conclusion. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the court found that Prodigy, an Internet service provider, was a publisher of a defamatory statement rather than a distributor.⁵⁹ Because Prodigy advertised to its members and the general public that it moderated the content of its message boards and “actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste,’” the court found that Prodigy was “clearly making decisions as to content.”⁶⁰ Even though Prodigy did not always exercise its editorial discretion to remove offensive or inappropriate messages, the court believed that Prodigy “uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards,” and thus “Prodigy is a publisher rather than a distributor.”⁶¹

B. Section 230

The *Stratton* decision sent shockwaves throughout the Internet community. Although the outcome of *Stratton* deviated from the holding in *Cubby*, there was little doubt that the *Stratton* case was correctly decided based on existing common-law-defamation precedent treating those who have actual editorial control over content as publishers. However, while *Stratton* was a correct application of existing law, many Internet businesses, users, and legislators feared that continuing to apply these long-standing laws of defamation to the Internet context would have a substantial negative impact on Internet speech.

Some, particularly social conservatives such as Congressman Chris

56. *Id.* at 140.

57. *Id.*

58. *Id.* at 141.

59. No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995).

60. *Id.*

61. *Id.*

Cox, feared that the *Stratton* holding would lead to severe under-self-regulation of Internet content. Internet service providers and other intermediaries, in order to prevent being treated as publishers by the courts, would simply refuse to edit or remove any third-party content under any circumstances. In other words, Congressman Cox and others feared that *Stratton*, if allowed to stand, would provide intermediaries with a strong incentive to never exercise editorial control, thus increasing the risk that children and others would be exposed to highly offensive or inappropriate Internet content.⁶²

However, most believed that the *Stratton* decision would more likely result in a chilling effect on Internet speech. Intermediaries, rather than never censoring their content, would overcensor their content in order to both avoid lawsuits and please parents and others who desire a "clean" Internet experience. Thus, many feared Internet intermediaries would remove a third party's content whenever an individual claimed the content was offensive or defamatory, "regardless of whether the speech actually met the threshold for defamation or not."⁶³ Such over-censorship could ruin the Internet's potential as a vibrant marketplace for the exchange of ideas, as ideas that may offend even just one individual might be removed by an Internet intermediary fearing litigation.

Congress, acting on a belief that either of these potential outcomes would undermine the Internet as a marketplace of ideas, used its legislative power to alter the common law as it applies to "interactive computer services." In 1996, Congress passed § 230, the Communications Decency Act, which explicitly overturned *Stratton* by stating that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁶⁴ This statute also immunizes interactive computer services from any liability resulting from "any action voluntarily taken in good faith to restrict access to . . . material that the provider . . . considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁶⁵ Section 230 also preempts all state law, for it states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this

62. See 141 CONG. REC. 22045 (1995) (statement of Rep. Cox) (stating that Congressman Cox's proposed amendment would "protect [intermediaries] 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 [indecentcy] problem").

63. Anthony Ciolli, *Defamatory Internet Speech: A Defense of the Status Quo*, 25 QUINNIPIAC L. REV. 853, 863 (2007).

64. 47 U.S.C. § 230(c)(1) (2000).

65. *Id.* § 230(c)(2)(A).

section.”⁶⁶

C. *Zeran*

Federal and state courts have interpreted § 230 to grant very broad protection to interactive computer services and their users from liability for defamatory Internet statements authored by third parties.⁶⁷ The first case to involve a defendant raising § 230 as a defense, *Zeran v. America Online, Inc.*,⁶⁸ was decided by the Fourth Circuit Court of Appeals a year after Congress enacted the statute. In *Zeran*, a defamation plaintiff appealed a district court’s grant of summary judgment for America Online, arguing that § 230 “leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services”⁶⁹ since American Online “had a duty to remove the defamatory posting promptly, to notify its subscribers of the message’s false nature, and to effectively screen future defamatory material.”⁷⁰ The *Zeran* court rejected this argument, finding that the plain language of the statute “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service” and that Congress clearly “recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium”⁷¹ and “made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.”⁷²

Critics of *Zeran* argue that the court went beyond the original intent of Congress by not only holding that America Online was immune from publisher liability, but that § 230 also immunized America Online from

66. *Id.* § 230(e)(3).

67. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123, 1125 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1030–34 (9th Cir. 2003); *Green v. AOL*, 318 F.3d 465, 470–71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–32 (4th Cir. 1997); *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431, at *4–6 (E.D. Tex. Mar. 30, 2006); *Ramey v. Darkside Prods., Inc.*, No. 02-730 (GK), 2004 U.S. Dist. LEXIS 10107, at *19–21 (D.D.C. May 17, 2004); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50–53 (D.D.C. 1998); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714–15 (Ct. App. 2002); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 776–77 (Ct. App. 2001); *Barrett v. Clark*, No. 833021-5, 2001 WL 881259, at *9 (Cal. Super. Ct. July 25, 2001), *aff’d in part and rev’d in part sub nom. Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40–41 (Wash. Ct. App. 2001); cf. *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (finding no defamation because of the inherently “unreliable nature” of internet posts).

68. 129 F.3d 327.

69. *Id.* at 328.

70. *Id.* at 330.

71. *Id.*

72. *Id.* at 330–31.

distributor liability. The plaintiff contended that America Online and other interactive computer service providers are “like traditional news vendors or book sellers” and thus are “liable for defamatory statements contained in the materials they distribute” if one can prove that the provider had “actual knowledge of the defamatory statements upon which liability is predicated.”⁷³ America Online, the plaintiff argued, was “provided . . . with sufficient notice of the defamatory statements” on its message boards and thus “could be held liable as a distributor.”⁷⁴ Since § 230 only used the term “publisher” and not “distributor,” Zeran argued that Congress intended to leave distributor liability intact.⁷⁵

The Fourth Circuit Court of Appeals rejected this argument by implicitly rejecting the reasoning in *Cubby*. Although the court acknowledged “that decisions like *Stratton* and *Cubby* utilize the terms ‘publisher’ and ‘distributor’ separately,”⁷⁶ the court held that distributor liability “is merely a subset, or a species, of publisher liability,” and thus § 230, by granting interactive computer services immunity for the broad category of publisher liability, also immunized these services from distributor liability.⁷⁷ Furthermore, the court observed that providing immunization from publisher liability while leaving distributor liability intact would not prevent the chilling effect Congress had intended to prevent in passing the statute, for, “[w]henver one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply ‘notify’ the relevant service provider, claiming the information to be legally defamatory” and thus force service providers to “be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.”⁷⁸

D. *Expanding § 230 Immunity Beyond Internet Service Providers*

Six years after *Zeran*, the Ninth Circuit Court of Appeals examined the scope of § 230 immunity in *Batzel v. Smith*.⁷⁹ Ellen Batzel, the plaintiff, had sued Tom Cremers, the owner of a moderated Internet mailing list, when Cremers—after making some edits—distributed a defamatory e-mail to the mailing list’s subscribers and posted the edited e-mail on the mailing list’s website.⁸⁰ Batzel contended that § 230 immunity did not extend to Cremers, for Cremers’s mailing list and website did not

73. *Id.* at 331.

74. *Id.*

75. *Id.* at 332.

76. *Id.*

77. *Id.*

78. *Id.* at 333.

79. 333 F.3d 1018 (9th Cir. 2003).

80. *Id.* at 1022.

qualify as a “provider or user of an interactive computer service” under § 230(c)(1). A district-court judge agreed and denied *Cremers’s* motion for summary judgment.⁸¹

The Ninth Circuit reversed the district court, recognizing a broad definition of “provider or user of an interactive computer service” already recognized by several state courts.⁸² Although “[t]he district court concluded that only services that provide access to the Internet as a whole are covered by” the § 230 immunity, the Ninth Circuit found that “the definition of ‘interactive computer service’ on its face covers ‘any’ information services or other systems, as long as the service or system allows ‘multiple users’ to access ‘a computer server.’”⁸³ With few exceptions,⁸⁴ the Ninth Circuit’s holding extended § 230 immunity to all Internet intermediaries that publish or distribute work created by other “information content providers.”

But the Ninth Circuit did not stop at extending the immunity beyond Internet service providers. Just as the *Zeran* court arguably went beyond Congress’s legislative intent by conferring immunity from both publisher and distributor liability, the *Batzel* court enlarged this immunity even further by finding that altering content originally written by a third-party, as well as choosing to proactively screen third-party content *before* initial publication, still made an Internet intermediary eligible for § 230 immunity.⁸⁵

The California Supreme Court is one of the most recent appellate courts to interpret § 230. It is also the first state supreme court to interpret the statute. In *Barrett v. Rosenthal*, the court overturned a California Court of Appeal decision that had rejected the *Zeran* approach and found that § 230 did not confer immunity from distributor liability.⁸⁶

81. *Id.* at 1023, 1031.

82. *Id.* at 1030 & n.15, 1034–35; *see also* *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d. 703, 714–15 (Ct. App. 2002) (finding that an online auction website is an “interactive computer service”); *Barrett v. Clark*, No. 833021-5, 2001 WL 881259, at *9 (Cal. Super. Ct. July 25, 2001) (finding that a Usenet newsgroup is an “interactive computer service”), *aff’d in part and rev’d in part sub nom.* *Barrett v. Rosenthal*, 9 Cal. Rptr. 3d 142 (Ct. App. 2004), *rev’d*, 146 P.3d 510 (Cal. 2006); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40–41 (Wash. Ct. App. 2001) (finding that an online bookstore is an “interactive computer service”).

83. *Batzel*, 333 F.3d at 1030.

84. The court instituted a “reasonable perception” requirement, finding that a service provider or user is immune from liability under § 230(c)(1) when a third person or entity . . . furnished [information] to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”

Id. at 1034.

85. *See id.* at 1032.

86. 146 P.3d at 510–16.

However, the *Barrett* case is particularly noteworthy because the decision once again expands eligibility for § 230 immunity. The defendant, who had reposted an allegedly defamatory article on two Usenet newsgroups, was clearly not a service provider, and the court correctly observed that *Barrett* was

the first published case in which section 230 immunity ha[d] been invoked by an individual who had no supervisory role in the operation of the Internet site where allegedly defamatory material appeared, and who thus was clearly not a provider of an 'interactive computer service' under the broad definition provided in the CDA.⁸⁷

As a result, the most significant parts of the majority opinion focus on the meaning of the term "user" in the statute.

Although § 230 immunizes "provider[s] and user[s] of . . . interactive computer service[s],"⁸⁸ the statute itself does not provide a definition for the term "user," nor does the statute's legislative history indicate whether Congress intended the same immunity to apply to users as it does to service providers. The *Barrett* court correctly noted that "[i]ndividual Internet 'users' like Rosenthal . . . are situated differently from institutional service providers with regard to some of the principal policy considerations discussed by the *Zeran* court and reflected in the Congressional Record."⁸⁹ Most significantly, individual users "do not face the massive volume of third-party postings that providers encounter," and thus "[s]elf-regulation is a far less challenging enterprise for them."⁹⁰ In addition, service providers "typically bear less responsibility for . . . content than do the users," for "[u]sers are more likely than service providers to actively engage in malicious propagation of defamatory or other offensive material."⁹¹

The plaintiff argued that Congress had intended to distinguish between "active" and "passive" Internet use and that Congress meant to immunize users who passively receive offensive or defamatory information and take steps to "screen and remove such information from an Internet site."⁹² The plaintiff further argued that "those who actively post or republish information on the Internet are 'information content providers' unprotected by the statutory immunity."⁹³

The California Supreme Court rejected this argument, finding that "no logical distinction can be drawn between a defendant who actively

87. *Id.* at 515.

88. 47 U.S.C. § 230(c)(1) (2000).

89. *Barrett*, 146 P.3d at 526.

90. *Id.*

91. *Id.*

92. *Id.* at 527.

93. *Id.*

selects information for publication and one who screens submitted material, removing offensive content.”⁹⁴ The court also rejected the argument that active posting or republishing information made one an “information content provider,” observing that “[a]ll republications involve a ‘transformation’ in some sense.”⁹⁵ Finally, the court found that “[a]lthough individual users may face the threat of liability less frequently than institutional service providers, their lack of comparable financial and legal resources makes that threat no less intimidating,” and thus not conferring § 230 immunity on users would motivate users “to delete marginally offensive material, restricting the scope of online discussion,” and as a result “chill the free exercise of Internet expression.”⁹⁶

IV. THE PROBLEM OF ONLINE DEFAMATION

Although virtually every court to hear a § 230 case has ruled that the statute confers a broad immunity on Internet intermediaries sued for defamation and other torts committed by third parties, the statute remains highly controversial. Several legal scholars,⁹⁷ and even some judges, have found § 230’s grant of immunity from both publisher and distributor liability highly troubling. One district judge, though applying § 230 immunity to an Internet intermediary defendant, found it “troubling . . . that CDA immunity leaves website operators ‘little incentive to take . . . material down even if informed that the material is defamatory.’”⁹⁸ Judge Friedman expressed similar sentiments in *Blumenthal v. Drudge*, writing that it “seem[ed] only fair to hold AOL to the liability standards applied to a publisher or, at least, . . . to the liability standards applied to a distributor.”⁹⁹

This Part will begin with a section examining why defamation on the Internet is a problem. The remaining sections will then explain why expanding the scope of defamation law is not the best way to remedy this problem.

A. *Why Online Defamation Matters*

Defamation on the Internet has been described as a social prob-

94. *Id.* at 528.

95. *Id.*

96. *Id.* at 529.

97. See discussion *infra* Part IX (summarizing several prominent law professors’ objections to § 230 and analyzing their alternate proposals).

98. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *8 (D. Ariz. Oct. 10, 2007) (second alteration in original) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003)).

99. 992 F. Supp. 44, 51–52 (D.D.C. 1998).

lem.¹⁰⁰ Due to the growing popularity and comprehensiveness of Google and other search engines,¹⁰¹ an increasing number of employers now use the Internet to “dig up potential dirt on their prospective hires during the interview process.”¹⁰² As a result, some malicious individuals—knowing that their actions on the Internet may have real-life consequences for the intended target—have begun to “Google bomb” individuals by creating a large number of defamatory messages about the target that are likely to show up in search engines and be seen by prospective employers, dates, friends, and others. One victim of such a “Google bombing” summarizes her experience as follows:

“Well, you’re certainly the most Googleable candidate we’ve ever had,” the partner interviewing me said and smiled. I winced and looked at the ground. This moment had been a source of stomach-sinking angst for nearly a year, since I first read the words, typed by a stranger: “Why are you such a whore, Caitlin? P.S. I’m going to ruin your career.” And in the months that followed, it seemed that he might.

....

... [The Google bomber] also blanketed the board in Googleable threads, over twenty in two days, with thread names such as “Caitlin Hall fucked her way into Yale,” “We need more Caitlin Hall defamation threads,” and “Caitlin Hall Nude Photos.” One thread, “Who will Caitlin Hall (prestigious bitch) fuck first at Yale Law?”, sprang to the top of the list of results for a Google search of my name, and has remained there since. The poster made plain his purpose, as if it was not already clear: “I’m sure having your real name all over this board will never have any negative consequences. Nor will the Google bombs I set up before you start interviewing. I’m sure employers don’t actually Google applicants. HAHAAHAHA HAAAA . . . bitch.”¹⁰³

But while the law-firm partner interviewing Caitlin Hall merely smiled when referencing the obviously defamatory postings discovered in Google, other victims of defamation on the Internet have not been as lucky and have experienced tangible economic loss as a result of such messages. Perhaps the textbook example of such an individual is Kenneth Zeran, the plaintiff in the seminal *Zeran* case.

Shortly after the 1995 Oklahoma City bombing, an America Online

100. Jarret Cohen, Op-Ed., *Free Expression on the Internet*, HARV. L. REC., Apr. 12, 2007, at 9, available at <http://media.www.hlrecord.org/media/storage/paper609/news/2007/04/12/Opinion/Free-Expression.On.The.Internet-2838281.shtml>.

101. See discussion *infra* Part V.

102. Cohen, *supra* note 100.

103. Caitlin Hall, *Swimming Downstream: Battling Defamatory Online Content via Acquiescence*, 19 YALE J.L. & FEMINISM 287, 287–88 (2007) (last alteration in original).

user named “KenZZ03” posted a message on an AOL message board advertising “Naughty Oklahoma T-shirts,” with slogans such as “Visit Oklahoma . . . It’s a Blast!!!” and “McVeigh for President 1996.”¹⁰⁴ This individual—who was not Kenneth Zeran—told people that they could order these T-shirts by calling “‘Ken’ at Kenneth Zeran’s home phone number.”¹⁰⁵ Soon afterwards, Zeran began to receive angry phone calls from people, many of which were “nasty and threatening,” which continued even after America Online removed the original message.¹⁰⁶ Because “Zeran’s business consisted of listing apartments on a monthly basis, and he had given out his phone number on the listings,” he could not change his phone number without hurting his business, and thus the calls continued unabated.¹⁰⁷

After the original posting was removed, a second message appeared by a user with a similar username, stating that some of the T-shirts had sold out, but new T-shirts were available with additional offensive statements. Once again, individuals were told to call “Ken” and to “‘please call back if [the phone line was] busy.’”¹⁰⁸ Zeran continued to receive harassing phone calls, and, while America Online attempted to terminate the impersonator’s account, messages continued to appear, this time touting “Oklahoma City bombing bumper stickers and key chains.”¹⁰⁹ As a result of this continuous barrage of postings, “[w]ithin a few days, Zeran was receiving a call about every two minutes.”¹¹⁰

Though the phone calls eventually abated, “the ordeal had taken its toll on Zeran,” who, in addition to experiencing significant emotional distress,¹¹¹ had his business damaged. Zeran unsuccessfully attempted to recover his damages by suing America Online for negligence, his lawsuit failing due to the court applying § 230 to AOL. But while Zeran would have been allowed to recover from the original author of the defamatory postings, this individual—who had registered his America Online account using fraudulent information—was never identified, and thus could not be brought to justice. As a result, Zeran was unable to recover monetary damages from anyone for his ordeal.

The Kenneth Zeran situation, as well as others like it, provides the basis for the majority of criticisms of § 230. By all accounts, Zeran is an

104. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 150 (2007).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* (alteration in original).

109. *Id.*

110. *Id.* at 151.

111. *Id.*

innocent victim who did nothing wrong, yet incurred substantial economic loss as a result of the actions of a third party. Few would argue that Zeran is somehow not deserving of any compensation for these losses. However, since the original defamer is unknown—and likely not very wealthy—the only apparent options are for Zeran to go uncompensated or for another involved party, such as America Online, to bear the costs. Those who believe that it is unfair or unequitable to allow Zeran to go uncompensated will typically oppose the § 230 immunity and prefer that Zeran have the opportunity to recover damages from the intermediary. As one scholar summarizes, “AOL maintained the bulletin board. It had a lot of money, and the person who posted the bogus T-shirt ads was anonymous. So AOL was the natural target.”¹¹²

But because of § 230, Zeran could not recover from any target. Zeran “couldn’t track down the [anonymous] person who posted the T-shirt ads,”¹¹³ and he also “couldn’t sue AOL.”¹¹⁴ In other words, Zeran “had no way to fight back,” and was forced to bear the costs of the ordeal himself.¹¹⁵

There is no doubt that, in at least some situations, Internet defamation can result in very serious harm. As the Zeran case demonstrates, an anonymous prankster’s actions can cause significant damage to an individual’s business, and, when one combines § 230 immunity for intermediaries with user anonymity, it is possible that in some situations current law will prevent a true victim from recovering damages from anyone. A natural response to this troubling phenomenon is to advocate for an expansion of defamation law’s reach by repealing § 230, in order to allow these individuals to receive compensation. However, compensating victims is not the only value that must be considered during this decision-making process. The next section will discuss the chilling effects on speech that go hand in hand with greater defamation liability.

B. *Defamation Law’s Chilling Effect on Speech*

Proponents of strong First Amendment rights and protections have frequently argued that defamation law has a chilling effect on speech, and particularly speech by media outlets.¹¹⁶ Such commentators “suggest the risks of defamation liability deter publications,” and that “[t]he quality of public debate about political and public interest matters is thought to be limited by the media’s fear of lengthy, complex and

112. *Id.*

113. *Id.* at 143.

114. *Id.* at 152.

115. *Id.*

116. See, e.g., Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 689–701 (1978).

expensive . . . litigation.”¹¹⁷ As one judge succinctly summarized, “Whatever is added to the field of libel is taken from the field of free debate.”¹¹⁸

In the United States, courts have been highly conscious of the potential for a chilling effect and, when given the opportunity, have “significantly modified substantive and procedural legal doctrines” relating to defamation and similar torts “to expressly carve out breathing space to protect First Amendment interests.”¹¹⁹ The classic example of a court’s concern with chilling effects is the Supreme Court’s opinion in *New York Times Co. v. Sullivan*.¹²⁰ The Court, in its decision finding Alabama’s libel laws constitutionally deficient, recognized the need for a robust marketplace of ideas: “Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹²¹

The Court further found that the judicial system, through the use of the libel tort, was not the appropriate vehicle for determining a statement’s truthfulness:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. The constitutional protection does not turn upon “the truth, popularity, or social utility of the ideas and beliefs which are offered.”¹²²

The Court concluded its decision by rejecting the argument that a defense of truth would prevent a chilling effect on truthful and socially beneficial speech:

The state rule of law is not saved by its allowance of the defense of truth. . . .

. . . .

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of

117. Chris Dent & Andrew T. Kenyon, *Defamation Law’s Chilling Effect: A Comparative Content Analysis of Australian and U.S. Newspapers*, 9 MEDIA & ARTS L. REV. 89, 89 (2004).

118. *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942).

119. Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 436 (2007).

120. 376 U.S. 254 (1964).

121. *Id.* at 270.

122. *Id.* at 271 (citation omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.¹²³

The Court, recognizing in *Sullivan* "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'"¹²⁴ essentially held that it is necessary for some victims of false and defamatory statements to not receive any compensation "because, without such breathing space, robust discussion about public issues would be chilled by the potential for liability."¹²⁵ In subsequent decisions, the Court would use the chilling-effect rationale to constrain defamation recovery even further by requiring that all public figures—rather than just public officials—prove actual malice.¹²⁶ In *Hustler Magazine v. Falwell*, the Court, extending the core principles of *Sullivan* to an intentional infliction of emotional distress cause of action, reiterated that it is inevitable that some individuals harmed by "vehement, caustic, and sometimes unpleasantly sharp attacks"¹²⁷ will have to forego monetary compensation in order to "create a buffer zone for free speech."¹²⁸

Many would agree that, "[i]n a perfect world, liability for defamation or intentional infliction of emotional distress could extend right up to the constitutional limit, without regard for breathing space."¹²⁹ If it was always possible to prove that "a speaker had perfect knowledge about precisely what statements were defamatory and which were not, liability could be placed right at that line," and then "[n]o protected speech would be chilled, as speakers could easily determine which statements they could properly make."¹³⁰ However, because "[m]uch uncertainty surrounds whether a statement might be defamatory," it is

123. *Id.* at 278–79 (citations and footnote omitted) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

124. *Id.* at 271–72 (second alteration in original) (quoting *Button*, 371 U.S. at 433).

125. Liu, *supra* note 119, at 437.

126. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974).

127. 485 U.S. 46, 51 (1988) (quoting *N.Y. Times Co.*, 376 U.S. at 270).

128. Liu, *supra* note 119, at 438.

129. *Id.*

130. *Id.*

“difficult to predict precisely where the line falls,” with the result being that “legitimate speech may be chilled because of the fear of liability.”¹³¹ While it may be unfortunate that “there will be a set of cases in which plaintiffs are harmed . . . but there is no remedy,” the weighing of countervailing interests “privileges the interests of speech over the interests vindicated by the tort laws.”¹³²

Of course, some may question the premise that there is such a thing as a chilling effect. After all, though the *Sullivan* Court may have made an eloquent logical argument, it cited no social-science research or other evidence to support the position that greater protections afforded to defamation plaintiffs will result in the media self-censoring legitimate or socially desirable speech to a higher degree. Several recent empirical studies, however, have suggested that such self-censorship does occur.¹³³ One study, focusing on the media in the United Kingdom, found “that journalists, particularly those with experience, are well aware of the libel regime in which they are working and, therefore, shape their research and their writing to meet its requirements.”¹³⁴ Additional studies have concluded that “publishers said they withheld stories because of legal concerns”¹³⁵ and that most journalists “believe some stories are not covered because of defamation concerns.”¹³⁶

These earlier studies, which were primarily conducted through “interviews and surveys of journalists, editors and lawyers,” have been criticized for measuring subjective perceptions of individuals rather than producing objective evidence that defamation law influences media content through facilitating a chilling effect of protected speech.¹³⁷ Recent empirical research, however, has provided stronger evidence in support of a chilling effect. In a 2004 study, Australian scholars Chris Dent and Andrew Kenyon conducted “a comparative content analysis of more than 1,400” Australian and United States newspaper articles¹³⁸ in order to determine whether the radically different defamation regimes used by

131. *Id.* at 439.

132. *Id.*

133. See, e.g., Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV., May/June 1985, at 31, 31–39; Stephen M. Renas et al., *An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?*, in THE COST OF LIBEL 41, 45–55 (Everette E. Dennis & Eli M. Noam eds., 1989); Susan P. Shapiro, *Libel Lawyers as Risk Counselors: Pre-Publication and Pre-Broadcast Review and the Social Construction of News*, in ORGANIZATIONS, UNCERTAINTIES, AND RISKS 131, 141–55 (James F. Short, Jr. & Lee Clarke eds., 1992).

134. ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT 68 (1997).

135. ANDREW T. KENYON, DEFAMATION 11 (2006).

136. Dent & Kenyon, *supra* note 117, at 90.

137. *Id.*

138. *Id.* at 91.

the two countries influenced media content.¹³⁹ Despite the common journalistic culture shared by the countries, the researchers found several highly significant differences in newspaper content, with United States newspapers being three times more likely to report on political and corporate corruption than Australian newspapers despite relatively similar levels of perceived corruption in both nations.¹⁴⁰ The differences were particularly pronounced in the corporate context, with Australian newspapers publishing substantially fewer articles critical of corporate interests compared to American newspapers, which the researchers attributed to a corporation's enhanced ability to recover for defamation under Australian law.¹⁴¹ Thus, the authors concluded that there is substantial evidence to "suggest Australian newspaper content is 'chilled' in comparison to the" United States due to the different defamation laws used in each country.¹⁴²

C. *The Value of Internet Speech*

Though there is little doubt that defamation law has the potential to chill speech, some may argue that speech found on the Internet—particularly speech facilitated through blogs and message boards—has little value and thus neither society nor government should be concerned if it is chilled.¹⁴³ Given that even vocal supporters of new media outlets and § 230 often label blogs and message boards as "low authority" media¹⁴⁴ and sometimes even argue that no one should ever take online speech seriously,¹⁴⁵ one would be justified to question why Congress should care about facilitating an open and free marketplace of ideas on the Internet.

Few would deny that discourse on some message boards and blogs

139. Although American and Australian defamation law is similar in terms of what statements would constitute defamation, significant differences, particularly with regard to the defenses available to defendants and the elements plaintiffs must prove to recover damages, exist that make Australian law significantly more favorable to defamation plaintiffs. For a full discussion of these differences, see *id.* at 92–98.

140. *Id.* at 105.

141. See *id.* at 107–08.

142. *Id.* at 105.

143. See, e.g., Megan M. Sunkel, Comment, *And the I(SP)s Have It . . . But How Does One Get It? Examining the Lack of Standards for Ruling on Subpoenas Seeking To Reveal the Identity of Anonymous Internet Users in Claims of Online Defamation*, 81 N.C. L. REV. 1189, 1217–18 (2003) ("Internet speech in general is arguably of lesser value compared to that from reporters in other news media.").

144. See, e.g., Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157, 1164–65 (2006).

145. See, e.g., Caitlin Hall, Op-Ed., *Sex, Lies, and Broadband*, ARIZ. DAILY WILDCAT, Apr. 2, 2007, available at <http://media.wildcat.arizona.edu/media/storage/paper997/news/2007/04/02/Opinions/Sex-Lies.And.Broadband-2817310.shtml>.

“bears more resemblance to informal gossip than to rational deliberation” and that the culture of some of these forums may foster “disinformation, rumors and garbage.”¹⁴⁶ Furthermore, because most bloggers and discussion forum users “lack a newspaper’s institutional memory and the type of risk-averse restraint that might temper an [I]nternet diatribe,” messages rarely go through a time-intensive writing and editing process, resulting in unrefined posts that may not be of the same quality as content found in newspapers and other traditional media.¹⁴⁷

But such speech, even if uncivil, unrefined, or even frequently wrong, is an essential component of the marketplace of ideas. Speech “has attributes of a network good,” in that “[i]t is more valuable when more people use it—more valuable for building communities, for igniting illuminating debates, and for spreading ideas.”¹⁴⁸ Even incorrect speech has value, for the “search for truth” and citizens “transcend[ing] their differences in order to forge consensus on issues of public concern” are key functions of a free and uninhibited marketplace of ideas.¹⁴⁹

The Internet, though contributing to an increased amount of speech of lower relative value, makes “public discourse more democratic and inclusive” and “less subject to the control of powerful speakers” by “eliminat[ing] structural and financial barriers to meaningful public discourse.”¹⁵⁰ By “transform[ing] every citizen into a potential ‘publisher’ of information,”¹⁵¹ the Internet has ensured that “[f]reedom of the press . . . is [no longer] limited to those who own one.”¹⁵² While “it may be an overstatement to say that the speech of ordinary John Does ‘compete[s] equally with the speech of mainstream speakers in the marketplace of ideas,’ it is certainly true that ordinary John Does need no longer win approval of the mainstream media in order to be heard,”¹⁵³ resulting in discussion on the Internet that “is more broadly inclusive than real-world discourse” due to the significant reduction—if not outright elimination—of the financial barriers to speaking and being heard.¹⁵⁴

146. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 893 (2000).

147. Paul S. Gutman, Note, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 153 (2003).

148. Molly S. Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT’L L. 697, 714 (2003).

149. Lidsky, *supra* note 146, at 894.

150. *Id.*

151. *Id.* at 895.

152. *Id.* (last alteration in original) (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999)).

153. *Id.* (alteration in original) (quoting *Reno*, 31 F. Supp. 2d at 476).

154. *Id.*

One should not underestimate the power of blogs, message boards, and other Web 2.0 intermediaries to draw attention to social problems that would otherwise be ignored by the mainstream media. Perhaps one of the best recent examples of this phenomenon is the impact Internet intermediaries, such as the JdJive¹⁵⁵ and J.D. Underground¹⁵⁶ message boards and the Tom the Temp blog,¹⁵⁷ have had on public consciousness of the plight of recent graduates of law schools outside of the “Top 14,” and particularly those who graduated from third- and fourth-tier law schools.¹⁵⁸ These intermediaries, dedicated to “help[ing] expose the nasty sweatshops, swindling law schools, and opportunistic staffing agencies,”¹⁵⁹ have persisted in shedding light on the lives and working conditions of attorneys in a sector of the legal-employment market overlooked by traditional media outlets, which almost exclusively focus on life at America’s largest and most prestigious law firms.¹⁶⁰

Yet no one could characterize JdJive and J.D. Underground as conduits of exclusively socially beneficial information. Though these message boards contained significant information about the low-end legal-employment market that could not be duplicated anywhere else, they were also inundated with Internet trolls, racist posts, and other offensive content. One former JdJive user, writing shortly after the March 2007 shut down of JdJive, succinctly summarized the message board’s utility despite its dual nature in her eulogy of the website:

The administrators of JdJive have shut down the site and are selling the JdJive.com domain name on eBay. Although it contained countless trolls, the only forum for “the rest of us” has now gone the way of the dodo. Often offensive, often revolting, it was the only

155. As of March 2007, the JdJive website is no longer operational. The preserved archive of the website before it shut down is available at Internet Archive, <http://web.archive.org/web/20070308015438/http://www.jdjive.com> (last visited Sept. 10, 2008).

156. JD Underground, <http://www.jdunderground.com/forum.php> (last visited Sept. 10, 2008).

157. Temporary Attorney: The Sweatshop Edition, <http://temporaryattorney.blogspot.com> (Mar. 19, 2007, 1:37 EST).

158. For more information on law-school rankings and career placement, see Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 JURIMETRICS J. 413 (2005).

159. Temporary Attorney: The Sweatshop Edition, *supra* note 157.

160. Articles about salaries, bonuses, working conditions, and job satisfaction at these elite law firms appear on an almost daily basis in legal newspapers, as well as the popular press. See, e.g., Attila Berry, *Mad Money: The Associate Pay Raise Bandwagon Rolled Again, with Firms Hitting the \$160,000 Mark for First-Years*, LEGAL TIMES, Dec. 31, 2007, at 21 (discussing associate salaries at elite law firms); Leigh Jones, *Leaner Pay, Bonuses May Be Reality in 2008*, NAT’L L.J., Jan. 7, 2008, at 1, 1 (discussing associate bonuses at elite law firms); Alex Williams, *The Falling-Down Professions*, N.Y. TIMES, Jan. 6, 2008, § 9, at 1 (discussing retention problems in law firm); Peter D. Zeughauser & Ron Beard, *Rewarding Leadership*, AM. LAW., Jan. 2008, at 59, 59–60 (discussing partner compensation at elite law firms).

place where, hidden in the trolling, attorneys who did not graduate from top schools could get realistic advice.

My law school published statistics that said that 97% of us would be employed six months after graduation and that attorneys in the private sector would be making over \$90,000. This turned out to be a fabrication. Well, it was a huge stretch from the truth. Around 50% of us were temping six months after graduation, often in short term projects, some as short as two weeks. JdJive was the only place with realistic statistics.

I don't know how I feel about JdJive's demise. Although I found a lot of the posts distasteful, it was the only place where a person could get the cold hard truth about employment prospects and insiders' views on law schools and law firms.

. . . .

Tough call. I guess those framers of the Constitution were rock stars when they wrote the First Amendment.

I guess you don't know what you got 'til it's gone¹⁶¹

Such a dichotomy is not limited only to JdJive, for many Internet intermediaries simultaneously are host to both highly useful information and false or defamatory information. Steven Horowitz further summarizes this phenomenon by citing another example of a law-school message board with a similar culture:

When confronting the evil of anonymous [I]nternet defamation, the first step is to realize that the sites hosting such content are not always the uniformly grotesque villains we might like them to be. AutoAdmit is just one example, but it demonstrates that such sites may have both good and bad content. For example, a Google search for "help with clerkships" returns a useful, obscenity-light AutoAdmit thread discussing the competitiveness of various clerkships as its first hit.¹⁶²

As a direct result of the popularity of intermediaries such as JdJive and Tom the Temp, even the mainstream media, which had largely ignored this sector of the legal market, began to pay attention. The *American Lawyer* published an article about the Tom the Temp blog, which compared temporary-attorney working conditions to slavery,¹⁶³ and subsequently reported on Tom the Temp's naming of a prominent law firm "Sweatshop of the Year" for having "kept a crew of temporary attorneys doing 12-hour shifts of document review in a basement store

161. Posting of emily2 to Waiting for Dorothy, <http://waitingfordorothy.blogspot.com> (Mar. 9, 2007, 20:36 EST).

162. Steven J. Horowitz, *Defusing a Google Bomb*, 117 YALE L.J. POCKET PART 36, 36 (2007), <http://yalelawjournal.org/images/pdfs/580.pdf>.

163. Julie Triedman, *Upstairs, Downstairs: Law Firm Temps Are Furiously Blogging About Their Work Conditions*, AM. LAW., Mar. 2006, at 19, 19.

room known as ‘the pit.’”¹⁶⁴ Similar articles about these intermediaries and temporary-attorney life appeared in several other prominent newspapers, including a front-page article in the *Wall Street Journal*,¹⁶⁵ *Washington City Paper*,¹⁶⁶ and *The Nation*.¹⁶⁷ Mainstream media coverage ultimately culminated in “Loyola 2L,” a frequent commenter on J.D. Underground and various other message boards and legal blogs about the difficulties of obtaining an entry-level job from a low-ranked law school, being named the *Wall Street Journal*’s Law Blog Lawyer of the Year for 2007.¹⁶⁸

But despite JdJive’s growing popularity and media attention, the owners of the message board abruptly shut it down in March 2007. What caused JdJive’s owners to take such a puzzling action? The increasing attention paid to the website by the legal community caused law firms—namely, those labeled “sweatshops” and “slavedrivers” by JdJive users—to demand that JdJive begin to censor the speech of its users. One JdJive user complained on another message board about one particularly egregious incident:

If you ever wanted proof of the value of free speech, look what’s happening on jdjive.com.

So a month ago, someone created a website to organize toilet firm lawyers. To help them get a bit of leverage on the firms. He created firm profiles, salary charts and so on. The website was: <http://nycinsurancelaw.googlepages.com/>

If you can access internet archives you’ll see that he had really valuable and shocking information (for example the average starting salary of the twenty firms he profiled was about \$40,000.)

Now not only have toilet firms shut that site down, but if you type nycinsurancelaw into a jdjive post it will be scrambled!

Information is the only leverage people have against toilet firms and ripoff law schools, and it’s been taken away.¹⁶⁹

One week after this incident, JdJive shut down, purportedly because of threats made by certain law firms criticized on the website.¹⁷⁰

Why would JdJive’s owners remove truthful information about

164. See *The Year in Beastly Behavior*, AM. LAW., Jan. 2007, at 16, 16.

165. Amir Efrati, *Hard Case: Job Market Wants for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1.

166. Arin Greenwood, *Attorney at Blah*, WASH. CITY PAPER, Nov. 7, 2007, at 19.

167. Barbara Ehrenreich, *CEOs vs. Slaves*, THENATION.COM, May 29, 2007, <http://www.thenation.com/doc/20070611/ehrenreich>.

168. Peter Lattman, *The Law Blog: Angry, Nameless Student for Lawyer of the Year?*, WALL ST. J., Dec. 19, 2007, at B2.

169. AutoAdmit Forum: Toilet Firm Censorship on JdJive, http://www.xoxoth.com/thread.php?thread_id=592677&mc=30&forum_id=2 (last visited Sept. 10, 2008).

170. Temporary Attorney: The Sweatshop Edition, *supra* note 157.

law-firm salaries posted by its users upon a law firm's request, and later ultimately choose to completely shut down its successful website rather than asserting a § 230 defense in court? Part VI will discuss why it is common for Internet intermediaries to give in to—often baseless—legal threats despite the existence of the § 230 immunity and explain why this trend will continue unless § 230 is amended to include a fee-shifting provision for prevailing defendants. But before discussing this particular problem and proposing a solution, one must consider the fundamental—and unforeseen—changes to the Internet that took place between § 230's passage in the mid-1990s and the present day that brought about this problem.

V. HOW GOLIATH BECAME DAVID: THE HISTORY OF INTERNET INTERMEDIARIES

As mentioned earlier in the Article, the Internet is an ever-changing medium. Over the past decade, the demographics of those who provide third-party content on the Internet have gradually changed from large corporations to regular individuals. For instance, though conglomerates such as America Online were the primary proprietors of message-board communities in 1996, virtually all of the most popular Internet forums today are operated by individuals of relatively modest means.¹⁷¹ The following sections will examine the history of Internet intermediaries commonly affected by § 230 and illustrate the transition from the “Goliath” intermediaries of the mid-1990s to the “David” intermediaries of the modern era.

A. *The Walled-Garden Internet of the 1990s*

As discussed earlier, the foundational third-party Internet defamation lawsuits were *Cubby, Inc. v. CompuServe, Inc.*,¹⁷² *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹⁷³ and *Zeran v. America Online, Inc.*¹⁷⁴ The list of defendants in these initial lawsuits also doubles as a list of the largest and most prominent Internet companies of the mid-1990s. America Online, for instance, was at the time not just the largest Internet service provider in the United States, but the entire world, with CompuServe and Prodigy ranked second and fourth respectively.¹⁷⁵

But America Online, CompuServe, and Prodigy were not sued

171. See discussion *supra* Part I.

172. 776 F. Supp. 135 (S.D.N.Y. 1991).

173. No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

174. 129 F.3d 327 (4th Cir. 1997).

175. Fed. Trade Comm'n, *America Online, CompuServe and Prodigy Settle FTC Charges Over “Free” Trial Offers, Billing Practices*, FTC.gov, May 1, 1997, <http://www.ftc.gov/opa/1997/05/online.shtm>.

because of their role as providers of Internet access. Rather, litigation against these intermediaries arose out of their roles as administrators of interactive content. In *Cubby*, CompuServe was sued over an allegedly false statement on the "Rumorville, USA" daily newsletter provided by an outside company exclusively for CompuServe's subscribers.¹⁷⁶ Similarly, the *Stratton Oakmont* litigation was the result of messages made by Prodigy subscribers on Prodigy's "Money Talk" bulletin board.¹⁷⁷ Likewise, the cause of the *Zeran* litigation was defamatory postings on an America Online forum set up exclusively for America Online's subscribers.¹⁷⁸

CompuServe's Rumorville newsletter, Prodigy's "Money Talk" board, and the America Online forums are representative examples of the "walled garden" Internet of the 1990s. The term walled garden generally "refers to a browsing environment that controls the information and Web sites the user is able to access."¹⁷⁹ In the specific context of Internet service providers, a walled garden is present when the provider "direct[s] users to paid content that the ISP supports."¹⁸⁰ The most popular Internet service providers of the mid-1990s used a walled garden to direct subscribers to proprietary online forums or third-party content that cannot be accessed by non-subscribers in order to generate profit—in other words, Internet service providers would collaborate and enter into contracts with certain vendors "to direct consumer's Internet navigation to each others' Web sites and to try to keep them from accessing the Web sites of competitors."¹⁸¹ In addition to directing subscribers to exclusive content within the walled garden, such walled-garden Internet service providers would also take measures to make it difficult to access, and sometimes even outright prevent their users from accessing, content outside the walled garden. Most notably, America Online did not allow its subscribers to access *any* Internet content outside of its proprietary network until 1995.¹⁸²

The walled-garden system generated substantial revenue for these Internet service providers beyond subscriber fees. At the peak of its pop-

176. 776 F. Supp. at 137–38.

177. 1995 WL 323710, at *1.

178. 129 F.3d at 328–29.

179. Webopedia, http://www.webopedia.com/TERM/W/walled_garden.html (last visited Sept. 10, 2008).

180. *Id.*

181. SearchSecurity.com Definitions, http://searchsecurity.techtarget.com/sDefinition/0,,sid14_gci554703,00.html (last visited Sept. 10, 2008).

182. Dan Tynan, *The 25 Worst Tech Products of All Time*, PC WORLD.COM, May 26, 2006, <http://www.pcworld.com/article/id,125772-page,2/article.html>.

ularity America Online had more than thirty million subscribers,¹⁸³ and an estimated eighty-five percent of those subscribers never ventured beyond the confines of America Online's walled garden.¹⁸⁴ As a result, many third-party content providers paid America Online and similar services large sums of money for the privilege of providing third-party content exclusively for their subscribers.

During this period, America Online's influence as an aggregator of preferred third-party content was so great that many companies would refer people to their proprietary America Online "Keyword" in their print, radio, and television advertisements in lieu of an Internet domain name.¹⁸⁵ Such keywords were so expensive that it was "nearly impossible for any individual to have their own Keyword, with the exception of a few celebrity notables."¹⁸⁶ The value of America Online Keywords was so great that a 1998 charity auction of one personalized non-commercial America Online keyword that would allow the winning individual to "stake a claim in cyberspace by creating a personalized online site to showcase anything from their family photos to their favorite sports teams or celebrities," which would expire after just one year, was promoted with a *starting* bid of \$25,000, well out of reach of most individuals.¹⁸⁷

Section 230 was drafted and signed into law during this era of the walled-garden Internet, where Internet service providers, both directly and in collaboration with their preferred vendors, were responsible for providing virtually all of the third-party content actually accessed by most American Internet users. While many "regular" individuals certainly created their own online content outside of the walled-garden Internet service providers, typically by making personal homepages through various free web hosts, these ventures rarely involved those individuals acting as an Internet intermediary or administrator of a larger community. GeoCities, the most popular provider of free homepages for the general public in the mid-1990s,¹⁸⁸ only provided its two million

183. Catherine Holahan, *Will Less Be More for AOL?*, BUS. WK., July 31, 2006, http://www.businessweek.com/technology/content/jul2006/tc20060731_168094.htm.

184. SearchSecurity.com Definitions, *supra* note 181.

185. Michael Jensen, *Google and SEO: The New "AOL Keyword?"*, SEARCHNEWZ, June 20, 2007, <http://www.searchnewz.com/blog/talk/sn-6-20070620GoogleandSEOTheNewAOLKeyword.html>.

186. *Personalized AOL Keyword To Be Sold at Starting Bid of \$25,000*, BNET, Sept. 15, 1998, http://findarticles.com/p/articles/mi_m0EIN/is_1998_Sept_15/ai_21132319.

187. *Id.*

188. See Jim Hu, *GeoCitizens Fume over Watermark*, CNET NEWS.COM, June 23, 1998, http://www.news.com/GeoCitizens-fume-over-watermark/2100-1023_3-212596.html (stating that GeoCities has two million members); *Yahoo! Buys GeoCities*, CNNMONEY.COM, Jan. 28, 1999, http://money.cnn.com/1999/01/28/technology/yahoo_a ("GeoCities . . . is the third most visited site on the Web behind AOL and Yahoo! . . .").

“homesteaders” with the most basic website-building features available, and even to this day does not allow its non-premium users to build their own message boards or other interactive forums through the use of Perl or PHP scripts.¹⁸⁹ Because virtually all free web hosts forbade users from hosting such scripts and only allowed static webpages coded in basic HTML, such individuals had little or no reason to fear potential legal liability for the defamatory speech of third parties because their websites simply did not have the capability for third parties to contribute any content, defamatory or otherwise.

But even the relatively few individuals who had both the requisite programming knowledge to create or install a forum and a web host that allowed such scripts faced a significant obstacle in the form of poor and underdeveloped technology. Throughout the 1990s, message-board software—both free and commercial—geared towards individuals and small businesses was highly inefficient and did not support large communities. Infopop’s UBB.classic forum software, while one of the most widely used Perl message-board scripts during this period, simply could not handle a community that had a large number of online users.¹⁹⁰ Because database-driven message-board software was not developed and popularized until the early twenty-first century,¹⁹¹ individuals and small businesses attempting to create their own online communities in the 1990s typically hit a technological glass ceiling that prevented them from becoming large players in the message-board industry.

Similarly, blogs, which today are perhaps the most well-known examples of interactive online services run by regular individuals, did not even exist at all in the mid-1990s, at least in their current form. Though some have identified “The Drudge Report” and various online diaries as early examples of blogs, such websites consisted of mere static webpages that did not allow comments by third parties or have any other interactive features associated with modern blogs. Markos Moulitsas, the proprietor of the highly successful DailyKos.com political blog, which he founded in 2002, summarizes the state of blogging during the “Walled Garden” era in his description of his first experience running a “blog” in 1998:

189. Support for PHP/MySQL and Perl programming is only available through the Yahoo! Web Hosting service. *Compare* Yahoo! GeoCities, <http://geocities.yahoo.com> (last visited Sept. 10, 2008) (failing to mention PHP/MySQL and Pearl), *with* Yahoo! Web Hosting: Web Page Design Tools for a Professional Site, <http://smallbusiness.yahoo.com/webhosting/sitebuilding.php> (last visited Sept. 10, 2008) (mentioning PHP/MySQL and Pearl).

190. *See* vBulletin FAQ, <http://www.vbulletin-faq.com> (last visited Sept 10, 2008) (outlining the history of the vBulletin software, including its origins as a response to UBB.classic’s inadequacies).

191. *Id.*

So I began a site called the Hispanic Latino News Service, which was a blog before there were blogs. In the morning I would go online to find news stories to feature, then in class I would literally craft every page by writing the full HTML. So I would have to create a new page for that day's updates, and then move the previous day's stuff to the archives, which meant manually creating new pages, then manually updating the indexes. It sucked, sure, but it was better than paying attention in class.

Had blogging tools existed back then, perhaps I would've remained in my Latino niche.¹⁹²

Reader comments, one of the features most commonly identified with blogs, were not associated with blogs until October 1998 when the feature was innovated by the "Open Diary" community, more than two years after § 230 had become law.¹⁹³

B. *The Fall of the Walled Garden and the Rise of Web 2.0*

A variety of factors converged to greatly reduce the prominence of walled-garden Internet service providers in the early twenty-first century. These factors—greater demand for broadband Internet access, increased demand for communities outside of the walled gardens, and technological improvements—were necessary to cause the transition from the age of walled-garden providers to the era of the decentralized Internet and Web 2.0.

1. CONSUMER DEMAND FOR AFFORDABLE BROADBAND INTERNET ACCESS

The walled-garden Internet service providers of the 1990s—like most Internet service providers at the time—primarily provided their subscribers with dial-up access to the Internet. Dial-up access involves using a telephone line to "dial-up" the Internet service provider and connect to the Internet, with a theoretical maximum speed of fifty-six kilobits per second, which is sufficient for basic Internet activities such as sending e-mail and browsing webpages. In addition to paying a monthly fee to the access provider, which for walled-garden Internet service providers typically ranged from \$19.95 to \$23.90 per month for unlimited access,¹⁹⁴ subscribers would pay their telephone company for the cost of every "dial-up" call to the provider's access number as if it was a regular phone call.

192. Posting of kos to DailyKos, <http://www.dailykos.com> (Jan. 20, 2008, 12:18 PST).

193. See *Blog*, in WIKIPEDIA (2008), <http://en.wikipedia.org/wiki/Blog> (providing a broad historical overview of blogs).

194. Jim Hu, *ISPs Wary of Following AOL's Footsteps*, CNET NEWS.COM, May 22, 2001, http://www.news.com/2100-1023_3-258096.html.

But while America Online and other walled-garden Internet service providers focused on selling dial-up access, other companies—particularly those already providing telephone and cable services—began to develop broadband Internet access. Broadband access, which can come in many forms,¹⁹⁵ provides users with connection speeds that range from five to 150 times faster than dial-up.¹⁹⁶ Furthermore, unlike dial-up, those connecting to the Internet through broadband are connected to the Internet twenty-four hours a day without ever having to call an access number.¹⁹⁷ Thus, broadband subscribers may use their landline telephone while connected to the Internet, and do not have to pay their telephone company for their Internet usage in addition to the subscription fee paid to their Internet service provider.

Internet service providers specializing in broadband access was not a twenty-first-century development. For instance, Time Warner began to provide broadband access as early as 1995 through its Southern Tier On-Line Community service (later renamed RoadRunner).¹⁹⁸ But the mere availability of broadband service in an area was not sufficient to cause Internet users to abandon dial-up and the walled-garden Internet service providers. Though broadband certainly had advantages over dial-up, such as higher speed, many consumers in areas with a choice of dial-up and broadband providers did not believe that being able to load a typical webpage instantaneously instead of in fourteen seconds¹⁹⁹ justified the higher cost of broadband service. For instance, one 2002 poll of dial-up users revealed that seventy-two percent of respondents would not upgrade to broadband because it was “too expensive,” with “[m]any consumers fail[ing] to see the value proposition for investing in broadband, considering it a luxury they cannot afford or not yet worth the \$45–55 per month investment.”²⁰⁰ Furthermore, having to go through the difficult process of ordering and installing a cable or DSL modem (as compared to simply inserting one of the numerous free America Online CDs received through the mail into their computer and following the simple instructions), as well as having to forego the substantial

195. For an explanation of the different types of broadband Internet access available, see *Broadband Beginner's Guide*, <http://www.broadband.co.uk/guide.jsp?section=2> (follow “print out this guide” hyperlink) (last visited Sept. 10, 2008).

196. *See id.*

197. *Id.*

198. *See* Mike Luftman, *Who Knew in '93 that the Two-Way Plant Would Sprout the HSD Business?*, *CABLE WORLD*, Mar. 10, 2003, at 38, 38 (summarizing the early history of Time Warner's RoadRunner service).

199. *Broadband Beginner's Guide*, *supra* note 195.

200. OFFICE OF TECH. POLICY, U.S. DEP'T OF COMMERCE, *UNDERSTANDING BROADBAND DEMAND 14* (2002), available at http://www.broad-band.gr/content/modules/downloads/UNDERSTANDING_BROADBAND_DEMAND.pdf.

exclusive content available in the walled gardens, created additional disincentives for switching from dial-up to broadband in the 1990s and early 2000s.

But the Internet would not forever remain a medium devoted merely to simple text-based webpages and e-mail. The creation of file-sharing networks, such as Napster and Grokster, which allowed individuals to easily download movies, music, and games, would drive consumer demand for high-speed Internet connections by providing services that could not be realistically used with a mere dial-up Internet connection.²⁰¹ Though there is relatively little practical difference between downloading a webpage instantaneously versus waiting fourteen seconds for it to load, download time differences are far more apparent when it comes to digital media. For instance, while it would take twelve minutes and thirty seconds to download a five megabyte MP3 file of a song using dial-up, such a download would only take three minutes using the most primitive broadband connection available, while downloading such a file with a more typical broadband connection would cut the download time to as little as a mere five to twenty seconds.²⁰² These download disparities are even more pronounced when it comes to movies, which have substantially larger sizes than music files. A 700 megabyte AVI file of a popular movie would literally take six days to download with a dial-up connection, assuming that the user's computer was online twenty-four hours a day. In contrast, a user connected to the Internet with a high-speed broadband connection could download such a file in just a couple of hours.

Similarly, the growing popularity of online gaming in the United States would translate into growing consumer demand for broadband, with more sophisticated multiplayer online video games requiring higher-speed Internet access. In April 2002 alone, more than twenty-eight million Americans engaged in online gaming, and the online gaming industry was projected to quadruple in size between 2002 and 2005.²⁰³ Nations such as South Korea, where online gaming became popular several years earlier than the United States, saw very large and rapid increases in broadband proliferation after online gaming became mainstream.²⁰⁴

Just as e-mail and the World Wide Web drove demand for dial-up access in the 1990s, the "killer apps" of file sharing and online gaming would quickly increase the popularity of broadband in the early to mid

201. *Id.* at 16.

202. Broadband Guide, *supra* note 195.

203. OFFICE OF TECH. POLICY, *supra* note 200, at 15.

204. *Id.* at 16.

2000s. Broadband proliferation was initially concentrated in large cities, with San Diego, Boston, and New York City respectively reporting that fifty-two, fifty, and forty-nine percent of all Internet users in their cities were using broadband at home in early 2004.²⁰⁵ But by March 2006, more than forty-two percent of *all* American adults nationwide had broadband Internet at home, compared to thirty percent in March 2005 and just over three percent in June 2000.²⁰⁶

However, demand for “killer apps” was not the only input that contributed to broadband’s popularity. Beginning in 2003, the largest DSL broadband providers, including Verizon, SBC, BellSouth, and Earthlink, sought to lure customers from dial-up to broadband by sharply discounting their subscription rates, lowering prices from \$49.99 a month to just \$29.95 or—in the case of BellSouth—\$24.95 a month.²⁰⁷ In contrast, America Online’s dial-up service was being sold for \$23.90 a month at the time.²⁰⁸ Cable broadband providers, such as Comcast, responded not with aggressive discounts, but providing customers with better service, such as doubling Internet download speeds for subscribers at no extra charge.²⁰⁹

The broadband revolution had a devastating impact on the walled-garden Internet service providers, who had specialized in dial-up access and were slow to adapt to changing consumer demand. America Online, once the largest Internet service provider in the world, rapidly began to hemorrhage subscribers, falling from more than thirty million subscribers at the turn of the century to 24.3 million in 2003—losing 2.2 million in 2003 alone, the year the largest DSL providers lowered their costs and the largest cable providers doubled their access speeds—a loss the company attributed to the growing popularity of broadband.²¹⁰ The losses continued into 2006, with America Online’s “customer base shrink[ing] to less than 19 million” and the company averaging a loss of 200,000 subscribers every month.²¹¹ By August 2006, America Online was down

205. Jim Hu, *Broadband Overtaking Dial-Up in Major Cities*, CNET NEWS.COM, Mar. 10, 2004, http://www.news.com/Broadband-overtaking-dial-up-in-major-cities/2100-1038_3-5172107.html.

206. JOHN B. HERRIGAN, PEW INTERNET & AM. LIFE PROJECT, HOME BROADBAND ADOPTION 2006, at 1, 2 fig. (2006), available at http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf.

207. Jim Hu, *Endless Summer of DSL Discounts*, CNET NEWS.COM, July 7, 2003, http://www.news.com/Endless-summer-of-DSL-discounts/2100-1034_3-1023465.html.

208. Jim Hu, *AOL Subscribers, Sales Keep Sliding*, CNET NEWS.COM, Mar. 16, 2004, http://www.news.com/AOL-subscribers%2C-sales-keep-sliding/2100-1038_3-5173484.html.

209. Jim Hu, *Cable Firms Bet on Broadband Speed, Not Price*, CNET NEWS.COM, Oct. 10, 2003, http://www.news.com/Cable-firms-bet-on-broadband-speed%2C-not-price/2100-1034_3-5089322.html.

210. Hu, *supra* note 208.

211. Holahan, *supra* note 183.

to 17.7 million members, and the company expects to lose half of them by 2009.²¹² Other large dial-up Internet service providers, such as the Microsoft Network, also suffered substantial losses.²¹³

Why was America Online hit so hard by broadband? Although broadband providers traditionally charge their customers higher rates for broadband than dial-up service, broadband service has both lower average revenue per user and lower profitability when compared to dial-up.²¹⁴ As a result, America Online never provided broadband access of its own during this time, for converting its customers from dial-up to broadband, even if they paid higher rates and remained America Online subscribers, would result in lower profits for the company.²¹⁵ In response to the broadband revolution, America Online launched a "broadband" service of its own.²¹⁶ However, America Online did not actually provide broadband access to the Internet through this service. Rather, customers were expected to purchase broadband access from another provider for forty dollars a month and then pay America Online an additional \$14.95 a month solely to access America Online's walled garden of proprietary content.²¹⁷ Given the vast price disparity between America Online's broadband offerings and those of all other access providers, entirely stemming from the additional \$14.95 charge for America Online's proprietary content, relatively few individuals purchased this plan, and America Online stopped selling this service in January 2004.²¹⁸

2. DEMAND FOR COMMUNITIES AND SERVICES OUTSIDE THE WALLED GARDENS

Unlike America Online, the largest and most popular broadband providers, such as Verizon and Time Warner's RoadRunner, did not build their own walled gardens or proprietary communities for their subscribers. These companies, perhaps due to their roots as common carriers in other telecommunications sectors, simply provided subscribers with unfettered access to the Internet. But online communities did not disappear—rather, they began to thrive in the open, unenclosed Internet, where technological advances allowed small businesses and even regular

212. Saul Hansell & Richard Siklos, *In a Shift, AOL Mail To Be Free*, N.Y. TIMES, Aug. 3, 2006, at C1.

213. Jim Hu, *AOL Ditches Broadband Offering*, CNET NEWS.COM, Feb. 26, 2004, http://www.news.com/AOL-ditches-broadband-offering/2100-1038_3-5166107.html.

214. Hu, *supra* note 208.

215. See *id.*

216. Hu, *supra* note 213.

217. *Id.*

218. *Id.*

individuals to more easily create their own communities and, perhaps more importantly, continue to maintain them even after they achieved a critical mass of users.

The transition from communities primarily operated by walled-garden Internet service providers to communities mainly existing in the Internet at large began in the late 1990s. Although America Online grew throughout this decade, not all walled-garden providers experienced this same level of success. Prodigy, at one time the fourth-largest Internet service provider, dropped from a peak of 1.13 million subscribers in 1995 to under 200,000 in 1999.²¹⁹ Ultimately, these 200,000 subscribers were not enough to keep Prodigy afloat, and the company chose to shut down its proprietary walled garden on October 1, 1999, opting instead to launch a Prodigy Internet, a traditional Internet service provider that provided access to the Internet without any other proprietary content.²²⁰ Prodigy Internet, immediately proved more popular than the original walled garden, dubbed "Prodigy Classic" during the period the two services co-existed, with Prodigy Internet attracting 1.2 million members the same year Prodigy Classic shut down.²²¹

What caused Prodigy's proprietary walled-garden service to go from being the fourth largest Internet service provider to no longer being in business just a mere four years later? Much of Prodigy's downfall stemmed from poorly performing its role as a central planner of its proprietary service. Like America Online's vigorous enforcement of its Terms of Service,²²² Prodigy was often accused of censorship and treating its users unfairly.²²³ However, many of Prodigy's users considered the company's policies overly paternalistic and unnecessary. For instance, Prodigy forbade its users from mentioning other users by name on its public forums, and in one famous example banned a coin collector's message because "Roosevelt dime" happened to be the name of another Prodigy subscriber.²²⁴ Similarly, message-board moderators would promptly delete any remotely off-topic posting—for example, video-game-board moderators would delete messages that focused on a

219. Austin Bunn, *Death of a Child Prodigy: Old-School Online Service Pulls the Plug*, VILLAGE VOICE, Oct. 26, 1999, at 47.

220. *Id.*

221. *Id.*

222. For an overview of America Online's Terms of Service policies, which some have described as too strict, see *AOL: Terms of Service (TOS)*, in WIKIPEDIA, *supra* note 193, http://en.wikipedia.org/wiki/America_Online#Terms_of_Service_.28TOS.29.

223. For an overview of Prodigy's content control controversy, see *Prodigy (Online Service): Criticisms*, in WIKIPEDIA, *supra* note 193, [http://en.wikipedia.org/wiki/Prodigy_\(ISP\)#Content_Control](http://en.wikipedia.org/wiki/Prodigy_(ISP)#Content_Control).

224. *Id.*

games' storyline rather than actual gameplay.²²⁵ Messages criticizing Prodigy's service were also often deleted.²²⁶ Given Prodigy's status as a walled garden, with full access to the Internet never available to Prodigy Classic subscribers, the service's users were unable to use forums outside of Prodigy's control.

But Prodigy's overly aggressive role in content management was not its only failure as a central planner. Though Prodigy micromanaged its users' experiences, it did a poor job managing the technical aspects of the service, failing to make necessary upgrades and changes. As one Prodigy employee and subscriber summarized, "Prodigy had great content and people, but what caused the demise is that the tech changed so greatly. We didn't expect everybody to be upgrading their computers every two years You don't upgrade your TV every two years."²²⁷ Due to Prodigy's lack of upgrades, games and fonts that were once cutting edge became "hilariously out-of-date."²²⁸

Prodigy, like other walled-garden Internet service providers, essentially operated as a monopoly with respect to its current subscribers. Though in competition with other Internet service providers when it came to actually providing Internet access, after joining the proprietary network, no alternatives existed to Prodigy's services. Users who found Prodigy's thirty-e-mail limit insufficient found it difficult, if not impossible, to obtain a free e-mail account from Hotmail or another provider. Subscribers unhappy with Prodigy's message-board moderation policies did not have the option to post on a competitor's unmoderated message board. Those who found Prodigy's games outdated could not purchase and install Quake for its multiplayer mode was not compatible with Prodigy's proprietary service.²²⁹ Prodigy's subscribers who were dissatisfied with aspects of Prodigy's service could only bear with it, or cancel Prodigy outright and switch to a more liberal provider.

Prodigy provides an extreme example of the problems inherent in possessing a complete monopoly over a network. After all, America Online, though also highly paternalistic²³⁰ and not known for quickly

225. *Id.*

226. *Id.*

227. Bunn, *supra* note 219.

228. *Id.*

229. Prodigy (Online Service): Conversion to a True ISP, in WIKIPEDIA, *supra* note 193, [http://en.wikipedia.org/wiki/Prodigy_\(ISP\)#Conversion_to_a_true_ISP](http://en.wikipedia.org/wiki/Prodigy_(ISP)#Conversion_to_a_true_ISP).

230. Even during the height of its popularity, America Online was heavily criticized for "embod[ying] values that are not readily conducive to the ideal of the public forum." Dawn C. Nunziato, *Exit, Voice, and Values on the Net*, 15 BERKELEY TECH. L.J. 753, 757 (2000) (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)). One law professor, writing at the peak of America Online's hegemony in 2000, admonished the service for "restrict[ing] the content of its members' speech as well as the viewpoints they may express—whether such speech

upgrading its technology,²³¹ did not alienate its users nearly as much and continued to grow its subscriber base throughout the entire 1990s and into the early 2000s until it hit a peak of more than thirty million users. But while America Online would not see its user base begin to shrink for several more years, the seeds for the decline of America Online's walled garden would be planted in the late 1990s.

In 1995, only an estimated 6.6 million Americans used the Internet.²³² That same year, America Online had more than three million subscribers and secured its position as the largest Internet service provider in the world.²³³ By the year 2000, both America Online's subscriber base and United States' Internet penetration had increased exponentially, with 124 million Americans using the Internet.²³⁴ Though America Online remained the largest Internet service provider, growing to more than twenty-three million subscribers,²³⁵ its market share fell from more than forty-five percent in 1995 to less than twenty percent in 2000. Thus, while America Online made substantial gains to its subscriber base during this period, its hegemony and influence over the Internet became less secure with every passing year, for the number of individuals connecting to the Internet outside of America Online's walled garden grew at an even higher rate than America Online's subscriber base.

Increased competition in the dial-up access market caused America Online to gradually lose its market share in the latter half of the 1990s. Though America Online gained substantial momentum by switching from hourly to unlimited billing in 1996, it did not take long for America Online to lose its position as the most affordable Internet service provider. Rate increases, combined with the launch of several discount Internet service providers that offered Internet access without a walled garden or proprietary content, caused a large number of new Internet users to turn to more affordable options than America Online. By 2001, America Online had become the most expensive of the leading monthly unlimited-use Internet service providers with a monthly fee of

occurs within AOL-space proper or anywhere else on the Net." *Id.* For example, America Online would discipline members for "crude sexual references and crude conversations about sex, as well as the expression of viewpoints about illegal drug use that imply such use is acceptable." *Id.* (internal quotation marks and footnotes omitted).

231. America Online's chat software, for instance, was unable to handle more than twenty-three individuals in a single chatroom at the same time. LESSIG, *supra* note 230, at 68–69.

232. Thomas E. Miller, *Segmenting the Internet*, AM. DEMOGRAPHICS, July 2006, at 48, 48.

233. Mark Nollinger, *America, Online!*, WIRED, Sept. 1995, at 160, 160.

234. United States Internet Usage, Broadband and Telecommunications Reports, <http://www.internetworldstats.com/am/us.htm> (last visited Sept. 10, 2008).

235. History of America Online, <http://ecommerce.hostip.info/pages/48/Aol-Time-Warner-Inc-HISTORY-AMERICA-ONLINE.html> (last visited Sept. 10, 2008).

\$23.90, which was more than Microsoft (\$21.95) and Earthlink (\$19.95), and substantially higher than discount providers Juno (\$14.95) and NetZero (\$9.95).²³⁶ Other Internet service providers also undercut America Online's marketing efforts through promotions negotiated with various computer manufacturers. Prodigy Internet, for instance, was able to obtain 1.2 million members during its first year of operations in 1999 by offering \$400 rebates on new computer purchases to consumers who also purchased Internet access through Prodigy Internet.²³⁷

America Online's walled garden, like similar telecommunications services, benefits from network effects. When network effects are present in a service, each individual consumer gains more utility from the service whenever an additional person becomes a member. In the case of America Online, every new member enhances the value of the service for everyone by providing every existing member with an additional person they can Instant Message through America Online's proprietary messaging system, or converse with in America Online's proprietary chat rooms and message boards. As former America Online Chief Executive Officer Steve Case summarized, "We recognized early on that the killer app was people."²³⁸ Conversely, every individual who leaves America Online, or chooses another provider in lieu of America Online, reduces the value of America Online for its remaining subscribers, for a departing individual represents one less person who existing users can converse with in the walled garden.

As the number of individuals accessing the Internet through services other than America Online's walled garden began to constitute a supermajority of American Internet users, interoperability became a major concern. America Online's subscribers wanted to e-mail, chat with, and Instant Message their friends and family members who purchased Internet access through a different provider, and many individuals outside America Online's walled garden wished to easily communicate with loved ones who subscribed to America Online. America Online, seeking to satisfy this subscriber demand for the ability to chat with non-subscribers, made its AOL Instant Messenger application available to the general public free of charge in May 1997.²³⁹

However, despite opening its Instant Messaging system to non-subscribers, America Online and other proprietary networks did not truly embrace or seek interoperability with the rest of the Internet. America

236. Hu, *supra* note 194.

237. Bunn, *supra* note 219.

238. Nollinger, *supra* note 233, at 199.

239. AOL Instant Messenger, in WIKIPEDIA, *supra* note 193, http://en.wikipedia.org/wiki/AOL_Instant_Messenger.

Online did not consider itself a part of the larger Internet. Rather, it viewed the Internet as a competitor to its own walled-garden service, which it considered a *substitute* for the rest of the Internet.²⁴⁰ Instead of providing unfettered Internet access, America Online's business model hinged on negotiating deals with certain preferred companies and making it difficult or impossible for its subscribers to use their competitors. For instance, an America Online subscriber "could order books . . . from Amazon or Barnes and Noble . . . but not both," or "plan travel either with Expedia or Travelocity, but not both," with it all "[d]epend[ing] on who was able to make a deal with AOL."²⁴¹ As one writer for *Wired Magazine* prophesized in 1995, "the dark horse looming over everything is the Internet itself, which some say has the potential to doom not just AOL, but all the proprietary services, to the ash heap of online history."²⁴²

At the same time America Online's customers desired more choices and interoperability, more and more companies, seeking to take advantage of the large—and continuously growing—number of individuals accessing the Internet through providers such as Earthlink and NetZero who offered unencumbered access without a walled garden, began to develop their own presences on the Internet outside of America Online's proprietary network. The creation of such websites and services that circumvented America Online's walled garden would hasten the demise of proprietary networks and eventually usher in a world where Internet users would obtain their interactive content from a wide variety of different sources, most of whom would not have any affiliation or special agreement with their Internet service provider. But this change in the demographics of interactive content providers would not be complete until technological advances in the early twenty-first century would give rise to the services some have labeled "Web 2.0," which would allow any individual to become an Internet intermediary for free and without necessarily having any technological knowledge.

3. THE ADVENT OF WEB 2.0

What is meant by the term Web 2.0? In general, "Web 2.0 is characterized by user-created content that is prevalent on social networking sites, blogs, and video sharing sites."²⁴³ Tim O'Reilly, who coined the term at a conference in 2004, defines Web 2.0 as "the business revolu-

240. See *Too Much Face(Book) Time*, Doc Searls Weblog, <http://blogs.law.harvard.edu/doc> (Oct. 23, 2007).

241. Pito's Blog, <http://www.salas.com> (Oct. 23, 2007, 13:45 EST).

242. Nollinger, *supra* note 233, at 160.

243. Anthony Ciolli, *Joe Camel Meets YouTube: Cigarette Advertising Regulations and User-Generated Marketing*, 39 U. TOL. L. REV. 121, 121 (2007).

tion in the computer industry caused by the move to the internet as platform, and an attempt to understand the rules for success on that new platform. Chief among those rules is this: Build applications that harness network effects to get better the more people use them.”²⁴⁴

In short, the typical Web 2.0 website specializes in community and allows its users to interact with each other in some way through its service. In this respect, Web 2.0 services resemble America Online and its focus on community building. But unlike America Online, a Web 2.0 website does not see itself as a substitute for the Internet, but rather acknowledges that it is just an application that is run on the Internet. Because a Web 2.0 service is typically just a regular website, and not an Internet service provider, users are able to migrate freely from one Web 2.0 service to another or, more commonly, participate in many Web 2.0 communities at the same time.

Popular examples of Web 2.0 services include Wikipedia, Flickr, and Napster.²⁴⁵ But Web 2.0 is not limited only to large, popular websites. Blogs, which some have described as the replacement for the personal webpages of the 1990s,²⁴⁶ make up the “long tail” of Web 2.0.²⁴⁷ The number of blogs, which allow individuals to easily create their own content and allow third parties to respond to that content through comments, has grown exponentially over the course of the twenty-first century. According to data gathered by Technorati, the largest blog search engine, the number of blogs has risen from 500,000 in June 2003 to four million in November 2004,²⁴⁸ and to 112.8 million in December 2007.²⁴⁹

Why was it that blogs, which were virtually non-existent in the mid to late 1990s, mushroomed in number in the early to mid 2000s? Much of this growth was due to technological advances that made it possible for the average Internet user to create and administer a blog with far greater simplicity than in the past. These advances came in the form of new content-management systems, which made it possible for users with no web-programming background to set up blogs simply by filling out a couple of forms and making a few mouse clicks.

244. *Web 2.0 Compact Definition: Trying Again*, Posting of Tim O'Reilly to O'Reilly Radar, <http://radar.oreilly.com> (Dec. 10, 2006) (emphasis omitted).

245. See Tim O'Reilly, *What Is Web 2.0: Design Patterns and Business Models for the Next Generation of Software*, O'REILLY, Sept. 20, 2005, <http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html?page=1>.

246. See *id.*

247. *The First Rule of the Blogosphere . . .*, The Long Tail, http://www.thelongtail.com/the_long_tail (May 8, 2005).

248. Rob McGann, *The Blogosphere by the Numbers*, CLICKZ NETWORK, Nov. 22, 2004, <http://www.clickz.com/showPage.html?page=3438891>.

249. Technorati Media: About Us, <http://technorati.com/about> (last visited Sept. 10, 2008).

LiveJournal, which some regard as the first such blog-content-management system, was created in March 1999, originally as a way for its creator to keep in touch with his high school friends.²⁵⁰ However, like the early Internet message boards that existed independently of the walled-garden Internet service providers, once it grew in popularity Live Journal faced difficulties accommodating a large number of users due to inefficient server architecture. In order to keep the server from slowing to a halt, in the summer of 2001 LiveJournal became a closed community and only allowed new users to register accounts if they purchased premium membership or obtained an invitation from a current user.²⁵¹

But the next few years would result in the development of several new blog-content-management systems that did not suffer from the technological drawbacks that limited the growth of LiveJournal and the 1990s' independent message boards. Movable Type, which was publicly released a month after LiveJournal became a restricted community, allowed users to create free personal-use blogs, storing each blog's content and associated data within a MySQL database.²⁵² WordPress, along with its predecessor b2\cafelog, began to provide users with a similar database-driven, free-blogging service beginning in 2003.²⁵³ These services, and the many other similar services that integrated web programming languages such as Perl and PHP with MySQL or other databases, allowed Internet users to very quickly and easily create blogs and become Internet intermediaries in their own right, with the ability to control their blogs' comments sections and other interactive features.

Concurrently with these technological advances in blogging, new software was developed to allow Internet message boards to accommodate a greater number of users, as well as make them easier to create and administer without a technical background. In February 2000, John Percival and James Limm, frustrated that the technical shortcomings of the then-standard UBB.classic software were making it difficult for their forum community to grow beyond a certain threshold, coded their own message-board software, known as vBulletin.²⁵⁴ Like the newly developed blog-content-management systems, vBulletin was coded in PHP

250. See LiveJournal FAQ: How did LiveJournal Get Started? Who Runs it Now?, <http://www.livejournal.com/support/faqbrowse.bml?faqid=4&view=full> (last visited Sept. 10, 2008).

251. Posting of Robotech Master to Everything2, <http://everything2.com> (Nov. 11, 2001, 00:58 EST). LiveJournal reverted to open registration in 2003 after making various upgrades to its code and server. Posting of smileloki to Everything2, <http://everything2.com> (Sept. 20, 2002, 19:43 EST).

252. For an overview of Movable Type's history and features, see *Movable Type*, in WIKIPEDIA, *supra* note 193, http://en.wikipedia.org/wiki/Movable_Type.

253. For an overview of WordPress's history and features, see *WordPress*, in WIKIPEDIA, *supra* note 193, <http://en.wikipedia.org/wiki/WordPress#History>.

254. vBulletin FAQ, *supra* note 190.

and made use of a MySQL database to store message-board posts and user data, which made it possible for their forum to accommodate a very large number of posts and active users.²⁵⁵ Eventually, the duo made vBulletin a public release, with some fans describing it as “arguably the best forum software on the market today.”²⁵⁶ Around the same time, another programmer, James Atkinson, coded phpBB, another user-friendly message-board software coded in PHP and overcoming UBB.classic’s shortcomings through the use of a MySQL database to store data.²⁵⁷

vBulletin, phpBB, and similar free or low-cost forum software revolutionized the Internet message-board industry by allowing small businesses and even regular individuals to build extremely large and successful Internet communities without deep technical knowledge or a large monetary investment. In fact, many of the largest message boards on the Internet—including Gaia Online, which boasts more than one million members and 1.2 billion posts as of September 2008 despite only being founded in February 2003—make use of vBulletin or phpBB and are owned and operated by individuals and small businesses of rather humble origins.²⁵⁸

The popularity of Web 2.0 services and the growing irrelevance of walled-garden providers have changed the landscape of the Internet. But while the very nature of Internet intermediaries has radically changed over the past decade, § 230 remains the same. The next Part will examine how § 230 can be reshaped to remedy the social problems caused by these significant changes.

VI. RESHAPING § 230 FOR WEB 2.0 AND BEYOND

Despite such a significant shift in the demographics of Internet intermediaries from the mid-1990s to the present day, the § 230 safe harbor has not been changed since it was first made into law in 1996. While the absolute immunity provided by § 230 remains necessary, this immunity provision alone is no longer sufficient to further the policy goals enumerated by Congress in the statute, for a statutory immunity, no matter how strong, is useless if a party cannot afford to hire an attorney to raise the immunity as a defense in court. The following sections will discuss the general rationale against awarding attorneys’ fees during the litigation process, analyze the changing nature of § 230 litigation,

255. *Id.*

256. *Id.*

257. For an overview of phpBB’s development history, see *phpBB*, in WIKIPEDIA, *supra* note 193, <http://en.wikipedia.org/wiki/PhpBB>.

258. Forums Rankings, <http://rankings.big-boards.com/?p=aLl> (last visited Sept. 10, 2008).

and explain why § 230 must be amended to award attorneys' fees and court costs to a prevailing defendant.

A. *The Rationale for Not Awarding Attorneys' Fees to Prevailing Parties*

The United States does not generally award attorneys' fees to prevailing parties. This section will examine the historical rationale for this unique policy.

1. GENERALLY

Traditionally, the United States legal system has been very reluctant to award attorneys' fees to the prevailing party in a lawsuit. In what has become known as the "American Rule," each party to a lawsuit is typically responsible for paying his own attorney's fees, regardless of the outcome of the litigation.²⁵⁹ In this respect the United States' policy differs significantly from that of most other developed countries, which typically follow the "English Rule" and award attorneys' fees to the prevailing party at the conclusion of the litigation.²⁶⁰

Why has the United States rejected the English Rule in favor of the American Rule? Early American courts were concerned with providing access to the courts and wished to encourage individuals to seek legal redress for perceived wrongs. Opponents of the English Rule argued that awarding attorneys' fees to prevailing defendants is "intolerable because even good cases have a fluke chance of losing, and the prospect of paying the resulting hefty legal fees would scare litigants with good cases into bad settlements."²⁶¹ Similarly, some have "declared that unlimited liability for fees [under the English Rule] [would] simply reward . . . extravagant expenditure of legal expenses," and thus the American Rule is necessary to prevent lawyers from performing unnecessary services or charging above-market rates solely to obtain a windfall if their client prevails.²⁶²

Although efforts to fully replace the American Rule with the English Rule in the United States have failed, including a bill in the 104th Congress that comfortably passed the U.S. House of Representa-

259. See Robin Stanley, Note, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney's Fees!*, 36 AKRON L. REV. 363, 366-67 (2003) (defining the American Rule).

260. See Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 37 (1984) (identifying the United States as "the exception rather than the rule" when it comes to awarding attorneys' fees to prevailing parties).

261. Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1188 (1996).

262. *Id.* (second and third alterations in original) (internal quotation marks omitted).

tives but did not receive a vote in the Senate,²⁶³ both the federal government and some states have carved out legislative exceptions to the American Rule that impose modified versions of the English Rule under certain specialized circumstances. For instance, Congress, aiming to provide employers and owners of public accommodations with a disincentive to unlawfully discriminate, as well as provide victims of discrimination a greater incentive to bring their cases to court, included fee-shifting provisions in the Civil Rights Act of 1964 in which defendants may be compelled to pay the attorneys' fees of prevailing plaintiffs.²⁶⁴ Congress included similar fee-shifting provisions in the Clean Water Act²⁶⁵ and the Clean Air Act.²⁶⁶

2. IN THE § 230 CONTEXT

Why did the United States Congress not attach a fee-shifting provision when it passed its § 230 legislation in 1996, as it had previously done with other statutes? As discussed in the previous Part, the Internet at the time § 230 was passed was very different from the Internet of today. Most notably, the typical Internet intermediaries in the mid-1990s who were concerned with defamation liability for the statements of third parties were large Internet service providers that hosted third-party content on their proprietary walled-garden networks.²⁶⁷

Given this context, it is not difficult to see why Congress chose to immunize Internet intermediaries without making unsuccessful plaintiffs responsible for their attorneys' fees. At the time the statute was drafted, § 230's primary beneficiaries were America Online, Prodigy, CompuServe, and other walled-garden Internet service providers whose entire business model involved acting as a conduit between paying sub-

263. H.R. 988, 104th Cong. (1995) (as passed by House, Mar. 7, 1995).

264. See Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (2000) ("In any action [for discrimination in public accommodations] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ."); *id.* § 2000e-5(k) ("In any action [for denial of equal employment opportunities] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs . . ."). But see *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978) (limiting awarding of attorney's fees to prevailing defendant under Title VII of the Civil Rights Act to situations where the plaintiff's lawsuit was "frivolous, unreasonable, or without foundation"); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (*per curiam*) (stating that the Civil Rights Act's fee-shifting provision was included to provide an incentive for plaintiffs to obtain an injunction for Title II actions).

265. Clean Water Act § 505, 33 U.S.C. § 1365(d) (2000) ("The court, in issuing a final order in any action [for violation of the Clean Water Act] . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.").

266. Clean Air Act § 307(f), 42 U.S.C. § 7607(f) (2000).

267. See discussion *supra* Part V.

scribers and large companies who would pay large sums of money for the ability to reach those subscribers to the exclusion of their competitors.²⁶⁸ Without immunity, this business model would simply not be practical, for these companies would need to choose between investing substantial resources towards censoring the speech of third-party content providers or face the prospect of massive liability for defamation or other torts.²⁶⁹ However, a fee-shifting provision was not necessary to protect the business models of such intermediaries, for America Online and other walled-garden Internet service providers received so much money from both subscriptions and third-party providers that they could easily afford to enforce their immunity in court without it affecting their bottom line, particularly when the presence of such a strong immunity would theoretically scare off most litigants. Furthermore, given the significant wealth disparities between defendant intermediaries like America Online and plaintiffs such as Kenneth Zeran, some legislators may have found it inequitable or unduly punitive to force individuals like Zeran to pay the attorneys' fees of a wealthy corporation in addition to denying them recovery.

But since blogs had not been invented yet and independent Internet forums could not achieve critical mass due to the technological glass ceiling,²⁷⁰ those drafting § 230 in 1996 could not have contemplated that just a decade later private citizens of modest or limited means would use this statutory immunity as their shield when faced with lawsuits by wealthy individuals or large companies seeking to censor their websites and, in some cases, maliciously attempting to ruin their livelihood. The following section will discuss why these changing circumstances have made it necessary for Congress to amend § 230 to include a fee-shifting provision.

B. *Why Attorneys' Fees Are Necessary Today*

Why should § 230 be amended to award attorneys' fees to prevailing defendants who were sued despite their statutory immunity? Such a fee-shifting provision would reduce the impact of wealth disparities and deter frivolous and malicious lawsuits, both of which would further Congress's stated policy goal of furthering a free marketplace of ideas on the Internet.

1. REDUCING THE IMPACT OF WEALTH DISPARITIES

Lawsuits, or even the mere threat of lawsuits, are highly stressful

268. See discussion *supra* Part V.

269. See discussion *supra* Part III.

270. See discussion *supra* Part V.

events for the parties involved. This is particularly true for members of the economic middle class, who are often terrified by the prospect of potential legal liability even if they have a strong case.²⁷¹ Since the hourly billing rates of even “inexpensive” lawyers are more than many individuals can afford, and given that the United States uses the American Rule rather than the English Rule, those of modest means faced with the prospect of defending a lawsuit may feel that even if they win in court they will lose tens of thousands of dollars—or more—in attorneys’ fees.

Not surprisingly, such individuals, when threatened with a lawsuit—particularly by a party they know has access to greater resources—often give in to the opposing party’s demands, even if they are highly unreasonable and the party’s threats are unjustified. This is especially true in situations where the person is a blogger or other Internet intermediary and the threat involves speech made by third parties in their blog’s comments section. Law professor Mike Madison best illustrates the typical reactions of bloggers who are threatened with such litigation through his own experience of co-blogging with two non-lawyers:

The short just-the-facts version is that about a month ago, a neighbor alerted me to a mini brouhaha unfolding down the block. Another neighbor was re-landscaping a backyard and in the process was about to block access to a stone path that had run between two adjacent lots for several decades and that was, in popular understanding, protected by a recorded easement. I put up a short post about communal interests embedded in claims that sound initially in purely private property, and a lively comment thread ensued, the bulk of which took aim at my allegedly communist (and Communist) sensibilities. In the course of the thread, one commenter (apparently a child who uses the path to walk to school) “outed” the landscaping family by name, and a second commenter suggested that the owner, who is apparently a lawyer, should have known better than to buy a piece of real estate without checking the record for easements. Eventually the comments got repetitive, and I shut them off. The attention of the blog moved on.

Except that the landscaping homeowner is in fact a lawyer, and that person’s father is a lawyer and a person of influence in my little suburb, and that father’s ex-wife (mother of the homeowner; are you following?) is also a person of influence here. And so, a nastygram arrived unannounced in my inbox and in the inboxes of my two co-bloggers. (At the time there were two; now, there is one.) Delete the allegedly defamatory post (for the blog had impugned the profes-

271. See Olson & Bernstein, *supra* note 261, at 1189.

sional reputation of the landscaping homeowner!), or face the consequences. There was and is no doubt that the point of the letter was to suppress community discussion of the path-blocking landscaping project. Whether an easement was recorded, and what became of that easement if it no longer exists today, are questions that remain unanswered, to the best of my knowledge.

....

I've sent and received enough nastygrams on behalf of clients to understand what they really mean, I know enough about the Communications Decency Act to understand what it really means, and I know enough lawyers and law students and law professors to understand that if we stood and fought, we'd have some fun and some stress and in the end we would likely prevail.

A lot of knowledge can be a dangerous thing. This is where the story gets interesting and perhaps worth blogging about.

Co-blogger number one, not a lawyer, asked immediately that we delete the post. The details aren't important; the point is that he was scared out of his wits by the prospect of defending a lawsuit. Co-blogger number two, also not a lawyer, was chagrined by the letter's reflection of local social hierarchy, but he decided that he had better things to do with his time than get caught up in this little mess. He withdrew from the blog.

Blogging lesson number one: All of the noblest rhetoric from Chilling Effects and the EFF and law faculty colleagues is terrific, but it doesn't mean a lot when your co-blogger turns to jelly. Should lawyers blog with non-lawyers? Maybe not; maybe lawyers simply see the world in a different light. My co-bloggers and I didn't (and don't) have a formal co-blogging agreement or liability-shielding arrangement, but even if we had, it's clear that the dynamic would have played out essentially as it did. We had discussed dealing with hypothetical defamation claims, and I had walked through the immunity analysis under Section 230 of the CDA. All seemed well. But when push came to shove, the non-lawyers got extremely nervous. There was no trust. At that moment, our relative aversion to risk was quite different, and I felt that I couldn't leave the post up if it meant that my co-blogger would remain frightened.

So down the post came.²⁷²

Professor Madison is correct that he and his co-bloggers were certainly immunized from defamation liability by § 230 and, given these facts, probably would not have been found liable for defamation even if they had been the authors of the comments in question. Yet despite Professor

272. *On Receiving a Cease & Desist Letter*, Posting of Mike Madison to Madisonian, <http://madisonian.net> (Oct. 15, 2007).

Madison's assurances, both of his non-lawyer co-bloggers decided to give in to the legal threat.

Why would Professor Madison's non-lawyer co-bloggers, and other persons in similar situations, give in to such demands even when they know the individual making the threat does not have a case due to their § 230 immunity and is simply trying to extort them into suppressing negative, yet likely truthful, information? One must consider the nature of the blog in question. Professor Madison's local politics blog²⁷³—like most blogs—is not run for profit and does not contain any advertisements or other methods of generating revenue. Because the blog is hosted on Blogger, Google's free blog hosting service,²⁷⁴ the owners do not incur any monetary expenses in maintaining the blog, with the only cost to the owners in running the blog being the opportunity costs incurred by devoting time to it.

Since the blog does not generate any profits, its owners have no tangible or monetary incentive to fight such legal threats. Rather, principle—such as a strong belief in free speech or a desire not to be bullied—provides the only real incentive for putting up a fight. In fact, in many cases individuals do not even know that they can put up a fight, for typical bloggers “do not have sufficient knowledge of the law to do anything except comply with a corporation or wealthier party's request to remove or otherwise alter allegedly defamatory blog postings.”²⁷⁵ Even when these individuals, like Professor Madison's co-bloggers, have ready access to pro bono legal representation, general fears of the legal system and the remote possibility that maybe, just maybe, their case will be the one that results in § 230 being found unconstitutional or inapplicable are often enough to scare most people into submission.

But most defendants do not have access to pro bono legal representation, and fighting for principle does not come cheap for individuals of modest means, who cannot afford the luxury of paying an attorney \$250 an hour in order to prevent the deletion of a comment written by a third party criticizing a powerful attorney for blocking a stone path.²⁷⁶ The end result is that, as in Professor Madison's case, such Internet

273. Blog-Lebo, <http://bloglebo.blogspot.com> (last visited Sept. 10, 2008).

274. *Id.*; Blogger: Create Your Free Blog, <https://www.blogger.com/start> (last visited Sept. 10, 2008).

275. Jennifer Meredith Liebman, Recent Development, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343, 370.

276. In fact, many Internet users are not willing to dedicate such resources to a legal fight even when their very own speech is being threatened. For instance, Cara Davis, the author of a knitting blog, instituted a policy of never using any company's brand name in her posts after receiving a cease-and-desist letter from a yarn company she disparaged in a blog entry. January One, <http://www.januaryone.com> (Dec. 21, 2006, 9:09 EST). Although Davis had a strong defense and “could have defended her blog in court,” she “chose not to continue exercising her right to free

intermediaries will likely grudgingly censor the protected speech of their users or even cease being Internet intermediaries altogether.

Amending § 230 to allow for a fee-shifting provision will not completely remedy the problem of non-lawyer bloggers “turning into jelly” upon receipt of a cease-and-desist letter. However, such a fee-shifting provision would greatly reduce the impact of wealth disparities, and make it significantly more likely that Internet intermediaries that are not large, wealthy corporations will stand up to such threats and not censor their users solely because they are unable to afford to assert their § 230 immunity. But perhaps most importantly, a fee-shifting provision would greatly reduce the number of cease-and-desist letters that ultimately become lawsuits.

2. DETERRING FRIVOLOUS AND MALICIOUS LAWSUITS

The situation encountered by Professor Madison and his co-bloggers did not result in actual litigation.²⁷⁷ But would the landscaping lawyer have followed through with his threat to sue Professor Madison and his co-bloggers if the offending post had not been removed? Since the post actually was removed, it is unlikely we will ever know if the situation would have escalated further if the cease-and-desist letter had been ignored or if the deletion request had been denied.

Unfortunately, it would not have been unusual for this disgruntled lawyer to sue Professor Madison and his co-bloggers despite their § 230 immunity. Although the § 230 immunity is now well-established law, many individuals and corporations continue to file lawsuits against Internet intermediaries that are obviously immunized from all liability under the statute.²⁷⁸ This sub-section will examine why these lawsuits continue to proliferate and why a fee-shifting provision is necessary to deter them.

When analyzing why certain plaintiffs sue § 230 intermediaries for defamation despite their clear and unambiguous statutory immunity, it

speech online” because “she may not have been able to engage in a protracted legal battle to protect her right to speak freely.” Liebman, *supra* note 275, at 370.

277. *On Receiving a Cease & Desist Letter*, *supra* note 272.

278. *See, e.g.*, DiMeo v. Max, 248 F. App’x 280, 281 (3d Cir. 2007) (suing an immune message-board owner); Parker v. Google, Inc., 242 F. App’x 833, 834–35, 838 (3d Cir. 2007) (*per curiam*) (suing an immune search engine), *cert. denied*, 128 S. Ct. 1101 (2008); Browne v. Avvo, Inc., 525 F. Supp. 2d 1249, 1255 (W.D. Wash. 2007) (suing an immune website); Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 849, 850 (W.D. Tex. 2007) (suing an immune social-networking website), *aff’d*, 528 F.3d 413 (5th Cir. 2008); Complaint at 1–2, 4, 16, Doe v. Ciolli, No. 3:07-cv-00909-CFD (D. Conn. June 8, 2007) (suing an immune website employee); Complaint at 2, 5–6, RSA Enters. v. Rip-Off Report.com, No. 2:07-cv-01882-HAA-ES (D.N.J. Apr. 23, 2007) (suing an immune search engine); Amended Complaint at 1–2, 5–6, Toback v. Google, Inc., No. 06-007246 (N.Y. Sup. Ct. May 22, 2006) (suing an immune search engine).

may be helpful to explore why individuals choose to file suit against anyone for defamation in the first place. Unlike most personal-injury lawsuits, defamation lawsuits are rarely lucrative for the plaintiff. In fact, plaintiffs prevail in only thirteen percent of all defamation lawsuits.²⁷⁹

Why do individuals continue to file defamation lawsuits when the chance of receiving money damages is so remote? As one may surmise, most defamation plaintiffs did not file suit out of a desire to receive damages from the defendant. According to one researcher's findings, only twenty-five percent of defamation plaintiffs initiated legal proceedings primarily to get money, with the remaining seventy-five percent motivated by non-monetary factors.²⁸⁰

So what non-monetary desires motivate most defamation plaintiffs? One study of defamation plaintiffs has found that "[m]ost plaintiffs sue to correct the record and to get even" with the defendant.²⁸¹ This same study "found that the act of filing a suit seemed to bring a feeling of victory to the plaintiff,"²⁸² and research by other scholars has confirmed that, regardless of the actual outcome, individual plaintiffs "win" simply by filing a lawsuit against the defendant.²⁸³

But if the overwhelming majority of defamation plaintiffs receive no monetary damages, and primarily sue in order to vindicate themselves and punish the defendant, how are defamation plaintiffs able to afford their own lawyers? Simply put, "it is cheap for libel plaintiffs to sue," with one study reporting that "[r]oughly eighty percent" of defamation plaintiffs "engage lawyers on a contingency fee arrangement."²⁸⁴ Although only a tiny fraction of defamation lawsuits result in monetary damages, lawyers are still willing to represent defamation plaintiffs on a contingent-fee basis because the average verdict in a successful defamation lawsuit is often in the millions of dollars.²⁸⁵

Furthermore, the costs of defamation litigation disproportionately fall on the defendant. One study found that over ninety percent of all the

279. RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 116 tbl.6-6 (1987).

280. Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 744 (1986).

281. Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985).

282. Shannon M. Heim, *The Role of Extra-Judicial Bodies in Vindicating Reputational Harm*, 15 COMM'LAW CONSP'CTUS 401, 406 (2007).

283. Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 301 (1994).

284. Bezanson, *supra* note 281, at 228.

285. See MARC A. FRANKLIN & DAVID A. ANDERSON, *CASES AND MATERIALS ON MASS MEDIA LAW* 339-40 (5th ed. 1995) (stating that the average jury award in libel trials is \$1.5 million).

money spent in the average defamation lawsuit go to the defendant's legal fees and expenses, while a plaintiff's legal fees and expenses only account for 3.5 to eight percent of the total costs of litigation.²⁸⁶ Such great cost disparities provide plaintiffs with a dual incentive to sue for defamation even when they know they are unlikely to win in court, for a plaintiff can initiate legal proceedings at very little cost to itself while at the same time punishing the defendant by forcing it to incur virtually all of the costs of litigation.

Given this background on why individuals typically sue for defamation, it is not surprising that individuals continue to sue Internet intermediaries for the alleged defamatory statements of third parties despite the existence of the § 230 immunity. Since the overwhelming majority of plaintiffs in traditional defamation cases already know prior to filing suit that they have little chance of recovery and are suing primarily to vindicate themselves or to hurt the defendant, the § 230 immunity as currently constructed does not provide such plaintiffs with a good reason not to sue the Internet intermediary, for these plaintiffs do not expect to receive money damages in the first place. Because even plaintiffs who are not able to obtain contingent-fee representation still bear only a relatively small portion of the overall costs of litigation, the expense of filing a lawsuit may be a very reasonable price for an individual to pay in order to "ruin a blogger's life."²⁸⁷

When examining this continued proliferation of lawsuits against § 230 immunized intermediaries—particularly those owned by regular individuals—we should also consider the special circumstances involving corporate defamation plaintiffs. Like individual plaintiffs, corporate defamation plaintiffs often face very little prospect of recovering damages from those they sue for defamation.²⁸⁸ However, unlike the typical individual defamation plaintiff, "[a] company's decision to sue . . . makes some degree of financial sense,"²⁸⁹ for "[b]ringing suit sends a message to shareholders and potential investors that they should not believe all the negative information they hear about the company."²⁹⁰ In other words, the mere act of filing a defamation lawsuit "quells rumors and takes the focus away from . . . negative press the company has been receiving—whether true or untrue."²⁹¹ Similarly, filing a lawsuit may

286. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1207 (1995).

287. Technology & Marketing Law Blog, <http://blog.ericgoldman.org> (Oct. 28, 2007, 10:57 EST).

288. Lidsky, *supra* note 146, at 875–76.

289. *Id.* at 880.

290. *Id.* at 880–81.

291. *Id.* at 881.

result in victory for a corporation if the lawsuit results in “silencing” the defendant and others in the defendant’s position.²⁹²

Given a corporation’s motives for filing a defamation lawsuit, it is not surprising that some Internet intermediaries may be sued despite their § 230 immunity. Because the goal of a defamation suit filed by a corporation is generally to send a message or to silence a speaker, rather than to actually win and recover monetary damages, the existence of the § 230 immunity does not provide a strong deterrent to filing suit against an intermediary for the speech of a third-party user, for the corporation has much to gain from filing such a lawsuit but very little potential for loss.

C. *Potential Model: California’s Anti-SLAPP Legislation*

What might an amendment to § 230 requiring the use of fee shifting potentially look like? One may look to the state of California’s Anti-SLAPP legislation as a potential model.

1. AN OVERVIEW OF SLAPP LAWSUITS

Strategic Lawsuits Against Public Participation—or “SLAPP” suits²⁹³—are lawsuits “without substantial merit brought against individuals or groups with the intention of ‘silencing [the] opponents, or at least . . . diverting their resources,’ ”²⁹⁴ with “the effect of interfering with the defendants’ past or future exercise of constitutionally protected rights.”²⁹⁵ The plaintiff’s purpose in filing a SLAPP suit “is not to win, but rather to chill the defendants’ activities of speech or protest and to discourage others from similar activities.”²⁹⁶ Given this motive, one who files a SLAPP suit “expects to lose and is willing to write off litigation expenses . . . as the cost of doing business.”²⁹⁷ Defamation is the most common cause of action pursued through a SLAPP suit, though intentional infliction of emotional distress and invasion of privacy are also common.²⁹⁸

292. *Id.*

293. The term “SLAPP” was first coined by Professor George W. Pring. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

294. Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802 (2000) (alterations in original) (quoting John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 396 (1993)).

295. *Id.* at 802–03.

296. *Id.* at 803–04.

297. *Id.* at 805.

298. *Id.* at 804–05.

2. CALIFORNIA'S RESPONSE TO SLAPP SUITS

California's legislature, finding "that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances,"²⁹⁹ amended the state's Code of Civil Procedure in 1993 in order to deter the filing of SLAPP suits in the state.³⁰⁰ These amendments, commonly known as California's Anti-SLAPP Statute, provide a variety of safeguards for the targets of SLAPP lawsuits. This Anti-SLAPP Statute has consistently withstood constitutional scrutiny, with most courts applying it broadly, as the legislature had intended.³⁰¹

First, the Anti-SLAPP Statute allows a defendant to make a special motion to strike within sixty days of service of the complaint, which must be heard by the court within thirty days of the motion being served.³⁰² The ability for a defendant to make this special motion at such an early stage of the litigation not only greatly reduces the amount of time a defendant must spend fighting the SLAPP suit, but also significantly lowers the extent of the defendant's attorney's fees, for much of the defendant's fees would be incurred during pretrial discovery, which is suspended while the special motion is pending.³⁰³

Second, the statute allows a prevailing defendant to recover his or her litigation costs and attorney's fees immediately upon dismissal of the SLAPP suit.³⁰⁴ This fee-shifting provision not only makes a prevailing defendant whole with respect to the damages he has incurred as a result of the frivolous lawsuit, but gives the defendant an incentive to fight the SLAPP suit in the first place rather than "shutting up" or otherwise giving in to an unreasonable demand made by the plaintiff. In order to deter frivolous motions to strike by defendants who are actually not the victims of SLAPP suits, the statute also allows a prevailing plaintiff to be reimbursed for his or her attorney's fees incurred in fighting a motion to strike if the court finds that the motion was without merit.³⁰⁵

Finally, the legislation provides for an immediate appeal by the party who loses the motion to strike.³⁰⁶ As with the provision allowing

299. CAL. CIV. PROC. CODE § 425.16(a) (West 2008).

300. *See id.* § 425.16.

301. *See, e.g.,* DuPont Merck Pharm. Co. v. Superior Court, 92 Cal. Rptr. 2d 755, 758-59 (Ct. App. 2000); Monterey Plaza Hotel v. Hotel Employees & Rest. Employees Local 483, 82 Cal. Rptr. 2d 10, 13-14 (Ct. App. 1999); Beilenson v. Superior Court, 52 Cal. Rptr. 2d 357, 359, 361 (Ct. App. 1996); Church of Scientology of Cal. v. Wollersheim, 49 Cal. Rptr. 2d 620, 629-32 (Ct. App. 1996); Matson v. Dvorak, 46 Cal. Rptr. 2d 880, 882, 885-86 (Ct. App. 1995).

302. CAL. CIV. PROC. CODE § 425.16(f).

303. Tate, *supra* note 294, at 811.

304. CAL. CIV. PROC. CODE § 425.16(c).

305. *Id.*

306. *Id.* § 425.16(i).

for the motion to strike, this provision greatly benefits a SLAPP defendant by preventing the defendant from “having to incur the cost of the full lawsuit before the constitutional rights issue is fully adjudicated.”³⁰⁷

3. SECTION 230 AND CALIFORNIA’S ANTI-SLAPP LEGISLATION

SLAPP lawsuits and defamation lawsuits filed against Internet intermediaries immunized by § 230 have much in common. Both types of lawsuits are typically brought by plaintiffs who do not expect to actually obtain monetary damages from the defendant, but wish to merely send a message or punish the defendant for its lawful conduct. Furthermore, both SLAPP suits and litigation against immunized § 230 intermediaries often involve individual defendants who are particularly sensitive to the costs of defending a lawsuit and may be particularly susceptible to giving in to the plaintiff’s threats or unreasonable demands because the costs of litigation are too much to bear. Given these similarities, it is not surprising that the California Supreme Court has found that the Anti-SLAPP Statute is applicable to lawsuits filed against immunized § 230 defendants in California state court.³⁰⁸ Amending § 230 to include a fee-shifting provision modeled after the Anti-SLAPP Statute would extend these same protections to Internet intermediaries nationwide.

D. *Addressing Counterarguments*

Some may argue that a fee-shifting provision in § 230 would have a chilling effect on legitimate defamation lawsuits, or that this proposed provision would duplicate Rule 11 sanctions or the wrongful litigation torts. This section will respond to these counterarguments.

1. SECTION 230 FEE-SHIFTING WILL NOT CHILL LEGITIMATE LAWSUITS

As discussed earlier, a common argument against fee-shifting provisions is that the prospect—no matter how remote—of having to pay a defendant’s attorney’s fees will deter plaintiffs from pursuing legitimate causes of action against defendants who should be held liable for their actions.³⁰⁹ Thus, one may be tempted to argue that awarding attorneys’ fees to defendants who successfully assert their § 230 immunity would cause many plaintiffs to fear filing lawsuits based on defamatory Internet statements even when such lawsuits have merit.

But lawsuits against defendants immunized by § 230 differ from other types of actions in one important way: Section 230 and the judicial

307. Tate, *supra* note 294, at 812.

308. See Barrett v. Rosenthal, 146 P.3d 510, 514 n.4 (Cal. 2006).

309. Olson & Bernstein, *supra* note 261, at 1188.

opinions interpreting it are very clear and unambiguous as to who is immunized and who is not immunized. Applying the statute is very simple: If the defendant did not write the allegedly defamatory statements in question, then the defendant is immune under § 230, whereas if the defendant was the author of those statements then he or she is not immune. It should not be too much to ask that a plaintiff actually make an attempt to investigate and establish the identity of the alleged tortfeasor prior to initiating legal proceedings.

A critic may respond by correctly pointing out that there are instances where it may be difficult to identify the author of the alleged defamatory statement because the author was anonymous, and it may be theoretically possible that the anonymous speaker is the Internet intermediary. But even in this situation there should be no reason to take the extraordinary step of suing the Internet intermediary simply because the actual author remains unknown. Rather than suing the intermediary just because it is convenient or easy, the plaintiff should file a "John Doe" lawsuit against the anonymous author, and then attempt to subpoena information regarding the anonymous author's identity, subject to the protections established in *Doe v. Cahill*³¹⁰ and similar cases.³¹¹ If a plaintiff's case is sufficiently strong enough, the plaintiff will obtain this identifying information and then be able to amend its complaint to include the real name of the "John Doe" defendant.

Therefore, adding a fee-shifting provision to § 230 will not discourage legitimate defamation lawsuits arising in the Internet context. All such a provision would do is require that plaintiffs sue the correct party—the author of the defamatory statement, not the Internet intermediary. While some lawsuits will be discouraged by this provision—namely, those filed without probable cause or with an intent to financially ruin an intermediary—these are not the type of lawsuits that should ever be filed in the first place, and thus society would be better off without them.

2. WHY SANCTIONS ARE NOT A SUBSTITUTE FOR A FEE-SHIFTING PROVISION

Some may argue that § 230 does not require an attorneys' fees provision because Rule 11 of the Federal Rules of Civil Procedure already allows Internet intermediaries who were wrongfully sued to obtain redress. Rule 11(b) states as follows:

By presenting to the court a pleading, written motion, or other

310. 884 A.2d 451 (Del. 2005).

311. *E.g.*, *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) (establishing a "summary judgment-plus" standard for the unmasking of anonymous Internet speakers).

paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.³¹²

Rule 11(c) allows for a court, upon its own motion or motion by one of the parties, to “impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.”³¹³ These sanctions may include paying part or all of the victimized party’s “reasonable attorney’s fees and other expenses directly resulting from the violation.”³¹⁴

At first glance, it may appear that Rule 11 sanctions provide a sufficient remedy for immune Internet intermediaries who have been victimized through the wrongful initiation of civil proceedings against them. However, it is important to note that Rule 11 was not designed for the purpose of making injured parties whole. As Rule 11(c)(4) clearly states, “A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”³¹⁵ As one court succinctly summarizes, “[t]he main objective of [Rule 11] is not to reward parties who are victimized by litigation, but to deter baseless filings,” with sanctions not being considered a substitute for tort damages even though sanctioning a party may benefit its adversary.³¹⁶ In contrast, the proposed new attorneys’ fees provision of § 230 would have a dual objective of both deterring frivolous lawsuits against immune intermediaries and providing such intermediaries with an incentive to make use of their immunity in court rather than give in to

312. FED. R. CIV. P. 11(b).

313. *Id.* 11(c)(1).

314. *Id.* 11(c)(4).

315. *Id.*

316. *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 393 (3d Cir. 2002) (first alteration in original) (internal quotation marks omitted).

threats to censor the speech of their users in order to avoid incurring litigation costs.

Furthermore, courts are very reluctant to impose Rule 11 sanctions even when a plaintiff commences an action that is clearly lacking in merit. This is particularly true in § 230 cases, where a plaintiff can simply claim that it seeks to “extend, modify, or reverse existing law” involving the constitutionality of the § 230 statute or how it has been interpreted. In many cases, defendants who are the victims of such lawsuits are advised by their attorneys not to make a motion for Rule 11 sanctions because they are so rarely awarded. For instance, Tucker Max, a message-board owner whose § 230 immunity was affirmed by both the United States District Court for the Eastern District of Pennsylvania³¹⁷ and the Third Circuit Court of Appeals,³¹⁸ was strongly advised by his attorney not to request sanctions because “the local rules in Philly are such that it is almost impossible to win a Rule 11 motion.”³¹⁹ In addition, even when sanctions are awarded, they often do not make the party injured by the wrongful conduct whole.³²⁰

One must also consider that Rule 11 exists only in federal court, and thus, even if Rule 11 were an adequate remedy, it would not apply to cases such as *Barrett v. Rosenthal*,³²¹ which were litigated in the state court system. Though most states have adopted sanctions rules similar to Rule 11, they are not uniform and, like Rule 11, were designed primarily to compensate the courts for having to deal with frivolous lawsuits rather than to compensate injured parties.

3. THE UNJUSTIFIABLE LITIGATION TORTS ARE INADEQUATE

Still others may argue that amending § 230 is not necessary, for various common-law-tort actions that already exist can be used to deter malicious plaintiffs and compensate immunized defendants. Though the names and elements of these torts vary from jurisdiction to jurisdiction, these causes of action are most commonly known as abuse of process and wrongful initiation of civil proceedings.

The *Restatement of Torts* defines abuse of process as the use of “a

317. *DiMeo v. Max*, 433 F. Supp. 2d 523, 531 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007).

318. *DiMeo*, 248 F. App'x at 281–82.

319. The Legal Satyricon, <http://randazza.wordpress.com> (Sept. 25, 2007, 8:51 EST) cmt. Tucker Max.

320. *See, e.g., BidZirk, LLC v. Smith*, No. 6:06-109-HMH, 2007 WL 3119445, at *8–9 (D.S.C. Oct. 22, 2007) (sanctioning plaintiff's counsel for filing a *lis pendens* on the defendant's condo in order to secure a judgment in a frivolous defamation lawsuit, but only in the amount of \$1000).

321. 146 P.3d 510 (Cal. 2006).

legal process, whether civil or criminal, against another primarily to accomplish a purpose for which it is not designed.”³²² An example of abuse of process according to the *Restatement* would be an individual obtaining a judgment for a debt and then, after the debt has already been paid, taking out execution on the judgment.³²³

But the abuse-of-process tort is limited in that liability is not imposed for the wrongful initiation of civil proceedings.³²⁴ Though there certainly may be situations where the abuse-of-process tort may benefit a defendant immunized by § 230, the tort is not intended to allow recovery for simply filing a frivolous lawsuit against such a defendant. Thus, because of its narrow nature, the abuse-of-process tort cannot be considered a substitute for a fee-shifting provision.

One must also consider the wrongful-initiation-of-civil-proceedings tort. According to the *Restatement of Torts*,

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.³²⁵

Because the wrongful-initiation-of-civil-proceedings tort clearly seeks to compensate victims of frivolous lawsuits, of all existing remedies it is perhaps the most analogous to the proposed fee-shifting provision. However, while a closer fit than abuse of process, it is also not a substitute for amending § 230 to require fee shifting.

Why is the wrongful-initiation-of-civil-proceedings tort not a substitute for fee shifting? The tort, as outlined in the *Restatement*, is concerned with frivolous lawsuits that are especially egregious. In particular, the *Restatement*’s version of this tort requires two elements—a lack of probable cause, and an improper purpose—that are not present in every lawsuit against an immune § 230 defendant.

According to the *Restatement*, probable cause exists when the relevant individual “correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or . . . believes to this effect in reliance upon the advice of counsel.”³²⁶ Just as a party can escape Rule 11 sanctions by arguing that it is seeking to change the law,

322. RESTATEMENT (SECOND) OF TORTS § 682 (1977).

323. *Id.* cmt. a, illus. 2.

324. *Id.* cmt. a.

325. *Id.* § 674.

326. *Id.* § 675.

an individual may avoid liability for wrongful initiation of civil proceedings by arguing that the lawsuit was filed to challenge the continuing validity of § 230. Similarly, liability could be avoided for suing an intermediary over the speech of an anonymous or pseudonymous user by simply accusing the intermediary of being the anonymous speaker and later attributing the naming of the intermediary in the lawsuit as a permissible mistake of fact.³²⁷

The *Restatement* further states that for the improper-purpose requirement to be fulfilled, "the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based."³²⁸ Under the *Restatement's* view, an improper purpose is not present when an individual files suit with the belief that "the law is potentially subject to modification and that this case may be a suitable vehicle for producing further development or change."³²⁹ Similarly, a claim is considered meritorious even if an individual "believes that the actual facts warrant the claim but recognizes that his chances of proving the facts are meager."³³⁰ Generally, the improper-purpose element can only be met if the victim of the litigation can show that the original plaintiff knew that the claim was false or was based on manufactured or perjured testimony, or if the proceedings were initiated out of malice or an attempt to coerce a settlement in an unrelated matter.³³¹

Given these additional elements, it's clear that the wrongful-initiation-of-civil-proceedings tort is meant to punish conduct that is far more extreme than the typical frivolous lawsuit. This is reflected in the damages a successful plaintiff is entitled to, which include:

- (a) the harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of [the plaintiff's] land, chattels or other things, suffered by [the plaintiff] during the course of the proceedings, and
- (b) the harm to [the plaintiff's] reputation by any defamatory matter alleged as the basis of the proceedings, and
- (c) the expense that [the plaintiff] has reasonably incurred in defending himself against the proceedings, and
- (d) any specific pecuniary loss that has resulted from the proceedings, and
- (e) any emotional distress that is caused by the proceedings.³³²

327. *See id.* cmt. d.

328. *Id.* § 676.

329. *Id.* cmt. c.

330. *Id.*

331. *Id.*

332. *Id.* § 681.

In contrast, the proposed fee-shifting amendment to § 230 would merely require that an unsuccessful plaintiff reimburse an immunized defendant for its attorney's fees incurred in defending the action. After all, the purpose of such fee-shifting would be the furtherance of the free market of ideas on the Internet—awarding attorneys' fees to prevailing § 230 defendants would deter plaintiffs from initiating litigation against clearly immunized Internet intermediaries, as well as make it possible for individual Internet intermediaries to protect the speech rights of their users without incurring large attorney's fees that they cannot afford. Guaranteed recovery for emotional distress and other losses besides attorney's fees and costs is not necessary to increase an Internet intermediary's likelihood of resisting a threatening letter. Furthermore, as the number of lawsuits that continue to be filed against clearly immunized defendants demonstrates, the wrongful-initiation-of-civil-proceedings tort is not currently sufficient to deter litigation against immunized intermediaries, given the very high bar to recovery that is required.

It is also worth noting that, as with Rule 11, the wrongful-initiation-of-civil-proceedings tort is not applied uniformly throughout the United States. Though a majority of states have adopted the *Restatement's* view,³³³ several states apply the tort in an even more limited capacity. Rhode Island, for instance, requires that a plaintiff seeking recovery through this tort show "'special injury' beyond the trouble, cost, and other consequences normally associated with defending oneself against an unfounded legal charge,"³³⁴ with Illinois also requiring the plaintiff to demonstrate such a special injury.³³⁵

To summarize, a fee-shifting provision and the common-law wrongful-initiation-of-civil-proceedings tort would not be substitutes for each other, but complements. The fee-shifting provision would apply to most situations where an Internet intermediary was wrongfully sued, and would be awarded to the prevailing intermediary at the conclusion of the litigation. However, the wrongful-initiation-of-civil-proceedings tort would still be available to allow immunized defendants to obtain an additional recovery through a second, follow-up lawsuit in the particularly egregious situations where the intermediary can meet the high burden of proving both a lack of probable cause and an improper purpose.

Although a fee-shifting provision will deter some individuals from filing suit against immunized intermediaries and allow those intermediaries who are the subject of frivolous lawsuits to be made

333. *Id.* § 674 reporter's note (App. 1981).

334. *Jacques v. McLaughlin*, 401 A.2d 430, 431 (R.I. 1979).

335. *Nemanich v. Long Grove Country Club Estates, Inc.*, 255 N.E.2d 466, 467 (Ill. App. Ct. 1970).

whole, this solution alone does not address the underlying needs of potential plaintiffs who—rightly or wrongly—believe they have been defamed on the Internet and feel they have no recourse. The following Part will propose additional legislation that Congress may wish to consider to provide such individuals with the recovery that they truly desire.

VII. NO-FAULT DEFAMATION AS AN ALTERNATIVE TO TRADITIONAL LITIGATION

Many scholars and activists have examined the issue of defamatory Internet speech and have proposed various solutions to the problem, most of which involve repealing or amending § 230 to make Internet intermediaries vicariously liable in tort for the defamatory statements of their users. As will be discussed in greater detail in Parts VIII and IX, for a variety of reasons imposing publisher or distributor liability on Internet intermediaries is not a desirable course of action.³³⁶ But what is the best solution to this problem? Though some of § 230's proponents romanticize the common law, rarely is the question asked of whether the traditional defamation causes of action are actually the best method for victims of Internet defamation to recover for their injuries. This Part will advocate for the creation of a statutory no-fault-defamation cause of action as an alternative to the traditional defamation torts.

A. *Criticisms of the Defamation Torts*

Up to this point, it has largely been taken as a given that libel, slander, and related speech torts are effective vehicles for those harmed by defamatory statements, both online and offline. Defamation, however, remains one of the more controversial tort actions in the United States. In fact, some scholars have proposed eliminating the defamation torts altogether.³³⁷ This section will summarize the major criticisms of the defamation torts as they are currently constructed.

1. MONEY DAMAGES FOR PSYCHOLOGICAL HARM IS UNJUSTIFIED

A common argument against the defamation torts—and especially from those who wish to see such torts completely abolished—is that money damages should not be the remedy for those who have suffered psychological harm with no provable economic loss. Calvert Magruder, for instance, observed in 1936 that “the common law has been reluctant to recognize the interest in one’s peace of mind as deserving of general and independent legal protection” and argued that “a certain toughening

336. See discussion *infra* Parts VIII, IX.

337. See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 551 (1991).

of the mental hide is a better protection than the law could ever be" for defamation victims.³³⁸ Others have implied that defamation lawsuits brought to recover for mere psychic injury are un-American.³³⁹ And though the common law has since embraced compensation solely for psychic injury, some continue to argue that such torts should be abolished.³⁴⁰

Why oppose monetary compensation for psychic injury? By its very nature, psychic or emotional injury is not objectively verifiable, and thus awarding a precise monetary figure to compensate a plaintiff for such harm is difficult, if not impossible.³⁴¹ Furthermore, because such damages are not objectively verifiable, juries may be prone to emotion and award such libel plaintiffs "stupendous sums" of money that greatly exceed the amount of money needed to compensate the plaintiff for harm actually suffered.³⁴²

The argument against awarding money damages to defamation victims whose suffering is solely based on unverifiable psychic injury or a theory of general harm to reputation is further strengthened by the reasons defamation plaintiffs instituted their actions. As mentioned in the previous Part,³⁴³ more than seventy-five percent of defamation plaintiffs initiated legal proceedings not to recover money, but to get their side of the story out there or to simply punish the defendant.³⁴⁴ Given that a supermajority of defamation plaintiffs file suit primarily for reasons that have nothing to do with obtaining money damages, it is difficult to justify why plaintiffs who have not suffered verifiable economic loss as a result of a defamatory statement should receive money damages from the defendant even if they are successful.

2. TENSION WITH THE FIRST AMENDMENT

Other authors have criticized defamation law due to its inherent tension with the freedom-of-speech-and-press provisions of the First Amendment. Though the United States Supreme Court has erected several significant barriers that defamation plaintiffs who are public figures

338. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

339. See, e.g., David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 731-34 (1942).

340. See, e.g., FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 155 (1981).

341. See Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 18-19 (1983).

342. *Id.* at 21.

343. See discussion *supra* Part VI.

344. Bellah, *supra* note 280, at 744.

must overcome to obtain recovery,³⁴⁵ such as the actual-malice requirement, in order to allay First Amendment concerns, these additional elements do not apply to defamation plaintiffs who are purely private figures. Thus, there is still a fear that defamation law can be used as an instrument to punish individuals and media outlets for honest mistakes of facts.

Arguably, the biggest danger defamation law as it stands today poses to First Amendment freedoms is the potential that legitimate, socially beneficial speech will be chilled due to the threat of potential litigation. Many believe that defamation law thus "overdeters" speech by "encourag[ing] prospective speakers to engage in undue self-censorship" of "speech that is truthful or nondefamatory" in order "to avoid the negative consequences of speaking."³⁴⁶ Although the Supreme Court, through its rulings, has attempted to reduce the impact of this chilling effect on the mass media, "chilling-effect arguments have particular resonance in cases involving 'nonmedia' defendants like those typically sued in . . . Internet libel cases."³⁴⁷

Why are nonmedia defendants particularly susceptible to a chilling effect? As discussed in the prior Part, the owners of blogs, discussion forums, and other online media are typically regular individuals who do not have defamation insurance or access to large sums of money.³⁴⁸ As a result, "wealthy plaintiffs can successfully use the threat of a libel action to punish the defendant for her speech, regardless of the ultimate outcome of the libel action."³⁴⁹ In addition to not being able to afford lawyers, nonmedia defendants may not even possess the resources to litigate their case pro se when a plaintiff engages in strategic forum selection by filing suit in a court far from where the defendant actually resides, on a theory that statements published on a website can be downloaded in any jurisdiction. One such nonmedia Internet libel defendant explained the predicament, stating that "we ha[d] no way to travel [to Arizona] to defend ourselves. [T]he apparent aim there [was] to prevent us from answering their charges, so that they [would] win a default judgment against us. . . . They want[ed] us quiet."³⁵⁰ While some defendants may obtain pro bono legal assistance, most are not as lucky, and even more will engage in self-censorship of truthful speech in order to avoid having to deal with a lawsuit.

345. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974); *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

346. Lidsky, *supra* note 146, at 888.

347. *Id.* at 889 (footnote omitted).

348. See discussion *supra* Part VI.

349. Lidsky, *supra* note 146, at 891.

350. *Id.* at 892 (alterations in original).

3. TORT LAW NOT AN APPROPRIATE VEHICLE FOR DEFAMATION LAW'S
UNDERLYING PURPOSE

Perhaps the most compelling argument against the current state of defamation law is that tort law is simply not an appropriate vehicle for furthering the defamation torts' primary purpose of repairing damage to one's reputation. Given that only a mere 12.6% of defamation lawsuits result in a victory for the plaintiff,³⁵¹ few plaintiffs actually receive the vindication they seek—a conclusive finding that the defamatory statements about them are false.

Why do so few defamation lawsuits end with a victory for the plaintiff? Although some defamation lawsuits certainly lack any merit, many do involve actual false or potentially false statements about the plaintiff. But while many defamation lawsuits may involve statements that could be false, most defamation lawsuits are dismissed without any examination of whether the statements at issue are true or false ever taking place.

One may wonder why judges dismiss defamation lawsuits without actually considering the falsity of the very statements at issue. As one author summarized, "Truth is little used as a defense, though it would enable a decisive confrontation, because it may be very expensive to establish."³⁵² Because of the high costs of litigating a defamation lawsuit based on an issue of fact—whether the alleged defamatory statement is true or false—particularly when juries are usually not receptive to First Amendment defenses or sympathetic to defamation defendants,³⁵³ defamation defendants prefer to first contest cases based on issues of law that may be resolved in a summary-judgment motion. For instance, defamation defendants who have been sued by public-figure plaintiffs will typically "invoke the actual malice standard" on summary judgment because "it is easier and less risky" than contesting falsity, which would be "more likely to require a full-blown trial."³⁵⁴

As a result of many defamation lawsuits being resolved through summary judgment based on issues that have little or nothing to do with the actual statements at issue, many defamation plaintiffs are deprived "of any legal remedy for most defamatory falsehoods."³⁵⁵ More to the point, such dismissals make it difficult for defamation victims to ultimately claim that their reputational interests have been properly vindi-

351. BEZANSON ET AL., *supra* note 279, at 116 tbl.6–6.

352. MARC A. FRANKLIN, *CASES AND MATERIALS ON MASS MEDIA LAW* 137 (3d ed. 1987).

353. Cf. Evan L. Schwab & James C. Barton, *Trial of a Libel Case*, in *LIBEL LITIGATION* 1981, at 285, 293 (R. Winfield ed., 1981).

354. Anderson, *supra* note 337, at 521.

355. *Id.* at 524.

cated. The dismissal of a defamation plaintiff's lawsuit—for any reason—naturally casts doubt on whether the plaintiff was justified in suing the defendant in the first place. Defamation defendants who have the lawsuits against them dismissed, even on technical grounds unrelated to the purported defamatory statements about the plaintiff, may promote the dismissal as evidence that the defendant was not at fault for the original statements—or even that the statements about the plaintiff were true—even if a court never addressed the issue of falsity when reaching its decision. In any case, because the issue of truth is almost never addressed by most courts before the plaintiff's case is dismissed, the typical defamation plaintiff never receives the vindication that motivated him or her to file a defamation lawsuit in the first place.

B. *No-Fault Defamation as an Alternative to Common-Law Defamation*

A new statutory tort of no-fault defamation would allow those who believe they are victims of defamatory Internet statements to receive the vindication they desire without the need for filing frivolous lawsuits against Internet intermediaries immunized by § 230. As the name implies, a successful no-fault-defamation cause of action would result in a judicial finding that the elements of defamation have been met, but without a finding that the defendant was at fault for the defamatory statements and without assessing any damages against the defendant. The following sub-sections will examine previous no-fault-defamation proposals from the pre-Internet era and explain why no-fault defamation, while perhaps not a necessary tort in the 1980s or 1990s, would provide the ideal solution to the current Internet defamation problem.

1. EARLIER NO-FAULT-DEFAMATION PROPOSALS

No-fault defamation is not a new idea or concept. Several authors, witnessing the proliferation of defamation lawsuits against media defendants in the 1970s and 1980s, primarily filed by public-figure plaintiffs subject to the actual-malice standard, proposed variations of no-fault defamation as a method of furthering the interests of both sides. According to such authors, no-fault defamation would help defendants by substantially reducing litigation costs and the threat of monetary liability, while also benefiting plaintiffs who are primarily seeking vindication by requiring courts to actually address the issue of falsity.

These early no-fault-defamation proposals differ in various ways, but for the most part all these authors envisioned the no-fault-defamation tort as containing the same elements. The first two sections of the proposed "Plaintiff's Option Libel Reform Act," written and supported by

Professor Marc A. Franklin, illustrate the elements and limitations commonly found in proposals advocating for such a cause of action:

SECTION 1. ACTION FOR DECLARATORY JUDGMENT THAT STATEMENT IS FALSE AND DEFAMATORY.

(a) CAUSE OF ACTION.

(1) Any person who is the subject of any defamation may bring an action in any court of competent jurisdiction for a declaratory judgment that such publication or broadcast was false and defamatory.

(2) Paragraph (1) shall not be construed to require proof of the state of mind of the defendant.

(3) No damages shall be awarded in such an action.

(b) BURDEN OF PROOF. The plaintiff seeking a declaratory judgment under subsection (a) shall bear the burden of proving by clear and convincing evidence each element of the cause of action described in subsection (a). In an action under subsection (a), a report of a statement made by an identified source not associated with the defendant shall not be deemed false if it is accurately reported.

(c) DEFENSES. Privileges that already exist at common law or by statute, including but not limited to the privilege of fair and accurate report, shall apply to actions brought under this Section.

(d) BAR TO CERTAIN CLAIMS. A plaintiff who brings an action for a declaratory judgment under subsection (a) shall be forever barred from asserting any other claim or cause of action arising out of a publication or broadcast which is the subject of such action.

SECTION 2. LIMITATION ON ACTION.

(a) Any action arising out of a publication or broadcast which is alleged to be false and defamatory must be commenced not later than one year after the first date of such publication or broadcast.

(b) It shall be a complete defense to an action brought under Section 1 that the defendant published or broadcast an appropriate retraction before the action was filed.

(c) No pretrial discovery of any sort shall be allowed in any action brought under Section 1.

(d) When setting trial dates, courts shall give actions brought under Section 1 priority over other civil actions.³⁵⁶

Though Professor Franklin's full act also included provisions for prevailing-party attorneys' fees and monetary damages for plaintiffs who can prove actual malice,³⁵⁷ these additional provisions are not found in most other no-fault-defamation proposals, for they undercut one of no-fault defamation's strongest selling points. Second Circuit

356. Marc A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 CAL. L. REV. 809, 812-13 (1986).

357. *Id.* at 813.

Court of Appeals Judge Pierre N. Leval, in an article written while a judge on the United States District Court for the Southern District of New York, emphasized the importance of a no-fault-defamation tort not allowing any potential for the recovery of money damages for any reason.³⁵⁸ According to Judge Leval, the lack of money damages or fee-shifting in a no-fault-defamation lawsuit would allow “the plaintiff concerned primarily with restoring a damaged reputation”³⁵⁹ the ability to pursue “a vastly cheaper lawsuit limited to the subject of the plaintiff’s concern—the truth or falsity of the derogatory press account,” which would offer the plaintiff “a far greater chance of successfully vindicating his reputation.”³⁶⁰

Perhaps most importantly, if money is never made an issue, Judge Leval argues “some defendants might elect not to defend the suit at all, avoiding completely the expenses of litigation by allowing plaintiff a judgment of falsity by default.”³⁶¹ While defendants that pride themselves on accuracy, such as the established mainstream press, may choose to fight such a lawsuit on principle or to protect their own reputations, entities such as “the scandalmonger press” and “other organs that have no interest in cultivating a reputation for accuracy,” as well as “organs professing a pronounced political bias,” may simply “conclud[e] that a judgment without money damages is not worth defending,” thus giving the plaintiff the vindication he or she seeks without a drawn out and costly legal fight.³⁶²

2. WHY NO-FAULT IS NECESSARY TODAY

These proposals for a no-fault-defamation tort were never acted upon by Congress or other governmental entities. In a way, it is understandable why neither legislatures nor the courts felt it necessary to acknowledge no-fault defamation. The Franklin, Leval, and other no-fault proposals from the 1980s were intended to resolve a very narrow problem that only impacted a relatively small number of people—public figures that were unable to have their defamation lawsuits proceed against large, mainstream media outlets because of the actual-malice standard imposed by the Supreme Court. Since the Internet as we know it did not yet exist in the 1980s, and given the nature and composition of print and broadcast media during that time, private citizens of modest means were unlikely to ever be victims of defamation or accused of

358. Pierre N. Leval, Commentary, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287, 1288 (1988).

359. *Id.* at 1292–93.

360. *Id.* at 1293.

361. *Id.* at 1296.

362. *Id.*

defaming someone else, let alone a party in a defamation lawsuit. Thus, while defamation law may have needed modification decades ago, there was no pressing need for the government to undertake a reform effort.

But that is no longer the case today. With the popularization of the Internet, private citizens are frequently put in positions where they may defame other private citizens online or become victims of defamation themselves. Furthermore, the development and widespread use of search engines such as Google makes it easier than ever before for family, friends, prospective employers, and total strangers to encounter defamatory statements about an individual. And while individuals certainly have a right to issue their own responses to defamatory statements on the Internet, the algorithms employed by Google and other search engines may make it difficult for such rebuttals to get the same attention as the original defamatory statement.³⁶³

This proliferation of defamatory speech on the Internet, combined with the growing practice of running Google searches for the names of private individuals, has created a problem that did not exist in previous decades. A no-fault-defamation tort provides one of the strongest solutions to this problem, for it would give victims of defamatory Internet speech access to a new option they can exercise to receive the relief they truly desire without unnecessarily burdening defendants or chilling free speech.

3. NO-FAULT AND § 230

Some may question how a no-fault-defamation cause of action would interplay with an Internet intermediary's § 230 immunity, which did not exist when the no-fault-defamation tort was first proposed. Because § 230 immunizes Internet intermediaries from all liability in tort for causes of action that seek to treat the intermediary as a speaker of a third party's words, § 230 would continue to immunize intermediaries from both traditional defamation and no-fault-defamation lawsuits. Furthermore, the proposed amendment to § 230 requiring fee-shifting to a prevailing § 230 defendant should also apply to no-fault-defamation lawsuits brought against an immunized Internet intermediary.

Why continue to apply § 230 even to no-fault-defamation causes of action where no monetary liability is at stake? Simply put, there is no compelling reason for a defamation plaintiff to subject an Internet intermediary to a no-fault-defamation lawsuit. Perhaps the strongest argument for holding an Internet intermediary vicariously liable for a third

363. See discussion *infra* Part IX.

party's defamatory statements is that it may not be possible for the plaintiff to recover from the actual speaker, either because the actual speaker cannot be identified, or the actual speaker has few resources and cannot afford to pay money damages to the plaintiff even if the plaintiff wins in court.

But this rationale for intermediary liability does not apply in the context of no-fault defamation. Because money would not change hands in a no-fault-defamation proceeding even if the defendant were found to have defamed the plaintiff, it is irrelevant whether the Internet intermediary possesses more resources than the actual defamer. Similarly, it is not necessary to actually know the speaker's identity—a defamation victim may simply sue "John Doe," and if the anonymous speaker does not make an appearance to contest the plaintiff's claim, a default judgment would be rendered in favor of the plaintiff. Such a default judgment would have no practical impact on the anonymous speaker due to the no-fault and no-money nature of the cause of action. Because there is no valid reason—other than pure spite or a desire to punish—to sue an Internet intermediary in this sort of a proceeding, no legitimate purpose is served by not extending an intermediary's § 230 immunity to the no-fault-defamation cause of action.

C. *Addressing Counterarguments*

For a variety of reasons, some may feel that the no-fault-defamation tort is not the appropriate means of solving the problem of defamatory Internet speech. In particular, some may argue that the tort is unconstitutional, that the tort will harm plaintiffs by eventually replacing rather than supplementing the traditional defamation torts, or that no-fault defamation would lead to an explosion in the number of frivolous lawsuits filed. The remainder of this Part will address these potential counterarguments.

1. NO-FAULT DEFAMATION IS CONSTITUTIONAL

One potential criticism of a no-fault-defamation tort is the idea that such a cause of action may not withstand constitutional scrutiny. A critic may argue that the very act of a court granting, as part of the plaintiff's requested relief, that a certain statement be declared false would violate the First Amendment. This criticism, however, does not take into account the fact that the traditional defamation torts already require a finding of falsity as one of the essential elements a plaintiff must prove in order to prevail in a defamation action. Because a plaintiff in a no-fault-defamation action would still need to prove that the statement at issue is actually defamatory, the plaintiff's burden of proof in regard to

the falsity of the statement would be unchanged from traditional defamation law, and thus no constitutional problem should exist.

Others may find it troubling that a court may issue such a declaratory judgment against a defendant even without a showing of fault, and could argue that such an action would violate the First Amendment. But one must consider the Supreme Court's reasons shaping its related First Amendment jurisprudence. As Professor Franklin correctly notes, "the underlying rationale" behind the Court's decisions in *Gertz v. Robert Welch, Inc.*³⁶⁴ and related First Amendment defamation cases has been "to diminish the chill on media defendants while preserving the state's interest in protecting reputation."³⁶⁵ However, "the chilling effect" observed by the Court "ha[d] been produced by fear of large damage awards, which induce large and unrecoverable defense costs."³⁶⁶ Because such large awards would not be possible in a no-fault-defamation action, and a judgment in favor of the plaintiff would not result in any ill effects for the defendant, a defendant can simply default and allow the plaintiff to receive the requested judgment.³⁶⁷ Since a defendant may choose to avoid incurring any costs as a result of his or her speech and lose nothing, there is little or no threat of an actual chilling effect taking place because of the existence of a no-fault action.

2. NO-FAULT DEFAMATION WOULD NOT REPLACE TRADITIONAL DEFAMATION

Others may attack the proposed no-fault-defamation tort on the basis that it would displace the traditional defamation tort, and thus hurt victims of defamatory statements who have suffered actual economic loss and therefore are suing not to vindicate their reputations but to recover monetary damages from the defendant. However, there is no reason to believe that the creation of a no-fault-defamation action would eventually result in the traditional defamation causes of action being phased out or completely eliminated, given that traditional defamation and no-fault defamation would clearly be complementary causes of action rather than substitutes for each other.

How are traditional defamation and no-fault defamation complementary? Traditional defamation allows a prevailing plaintiff to receive both vindication and compensation, in the form of money damages from a defendant who is at fault. Given the low rate of success for plaintiffs in traditional defamation lawsuits, this is a particularly difficult cause of

364. 418 U.S. 323 (1974).

365. Franklin, *supra* note 356, at 820.

366. *Id.*

367. *Id.*

action to prove, and thus only those who have suffered truly egregious injuries that require monetary compensation will choose to sue under this tort. No-fault defamation, however, will award a prevailing plaintiff solely with vindication, and not with money damages. Defamation victims who have not actually suffered economic harm but wish to protect their reputations or prevent future economic harm, or who know that they cannot meet all the elements of traditional defamation, would choose this cause of action because it would better meet their needs than the traditional defamation torts. Since these two causes of action would serve different purposes and appeal to different types of defamation plaintiffs, there is no reason to believe that the traditional defamation torts would be placed in any danger of extinction if legislation were passed to authorize a no-fault-defamation cause of action.

3. NO-FAULT DEFAMATION WILL NOT SQUANDER SCARCE JUDICIAL RESOURCES

Finally, some may oppose the creation of a no-fault-defamation tort out of a belief that such a tort would further squander already scarce judicial resources by encouraging the proliferation of even more frivolous lawsuits. No-fault defamation, such individuals would argue, would simply overwhelm the judicial system because Internet users would initiate legal proceedings every single time they encountered a negative comment about themselves online.

The fear that the creation of a new tort, particularly one based on an existing tort but easier to prove, would overwhelm the court system is certainly a legitimate concern. However, Judge Leval, at the time a federal-district-court judge, has argued that "[t]he fear of new waves of frivolous lawsuits" after a no-fault-defamation action is created "seems exaggerated."³⁶⁸ As Judge Leval correctly notes, prior to *New York Times v. Sullivan*,³⁶⁹ public-figure-defamation plaintiffs "could bring libel suits free of the *Sullivan* obstacle" of proving actual malice "without even giving up hope for money damages," yet "the pre-*Sullivan* conditions did not produce floods of frivolous libel suits," leading the judge to reason that "there is no reason to suppose there would be floods of litigation under this proposal, which is less advantageous to plaintiffs."³⁷⁰

Though Judge Leval wrote his article prior to the advent of the Internet, much of his reasoning would still apply to the present day. Judge Leval reminds critics that "[i]t is expensive to bring a lawsuit and

368. Leval, *supra* note 358, at 1297.

369. 376 U.S. 254 (1964).

370. Leval, *supra* note 358, at 1297.

even more expensive to carry on with it,”³⁷¹ an observation that is particularly true when applied to lawsuits seeking a declaratory judgment or other non-monetary remedy. Because a contingency fee arrangement would simply not be possible for a plaintiff wishing to file a no-fault-defamation lawsuit, the plaintiff would have to hire a lawyer on an hourly or flat fee basis to pursue the matter, which in itself would provide a strong incentive against filing unjustified no-fault-defamation lawsuits. Although it would certainly be possible for a plaintiff to pursue frivolous or unnecessary no-fault-defamation lawsuit on a pro se basis, one must consider that individuals may already litigate frivolous traditional defamation lawsuits on a pro se basis and suffer no adverse consequences when they ultimately lose.³⁷² Because the costs of filing and losing a pro se defamation lawsuit are already low and the creation of a no-fault-defamation cause of action would not lower those costs any further, implementing the new no-fault tort should not result in a meaningful increase in the number of frivolous lawsuits filed.

It should go without saying that creating the tort of no-fault defamation, while making it more efficient for most defamation victims to achieve the compensation and result—vindicating their reputation—that they desire, does nothing for individuals such as Kenneth Zeran, who have suffered tangible economic loss and thus need to recover money damages in order to truly be made whole. The following Part will propose a mechanism to provide Zeran and other defamation victims in his situation with the compensation they deserve without shifting the costs to Internet intermediaries or otherwise damaging the online marketplace of ideas.

VIII. COMPENSATING KENNETH ZERAN

The previous two Parts have proposed two separate solutions that, if implemented, would represent an improvement over the status quo for Internet intermediaries, most defamation victims, and, by extension, society. However, the issue of compensating defamation victims such as Kenneth Zeran has thus far gone unaddressed, and remains the proverbial elephant in the room. Does this indicate that, in order to improve the situation for those groups and for society as a whole, we are compelled to leave Zeran and others who have suffered economic loss due to the actions of anonymous defamers, who cannot be located, uncompensated for their injuries?

371. *Id.*

372. *See, e.g.,* Parker v. Google, Inc., 242 F. App’x 833, 835, 838 (3d Cir. 2007) (per curiam) (noting the filing of a frivolous defamation lawsuit by a pro se plaintiff against a search engine immunized by § 230).

The answer to this question is a resounding “No.” As hinted in the previous Part, compensating victims and preserving a free marketplace of ideas on the Internet are separate issues that do not necessarily have to be in direct conflict with each other. No-fault defamation—a solution that would benefit the overwhelming majority of Internet defamation victims, who sue not to recover monetary damages but to vindicate their reputational interests—is not mutually exclusive with amending § 230 to include a fee-shifting provision, in that the government can easily implement both proposals. This is the case because a fee-shifting provision does not in any way prevent a defamation victim from vindicating her reputation through a no-fault-defamation lawsuit against the original defamer, and a defamation victim pursuing a no-fault-defamation lawsuit would not coerce an Internet intermediary into censoring the speech of its users. In other words, the government can further *both* efficient victim compensation and the marketplace of ideas through implementing both proposals without harming or setting back either underlying value relative to the status quo.

A. *Speech Versus Compensation Is a False Conflict*

The same is true when it comes to the issue of compensating those who have suffered tangible harm, such as Kenneth Zeran. Section 230’s failing with respect to Internet intermediaries—forcing intermediaries, when faced with a frivolous defamation complaint, to choose between censoring their users and incurring substantial attorneys’ fees to assert their immunity in court—has nothing to do with the issue of compensating those such as Zeran. One can immunize intermediaries and protect them from frivolous defamation lawsuits, while at the same time providing monetary compensation to the Zerans of the world.

But if one can both completely immunize intermediaries and establish a way to compensate people like Kenneth Zeran, why have such a large number of authors viewed intermediary immunization and compensating victims monetarily as mutually exclusive policy goals? The following sub-sections will examine how existing § 230 scholarship, through romanticizing the common law and ignoring technological change, has set up a false conflict between the values of promoting free speech and compensating defamation victims.

1. ROMANTICIZING THE COMMON LAW

Virtually all authors who have criticized § 230 and the *Zeran* decision have done so based on an unsound argument. According to these critics, Zeran not receiving any compensation for his injuries is an unfair result, and, since Zeran did not receive any compensation because § 230

immunized America Online, § 230 therefore causes people like Zeran to not receive compensation that they would have gotten in the absence of the statute.

It is true that, in that one specific case, Kenneth Zeran did not recover damages from America Online because of the company's § 230 immunity. However, it is improper to make the logical leap that, but for § 230, Zeran would have recovered damages from America Online. Just as uttering the magic words "Section 230" does not prevent Internet intermediaries from incurring attorneys' fees in litigation, the absence of a § 230 defense does not guarantee that, even in an egregious case such as that of Kenneth Zeran, the plaintiff will automatically prevail and recover millions of dollars in damages from the intermediary. To illustrate this point, one must consider the outcome of the second—and considerably less publicized—lawsuit Kenneth Zeran filed against a non-Internet intermediary stemming from the defamatory postings made on the America Online message boards.

In that case, *Zeran v. Diamond Broadcasting, Inc.*, Zeran attempted to recover damages from the owner of KRXO, a classic-rock radio station in Oklahoma City.³⁷³ A few days after the original defamatory postings appeared on America Online, "an AOL member sent an e-mail containing a copy of the original, April 25th posting to one of KRXO's on-air personalities, Mark ('Shannon') Fullerton, who, together with Ron ('Spinozi') Benton, hosted the 'Shannon & Spinozi Show,' a drive-time morning show" that "usually consisted of light-hearted commentary, humor, and games" but after the bombing became "serious and somber" in tone.³⁷⁴ On May 1, Shannon "went on the air, discussing the posting, reading the slogans, and reading [Zeran]'s telephone number" and also "urged his listeners to call Ken ZZ03 and tell Ken ZZ03 what they thought of him for offering such products," resulting in Zeran receiving "approximately 80 angry, obscenity-laced calls from the Oklahoma City area, including death threats."³⁷⁵ Zeran "described it as the worst day of his life."³⁷⁶

The radio station, though an intermediary like America Online, was not protected under § 230 because that statute only applies to Internet intermediaries. Thus, the Tenth Circuit Court of Appeals applied the traditional common law, which would allow the court to assess publisher or distributor liability on the station for the defamatory statements made by the hosts of the morning show it broadcast. Yet the Tenth Circuit

373. 203 F.3d 714, 717–18 (10th Cir. 2000).

374. *Id.* at 717.

375. *Id.* at 718.

376. *Id.*

found that the radio station was *not* liable to Zeran for defamation, false light, or intentional infliction of emotional distress.

Why did the Tenth Circuit reach such a perhaps puzzling decision? The court found that Zeran's "defamation claim fails because [Zeran] has not shown that any person thinks less of him, Kenneth Zeran, as a result of the broadcast."³⁷⁷ The court stated that Zeran produced

no evidence that anyone who called his number in response to the postings or the broadcast even knew his last name. In other words, under the facts of this case, there was an insufficient link between [Zeran's] business telephone number and [Zeran] himself for [Zeran] to have sustained damage to his reputation.³⁷⁸

As to the false light charge, Zeran could not recover because there was no proof that "Shannon and Spinozi had an actual, subjective awareness that what they were repeating on the air was probably false."³⁷⁹ The court rejected Zeran's intentional infliction of emotional distress claim for similar reasons, finding that Zeran could not establish "actual knowledge of probable falsity" on the part of the defendant.³⁸⁰

Given the outcome in the second *Zeran* case, it is unlikely that, in the absence of § 230, Kenneth Zeran would have prevailed against America Online on the merits. Although Zeran suffered an injury, he "did not suffer an injury to his reputation, which is the essence of an action for defamation."³⁸¹ Because Zeran "does not know of anyone who knows him by the name Kenneth Zeran who saw the AOL postings . . . or associated him with 'Ken Z' or the phone number on the AOL postings,"³⁸² it is likely that a court would have held in the America Online litigation that there, too, Zeran could not establish a sufficient link to sustain a finding that his reputation was damaged. Similarly, it would be hard for Zeran to recover via another tort, such as false light or intentional infliction of emotional distress, for, like the defendant radio station, America Online could not have known that the postings were false prior to publication. Furthermore, America Online, while perhaps not moving as fast as Zeran had wished, did delete the defamatory postings within a week of Zeran notifying it of their existence.

To summarize, critics of § 230 have romanticized the common law and, as a natural consequence, unduly vilified § 230. As the second *Zeran* case demonstrates, § 230 did not truly bar Zeran from recovering monetary damages from America Online—had Zeran's lawsuit been

377. *Id.* at 719.

378. *Id.*

379. *Id.* at 720.

380. *Id.* at 721.

381. *Id.* at 719.

382. *Id.* at 718.

allowed to proceed, it likely would have been dismissed for the same reasons as his lawsuit against the radio station. For Zeran to recover any damages from his ordeal in the absence of § 230, his best chance to recover monetary damages would be to sue the original defamer—the same recourse available to him with § 230. But since the original defamer has always remained anonymous, Zeran would have been denied recovery regardless of whether § 230 existed.

2. THE WALLED-GARDEN INTERNET NO LONGER EXISTS

As will be discussed in further detail in the discussion of notice-based liability,³⁸³ proponents of intermediary liability often fail to take into account that the demographics of Internet intermediaries today are no longer the same as they were in the mid-1990s.³⁸⁴ Though most popular interactive online content in the 1990s, such as message boards, had been created as exclusive “members-only” features for subscribers of walled-garden Internet service providers, such as America Online and Prodigy, the early to mid-2000s have seen the popularity of such services continuously spiral downward, to the point where Prodigy no longer exists and even the once-dominant America Online is only a shadow of its former self. In the present day, rather than being exclusively the purview of large corporations, most interactive content is provided through tens of millions of blogs and other “Web 2.0” services.³⁸⁵

This substantial shift in the demographics of Internet intermediaries undercuts the argument that society can only achieve the goal of compensating defamation victims through imposing liability on intermediaries. Suppose that Kenneth Zeran, rather than being targeted by postings on America Online’s message boards in 1995, had instead been defamed by an anonymous individual on a blog’s comments section in 2005, with the ensuing chain of events resulting in the same substantial damage to his business. If § 230 did not exist, and the intermediary blogger was not immune from liability for the anonymous commentator’s defamatory statements, would Zeran receive adequate compensation for his injuries by suing the blogger?

It is highly unlikely that, in this situation, Zeran would be compensated for the damage done to his business, even if a court found the blogger liable for defamation or a related tort. As discussed earlier, vir-

383. See discussion *infra* Part IX.

384. See, e.g., Sarah Duran, Note, *Hear No Evil, See No Evil, Spread No Evil: Creating a Unified Legislative Approach to Internet Service Provider Immunity*, 12 U. BALT. INTELL. PROP. L.J. 115, 124–25 (2004); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1450–51, 1479–82 (2006).

385. See discussion *supra* Part V.

tually all blogs are run on a non-profit basis by individuals of relatively limited means, who often cannot even afford to hire a lawyer to defend themselves in court, let alone pay a multi-million-dollar defamation verdict.³⁸⁶ As one author observed, imposing defamation liability on a blogger or message-board operator may “result in an award of damages that would render an individual bankrupt.”³⁸⁷

While very few judgments have been rendered against bloggers or other non-corporate Internet intermediaries, those that have confirm that observation. The \$11.3 million judgment obtained by Sue Scheff against Carey Bock—perhaps the most publicized judgment against a blogger in a defamation case—has never been collected by the plaintiff.³⁸⁸ In fact, Scheff has not only failed to collect even one penny from Bock, but has actually *lost* money by pursuing her case because it cost her money to sue Bock in the first place.³⁸⁹

The aftermath of the Bock verdict illustrates that intermediary liability is not a substitute for victim compensation. The \$11.3 million verdict, while perhaps making Scheff feel vindicated—a feeling she could have achieved with any judgment in her favor—does nothing to monetarily compensate her for any economic loss she may have suffered. Had the defamatory messages about Kenneth Zeran appeared as comments to Bock’s blog rather than on an America Online message board, Zeran, too, may have obtained a multi-million dollar verdict yet actually received no compensation for the harm done to his business, and even have been made worse off due to incurring court costs and attorneys’ fees in bringing his action. Therefore, unless one’s defamers are “considerate” enough to post their defamatory statements through an intermediary operated by a billion-dollar company, the demographics of today’s Internet intermediaries ensures that most victims will not receive any compensation from the typical Internet intermediary even if a court were to hold that the intermediary is vicariously liable for the tortious speech of a third-party user.

B. *Potential Solutions to the Compensation Problem*

As the previous section has established, simply imposing liability on intermediaries is not sufficient to solve the problem of compensating people like Kenneth Zeran. In some cases, such as the *Zeran* case itself, an intermediary, even if it possesses the resources to properly compen-

386. See discussion *supra* Part VI.

387. David R. Sheridan, *Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 174–75 (1997).

388. SOLOVE, *supra* note 104, at 122; Laura Parker, *Jury Awards \$11.3M over Defamatory Internet Posts*, USA TODAY, Oct. 11, 2006, at 4A.

389. SOLOVE, *supra* note 104, at 122; Parker, *supra* note 388.

sate the victim, will not have to actually pay monetary damages because the requisite intent or knowledge requirements to impose liability for defamation and related torts cannot be established. In other cases, such as those that involve bloggers or other intermediaries of very limited means, imposing liability on the intermediary may not actually result in the victim receiving any compensation, for the intermediary cannot satisfy the judgment. To summarize, imposing defamation liability on Internet intermediaries is not a panacea for the victim-compensation problem. Many—if not most—victims of particularly egregious conduct by anonymous or judgment-proof speakers will remain uncompensated for their injuries regardless of whether § 230 is the law of the land.

But this does not mean that it is impossible to effectively and fairly compensate such victims. Rather, it merely means that imposing liability on Internet intermediaries is not the best way to further this goal. The common law may have been correct to impose intermediary liability in the newspaper, radio, and television context, for doing so ensured that a defamation victim would actually receive compensations for her injuries. As mentioned earlier, it is very expensive to operate a traditional mass-media outlet, meaning that intermediaries who operate newspapers and radio or television stations would naturally have the resources to put on a defense in court as well as satisfy a defamation verdict if that defense was unsuccessful.³⁹⁰ Even if one finds the many other arguments against imposing liability on Internet intermediaries unpersuasive,³⁹¹ one cannot dispute the fact that, unlike the typical newspaper or television intermediary, the average Internet intermediary could not properly compensate Kenneth Zeran even if a judgment was rendered against it. Instead of continuing to cling to an outdated regime that has been proven ineffective in the Internet context, those who wish to see those like Zeran compensated should consider alternate, more effective victim compensation and schemes that do not tie a defamation victim's monetary compensation to the wealth of an intermediary.

It is important to emphasize that such alternate compensation systems already exist when it comes to other torts. After all, the issue of compensating the victims of unknown or judgment-proof tortfeasors long predates the problem of Internet defamation. Most notably, state legislatures have long struggled with the issue of how to compensate victims of uninsured motorists and hit-and-run drivers. Though states continue to differ on this issue, most states favor compulsory automobile insurance.³⁹² Under these laws, motorists are typically required, as a pre-

390. See discussion *supra* Parts I, III.

391. See discussion *supra* Parts V, VI.

392. Thomas C. Cady & Christy Hardin Smith, *West Virginia's Automobile Insurance Policy*

requisite to vehicle registration, to purchase a minimum amount of automobile insurance that would be sufficient to compensate a third party when the motorist is at fault in an accident, as well as give the motorist the opportunity (or sometimes outright require) to purchase additional insurance that would compensate the motorist in the event that he is injured by an uninsured motorist or a hit-and-run driver.³⁹³ By mandating such insurance, or at least requiring that motorists be given an option of purchasing uninsured motorist or hit-and-run insurance that can only be rejected in writing, the state is able to “provide immediate economic relief to all motor vehicle accident victims” while disbursing the cost of loss among all motorists.³⁹⁴

The problem of automobile accidents caused by hit-and-run or uninsured drivers is remarkably similar to the problem of Internet defamation by anonymous or judgment-proof speakers, in that victims of both torts may incur substantial economic loss and yet be unable to receive any compensation for that loss from the tortfeasor, either because the tortfeasor cannot be identified or does not have the financial resources to provide adequate compensation. Internet defamation insurance, like automobile insurance, could remedy this problem by providing a defamation victim, who has suffered tangible economic loss, with some monetary compensation even if the original defamer is unknown or does not have a lot of money. Just as many state laws require proof of automobile insurance to register a vehicle, one can envision federal or state laws requiring individuals to show proof of defamation insurance in order to register an account with an Internet service provider, or at least mandating that individuals sign a waiver form indicating that they are aware of the problems of Internet defamation but electing to waive coverage anyway.

It should go without saying that any defamation-insurance scheme would require certain safeguards in order to be effective and prevent insurance fraud or other abuses. Similarly, such insurance would have to be affordable in order to make it an effective solution to this problem. The actuarial analysis necessary to determine whether this type of defamation insurance could work in practice is beyond the scope of this Arti-

Laws: A Practitioner's Guide, 97 W. VA. L. REV. 583, 589 (1995) (“West Virginia and a majority of states follow the compulsory approach to automobile insurance.”).

393. See, e.g., DEL. CODE ANN. tit. 18, § 3902 (2008); FLA. STAT. § 627.727 (2007); 625 ILL. COMP. STAT. ANN. 5/7-601 (West 2008); IOWA CODE ANN. § 516A.1 (West 2008); ME. REV. STAT. ANN. tit. 24-A, § 2902(1) (2008); MASS. GEN. LAWS ANN. ch. 175, § 113L (West 2008); MO. ANN. STAT. § 379.203 (West 2008); N.J. STAT. ANN. § 17:28-1.1 (West 2008); N.C. GEN. STAT. ANN. § 20-279.21 (West 2008); VA. CODE ANN. § 38.2-2206 (West 2008).

394. Andrew Janquitto, *Uninsured Motorist Coverage in Maryland*, 21 U. BALT. L. REV. 171, 175 (1992).

cle. However, even in the event that defamation insurance is impractical, one could consider additional alternatives, such as a small tax on computers and related equipment that would go towards a compensation fund for victims of online torts. Such alternatives, if implemented, would further the goal of victim compensation without undercutting the free marketplace of ideas on the Internet.

C. *The Deterrence Argument*

Proponents of intermediary liability may respond that victim compensation is not the only value furthered by imposing such liability. Because Internet defamation is a social harm, they may argue that holding intermediaries liable would also serve a deterrence function, and thus provide intermediaries with an incentive to take proactive steps to prevent defamation from taking place that they would not take if an insurance or other alternative-compensation scheme were used. In other words, even if intermediary liability is not the most efficient way to compensate individuals such as Kenneth Zeran after the fact, it is necessary in order to prevent more people from going through Zeran's ordeal in the first place

This deterrence argument is not persuasive. Most notably, it is simply not possible—with the exception of completely exiting the market—for an intermediary to actually *prevent* defamatory content from appearing in the first place. As Professor Solove acknowledges, many intermediaries, such as America Online and the dating website in *Carafano v. Metrosplash.com, Inc.*,³⁹⁵ can host thousands, or even millions, of profiles, message-board posts, and other interactive content, and are simply not in a position to detect before the fact that some prankster intends to create a fake profile or post a defamatory message.³⁹⁶ Even the owner of a blog with a low-volume moderated comments section cannot meet such a high burden since she lacks perfect information and cannot ascertain whether a message purportedly authored by “Ken” was actually made by that person.

In other words, Internet intermediaries are very poor gatekeepers in the context of preventing defamation from taking place on their services. Therefore, imposing liability on such intermediaries would not actually further the goal of deterrence. Instead, it would serve to unduly punish intermediaries for choosing to remain in the market. To analogize, holding intermediaries liable because they are unable to prescreen defamatory third-party content is equivalent to holding gasoline companies liable for not creating a new type of gasoline that can automatically pre-

395. 339 F.3d 1119 (9th Cir. 2003).

396. SOLOVE, *supra* note 104, at 156.

vent an automobile from getting into an accident. Both rules, rather than actually deterring any undesirable conduct, would simply force all entities in the market to choose between leaving the market and being subject to highly punitive fees punishing them for not implementing technology that does not exist.

Of course, imposing liability on intermediaries would give them an incentive to remove content after being informed that it is defamatory. But the faults of such an approach have already been discussed earlier in this Article.³⁹⁷ Most notably, this sort of regime would “overdeter” speech, causing “undue self-censorship” of “speech that is truthful or nondefamatory,”³⁹⁸ particularly since “wealthy plaintiffs can successfully use the threat of a libel action to punish the defendant . . . regardless of the ultimate outcome of the libel action.”³⁹⁹

Internet intermediaries—particularly bloggers and other intermediaries who generate little or no revenue from their endeavors—are particularly susceptible to censoring their users in order even to avoid litigation, let alone potential legal liability. As one scholar notes, “[Internet] [i]ntermediaries do not and cannot reasonably expect to capture anything like the full social value of the uses that pass through their system,” meaning that, if the law “impose[s] the full social costs of harm from third party postings on intermediaries, . . . they will respond by inefficiently restricting the uses that third parties can make of the Internet.”⁴⁰⁰

One may be prepared to accept the censorship of a small number of truthful or socially beneficial postings if it meant having all defamatory postings promptly removed from the Internet. But this would not be the case if the law imposed liability on Internet intermediaries.⁴⁰¹ The Iowa Libel Research Project found that less than ten percent of all defamation lawsuits result in a judgment in favor of the plaintiff, and only a mere fifteen percent of those cases settle, resulting in more than seventy-five percent of all defamation results ending in a verdict in favor of the defendant.⁴⁰² Even if one were to very charitably assume that each and every one of the defendants who entered into settlement agreements would have been found liable for defamation if their cases had pro-

397. See discussion *supra* Parts V, VII.

398. Lidsky, *supra* note 146, at 888.

399. *Id.* at 891.

400. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 112 (2007).

401. In fact, as mentioned in Part VII, this is not the case even with § 230, for a desire to avoid litigation and the cost of having to assert the § 230 immunity in court is enough to result in a substantial chilling effect of non-defamatory Internet speech.

402. See Bezanson, *supra* note 281, at 228.

ceeded to a final judgment on the merits, the fact remains that, in more than three quarters of all instances where an individual not only claims to have been defamed, but actually files a lawsuit alleging defamation, no actionable conduct has actually taken place.

Given the ease and very low cost of sending a cease-and-desist letter relative to hiring an attorney and filing a lawsuit, one would expect a much larger percentage of Internet defamation complaints to be frivolous or otherwise not actionable compared to the results of the Iowa Libel Research Project. However, even if one were to assume that the percentage of meritorious Internet and non-Internet defamation complaints would be equivalent, the number of defamation complaints that lack merit would—even under the most conservative estimate—be more than *quadruple* the number of valid complaints. Under more realistic estimates, the number of frivolous or otherwise not actionable complaints could be up to nine times larger the number of valid complaints.⁴⁰³

Because most Internet intermediaries—even with the present § 230 immunity in place—do not have the resources or the incentive to defend the speech of their users, they will typically censor their users after receiving a complaint, without conducting an investigation as to whether takedown is appropriate or otherwise putting any consideration into whether the removal request has merit.⁴⁰⁴ Though this will result in some defamatory postings being removed, a substantially larger number of non-defamatory postings will also be taken down. Depending on which estimate is correct, every actual defamatory message that an intermediary is pressured to remove will result in between four to nine other, non-defamatory postings also being censored. Such a large false positive rate is unacceptable, particularly when one considers that, because such removals would have to occur after initial publication, damage to any legitimate defamation victims has likely already been done.

One must also consider the additional social consequences of imposing liability on intermediaries. The Internet is currently in the age of Web 2.0, and, as discussed earlier, the typical Internet intermediary today is now no longer a multi-billion dollar corporation like America Online, but a blogger.⁴⁰⁵ Even if Google and America Online possess the resources to develop new technology or hire a large amount of

403. Since the Iowa Libel Research Projects reports that virtually all of the settlements in the settled cases resulted in no money changing hands, *id.*, it is likely that, had there not been a settlement, defendants would have prevailed on the merits but chose to settle in order to save on litigation costs.

404. See discussion *supra* Part VI.

405. See discussion *supra* Part V.

employees that would result in faster take-down times, such options will never be available to the typical intermediary.

The basis for Zeran's lawsuit against America Online was that AOL, by waiting a week to remove the defamatory messages after Zeran had informed it of their existence, was negligent, and thus owed Zeran monetary damages. But once again, suppose that Zeran had not been defamed on an America Online message board, but in a blog comments section. While one may imagine that the typical blogger could easily accommodate Zeran's request in a timely manner because—if his blog is like most blogs—it does not have a high volume of comments, suppose that the defamatory comment was posted and Zeran's e-mail was sent during a period when the blogger was on a two week vacation, hospitalized, or otherwise unable to act on Zeran's request. Though imposing liability on this blogger intermediary may further a deterrence goal, doing so would clearly not be in society's best interest. The blogger—and his family—will have to suffer from the negative effects of filing bankruptcy, having his credit record destroyed, and a host of other catastrophes, all because he had the audacity to take a break from his blog because of vacation, illness, or another valid reason. Even if imposing such draconian consequences on an individual would result in an acceptable deterrent effect—though likely achieved only by deterring people from having blogs altogether—the costs to society would heavily outweigh any benefit achieved by the deterrent effect.

Since intermediaries cannot effectively prevent a third party from making a defamatory statement using its service, but—at best—could only remove already-posted content after the fact, and given the chilling effect intermediary liability would have on non-defamatory speech, it would be more efficient and socially beneficial not to provide intermediaries with an incentive to censor users, but rather create an insurance scheme or other mechanism to effectively compensate the very small number of individuals who have been damaged as a result of defamatory Internet speech.

Of course, some individuals may continue to be damaged due to defamatory information remaining on the Internet after initial publication. As mentioned earlier, employers are increasingly “googling” applicants and sometimes hold negative information discovered in search results against applicants in the employment application process, often without even informing applicants that they are aware of such information or giving them a chance to respond.⁴⁰⁶ As a result of this behavior, defamation victims may continue to experience harm years after the date of initial publication.

406. See discussion *supra* Part IV.

The “googling” of prospective employees by employers is clearly a problem. But once again, imposing intermediary liability is not the most efficient method of deterring this practice. Even if society was willing to accept having nine non-defamatory postings censored in exchange for every removed defamatory posting, “googling” would continue to remain an issue. Employers do not input the names of prospective employees into search engines because they have nothing better to do with their time. Rather, they do it because they believe it will yield useful information about the candidate, and allow them “to avoid major red flags” that they may not discover otherwise.⁴⁰⁷ While “googling” is obviously imperfect in that it may bring defamatory or misleading information about an individual to an employer’s attention, the fact that seventy-seven percent of employers “use search engines to learn about candidates,” with “[thirty-five] percent eliminat[ing] a candidate from consideration based on information they uncovered online,”⁴⁰⁸ demonstrates that the vast majority of employers believe that the benefits of this practice—eliminating job applicants with questionable pasts—outweigh the cost of turning away qualified candidates because of false information.

It is also no accident that employers rely on the Google search engine. Unlike other search engines, Google is known for “mak[ing] pages worth looking at rise near the top of search results,”⁴⁰⁹ and has been praised for “offer[ing] the overall most relevant [search] results.”⁴¹⁰ In fact, a recent poll of 18,000 CNN.com users found that forty-one percent considered Google “the most significant development in the 15-year history of the World Wide Web.”⁴¹¹

But what would happen if intermediary liability was imposed on Google in order to provide Google with an incentive to remove defamatory search results, and thus minimize damage done to job applicants? Google, by engaging in such censorship, would no longer provide the most relevant search results, since it would be very difficult, if not impossible, for Google to limit deletions to material that is actually

407. Allan Hoffman, Job Applicant, Beware: You’re Being Googled, <http://career-advice.monster.com/job-search-essentials/Job-Applicant-Beware-Youre-Being-Go/home.aspx> (last visited Sept. 10, 2008).

408. *Id.*

409. University of California, Berkeley Library: Recommended Search Engines, <http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/SearchEngines.html> (last visited Sept. 10, 2008).

410. Webmasterbrain: Blind Study Finds Google Really Does Offer Best Results, <http://www.webmasterbrain.com/seo-news/seo-tools-news/blind-study-finds-google-really-does-offer-best-results> (last visited Sept. 10, 2008).

411. *Poll: Google the Best of the Web*, CNN.com, Dec. 30, 2005, <http://www.cnn.com/2005/TECH/12/30/poll.results/index.html>.

defamatory. One must remember that the Internet is not exclusive to the United States, but a global medium. It is likely that new search engines, located in countries that do not have the same Internet defamation laws as the United States and thus lacking pressure to remove any search results, defamatory or otherwise, would displace Google as the preferred search engine of Internet users. Employers, who are “googling” applicants in order to find red flags,⁴¹² would simply continue the practice, using foreign search engines instead. Thus, the goal of preventing post-publication harm would not be achieved.

As with the other problems discussed earlier in this Article, there are more effective ways to deal with the harms caused by employers “googling” prospective employees than imposing liability on Internet intermediaries. Rather than providing intermediaries with an incentive to censor third-party speech, the government could enact laws that directly address the underlying problem. Such direct, narrowly tailored solutions can eliminate or greatly minimize the social harms of “googling” without forcing society to also incur the harmful externalities that come with censoring speech.

It is not difficult to imagine several direct, effective solutions to the “googling” problem. After all, the “googling” problem is not the first time society has had to deal with a situation where actions that are in the (perceived) best interests of employers result in a negative effect on job applicants and society as a whole. For instance, prior to the passage of the Fair Credit Reporting Act (FCRA),⁴¹³ there was significant concern about employers checking the credit reports of job applicants in order to reject those with poor credit histories.⁴¹⁴ The FCRA, however, has largely resolved that problem by placing a series of limitations on how employers may use such information. To summarize, the FCRA requires that employers who wish to obtain a credit report for employment purposes must notify the job applicant in writing that a report may be used and obtain that person’s written consent in order to obtain the report.⁴¹⁵

412. One could argue that employers would continue to use Google in this scenario because, by eliminating defamatory information about an applicant, Google would make searching more efficient, resulting in employers not having to disqualify candidates because of false positives. However, one must keep in mind that the mere existence of negative information about a job applicant—even if known to be false or defamatory—sends a signal to the employer that the applicant is controversial or not well liked. An employer may believe that the applicant may have done something to provoke the online defamation—after all, it is unlikely that an individual would go to the trouble of defaming a total stranger on the Internet for absolutely no reason whatsoever.

413. 15 U.S.C. § 1681 (2000 & Supp. V 2005).

414. See Steven C. Bednar, *Employment Law Dilemmas: What To Do When the Law Forbids Compliance*, 12 BYU J. PUB. L. 175, 179–80 (1997).

415. Fed. Trade Comm’n, *Using Consumer Reports: What Employers Need to Know*, <http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.shm> (last visited Sept. 10, 2008).

After obtaining a report in such a manner, an employer is required by law, before taking an adverse employment action, to disclose to the applicant that it intends to take the adverse action based on the report and provide a copy of the individual's report along with a summary of one's rights under the FCRA prepared by the Federal Trade Commission. In practice, this allows the applicant to respond to or dispute any negative information contained in the report.⁴¹⁶

A framework similar to the FCRA system could be applied to "googling" prospective employees. Prior to inputting a job applicant's name into a search engine, the employer may be required to send the applicant notice that it intends to conduct such a search, along with the name of the search engine(s) it plans to use. In order to conduct the search, the employer would need to obtain the written consent of the job applicant. If the search generated negative information that could lead to an adverse employment decision, the employer would be required to inform the applicant, provide the applicant with copies of the negative information it discovered, and give the applicant the opportunity to respond before taking adverse action. Such legal constraints would raise the costs of doing such searches—and thus provide employers with an incentive not to conduct them unless absolutely necessary—as well as give individuals (both defamation and non-defamation victims alike) an opportunity to set the record straight in the event that a search was conducted, without resulting in truthful speech being censored.

If legislation mirroring the FCRA is not desirable, other options still exist. For instance, if one is concerned that employers would simply strong-arm job applicants into providing written consent and ignore any rebuttals, an additional alternative could involve a blanket ban on "googling" job applicants. The United States would not even be the first nation to go this route, for Finland has recently banned employers from engaging in this practice.⁴¹⁷

If one finds the idea of limiting the information available to employers distasteful, or if one is concerned about "googling" done by prospective dates and others whose behavior would not be regulated by the above proposals, another option could involve search-engine regulation. Frank Pasquale has proposed the following solution to the "googling" problem, once again analogizing search-engine results to credit reports:

The FCRA requires credit bureaus to permit individuals to dispute negative information on their credit reports and to give their own side

416. *Id.*

417. *Finnish Employers Cannot Google Applicants*, Posting of William McGeeveran to Info/Law, <http://blogs.law.harvard.edu/infolaw> (Nov. 15, 2006).

of the story on reports generated for potential creditors, insurers, and employers. Applied to search engines, such protections would merely permit those dogged by negative information in search engines to put an asterisk next to the metadata indexing the information which would be hyperlinked to “their side of the story.”⁴¹⁸

This particular solution essentially involves responding to false or negative speech with more speech. As a result, the Pasquale proposal would not only minimize the harm that may accrue after publication, but actively improve the marketplace of ideas by providing a mechanism for individuals to provide more accurate information. As Jarret Cohen has noted, search engines may voluntarily embrace such a solution to the “googling” problem without the need for government regulation, for appending information to search-engine results would not only allow an individual to give her side of the story, but also serve to make the search engine more useful for its users.⁴¹⁹ In fact, Google has already voluntarily implemented this feature for its Google News service, allowing those mentioned in news articles indexed by Google News to give their side of the story.⁴²⁰

One should consider that any of the above proposals, in addition to reducing the amount of harm that may occur after publication, will also prevent a significant amount of Internet defamation from ever taking place. Many modern-day Internet defamers, such as the one who sought to ruin Caitlin Hall’s career, choose to create defamatory posts about an individual because they know the information will eventually end up in Google, or another search engine, and be seen by prospective employers, who may take action without notifying the victim or allowing her to provide her side of the story.⁴²¹ But by providing individuals like Caitlin Hall with a means of controlling what information is available to employers—or at least giving them the opportunity to respond and set the record straight—much of the “benefits” of defaming someone on the Internet eviscerate. After all, if the law ensures that a law firm will not take adverse employment action based on the “Caitlin Hall Nude Photos” thread in Google, what incentive will an anonymous Internet prankster have to create that thread and twenty others? While such legislation may not completely eradicate Internet defamation, it would do more to prevent defamatory statements from being made in the first

418. Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115, 136 (2006).

419. Cohen, *supra* note 100.

420. Kevin J. Delaney & Andrew LaVallee, *Google News Offers Rebuttal Time*, WALL ST. J., Aug. 9, 2007, at B2.

421. See, e.g., Hall, *supra* note 103, at 288.

place than could ever be done through imposing defamation liability on Internet intermediaries.

The past three Parts have each proposed a solution for the three unique problems caused by Congress's failure to incorporate imminent changes in the nature of the Internet into § 230 and other legislation. These proposed solutions are independent of each other, and each, if implemented, would promote either the values of speech or victim compensation—and sometimes both—without harming the other value. This is consistent with a core underlying premise of this Article: The conflict between promoting an online marketplace of ideas and compensating Internet defamation victims is largely illusory, for the government can enact policies that simultaneously further both goals. The conflict between these values, to the extent that it exists, is due to the various alternate proposals that other scholars have advocated, which seek to enhance one value to the detriment of the other, even though doing so is not efficient. The following Part will evaluate four such proposals and explain why they are not even superior to the status quo, let alone the proposals discussed in the last three Parts.

IX. THE DEFICIENCIES OF PROPOSED ALTERNATIVES TO § 230

Section 230, to the chagrin of its critics, has remained a seemingly impenetrable legal shield for Internet intermediaries sued for the speech of their users. Even when faced with some of the most egregious set of facts imaginable, courts have steadfastly refused to carve out loopholes or exceptions to an intermediary's § 230 immunity. For instance, in *Doe v. Bates*, the United States District Court for the Eastern District of Texas granted § 230 immunity to an Internet intermediary that, according to the plaintiffs, knowingly hosted and profited from a child-pornography ring.⁴²² In a similar case, *Doe v. MySpace, Inc.*, involving the sexual assault of a minor facilitated through the defendant intermediary's social-networking website,⁴²³ a Western District of Texas judge dismissed the plaintiff's attempt to hold MySpace liable "not . . . in its capacity as a publisher," but for "negligent failure to take reasonable safety measures to keep young children off of its site" as mere "artful pleading" that he considered a "disingenuous" attempt at circumventing § 230.⁴²⁴ Given such uniformly strong precedent rejecting policy or equity arguments against § 230, the only certain way to circumvent an intermediary's § 230 defense is to accuse the intermediary of producing

422. No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *1, *3–4 (E.D. Tex. Dec. 27, 2006).

423. 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007).

424. *Id.* at 849.

the content itself.⁴²⁵

Because of the current state of § 230 jurisprudence, various scholars and activists have proposed that § 230 be reformulated in various ways to make up for perceived deficiencies. This section will analyze four of these proposals and explain why, if enacted, they would not be superior to the status quo and—unlike the proposals discussed in the past three Parts—fail to resolve the tension between the competing values of speech and compensating victims.

A. *Reversion to the Common Law*

As discussed earlier, the idea that Internet intermediaries—particularly intermediaries such as Prodigy, which routinely exercised editorial control over third-party content—should be subject to publisher liability for the defamatory statements of third-party users is not revolutionary or novel, for it is a natural extension of the common law of defamation prior to the advent of Internet.⁴²⁶ Given this fact, as well as Internet defamation's potential to tangibly harm innocents, some may still question why Internet intermediaries need so-called “special treatment” via the § 230 immunity.

Proponents of a return to the common law of publisher liability often support their position by arguing that Internet intermediaries are acting disingenuously, and that their role is “clearly more like a disguised publisher” rather than that of an intermediary or “a true conduit for third-party content.”⁴²⁷ Perhaps the strongest support for such a position is that most Internet intermediaries, including the intermediaries at the center of the controversial *Zeran* and *Stratton* cases, have always retained the ability to edit third-party content after the fact and, if they wished to, could prescreen content before it becomes publicly available on their service. Since such intermediaries seem to have the power to mitigate or even outright prevent the damage done to defamation victims such as Kenneth Zeran, critics of § 230 may argue that it is only fair for those intermediaries to compensate those individuals if they do not exercise that power responsibly.

As illustrated in the previous Part, Internet intermediaries, short of exiting the market entirely, do not actually have the power to prevent third parties from posting defamatory messages about others.⁴²⁸ How-

425. See, e.g., *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006) (refusing to dismiss a lawsuit against Yahoo! Personals because the plaintiff alleged that Yahoo! itself, and not a third party, created the tortious content that was the subject of the lawsuit).

426. See discussion *supra* Part II.

427. Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 378 (2005).

428. See discussion *supra* Part VIII.

ever, is it even fair in the first place to compare Internet intermediaries with newspapers and other traditional aggregators of third-party content? While an Internet intermediary may seem like a “disguised publisher,” one must consider the inherent differences between an Internet intermediary’s editorial functions and those of a traditional publisher, such as a print newspaper. A traditional newspaper simply has no choice but to prescreen third-party content, for the technology does not yet exist for a third party to simply insert an article into a newspaper without a newspaper editor taking several proactive steps, including, but not limited to, laying out the article to fit with the rest of the newspaper and ultimately delivering the newspaper to the printer. Using current technology, it is just not possible for a newspaper or other print publisher to act as a truly passive conduit of third-party content even if that was its ultimate goal—at some point, even the most laissez-faire publisher or one of its agents will have no choice but to directly participate in the publication process in a way that requires seeing the content before it is publicly disseminated.

The Internet, in contrast, for the first time allows intermediaries to “publish” third-party content without the intermediary having to assume any editorial functions beforehand. As one court summarized, an Internet message board—a common source of controversy in early litigation—is, *at the same time*, fulfilling the roles of a bookseller, letters-to-the-editor column, library, and talk show.⁴²⁹

Thus, while owners of print media have no choice but to act as publishers due to the limitations of print technology, Internet intermediaries can freely choose between fulfilling the role of a traditional publisher by prescreening and heavily editing third-party content (as Prodigy did in the *Stratton* case) or the role of a traditional distributor and allow third parties to post content without the intermediary’s intervention (as CompuServe had done in the *Cubby* case).

Since Internet intermediaries have this choice of either assuming the role of a traditional publisher or distributor, some may question why the common law cannot simply be applied to the Internet context, with intermediaries either being treated as publishers or as distributors based on their level of control over third-party content. However, as the *Zeran* court observed, the specter of publisher liability for the statements of third parties would provide intermediaries with a very strong incentive to *never* perform any of the functions commonly associated with traditional publishers.

In other words, if the common law of defamation were applied,

429. *Stern v. Delphi Internet Servs. Corp.*, 626 N.Y.S.2d 694, 697, 700 (Sup. Ct. 1995).

intermediaries would intentionally refrain from prescreening or editing third-party content under any circumstances, in order to avoid the possibility of a court imposing publisher liability on them in future litigation, even if that subsequent litigation is completely unrelated. After all, this is exactly what happened in *Stratton Oakmont, Inc. v. Prodigy Services Co.*: Because Prodigy pre-screened or edited message-board posts in the past, it was liable as a publisher for all future content on that message board, even though the content Prodigy had removed in the past had absolutely no relation to the posts underlying the lawsuit.⁴³⁰ To put it another way, when it comes to the common law, the rule is “once a publisher, always a publisher.”

Because the “cost-effective reduction of defamation injury” is one of the social policy goals of defamation law,⁴³¹ as a matter of policy it makes little sense to “reward” an Internet intermediary who decides to unilaterally and spontaneously delete inappropriate or offensive third-party content with publisher liability for those statements. Thus, mere reversion to the common law is not an adequate solution even for those who consider victim compensation a more important policy goal than ensuring an uninhibited marketplace of ideas on the Internet, for if the common law were applied, Internet intermediaries would have a strong incentive to never attempt to prevent or mitigate damage through unilaterally deleting or editing third-party content.

Critics may respond by proposing that courts change the common law to eliminate the distinction between publisher and distributor liability in the Internet context. Under such a standard, an Internet intermediary would always be held liable as a publisher for a third party's defamatory statements, without any regard for the intermediary's prior actions or inactions. In other words, an Internet intermediary could not argue, as CompuServe successfully did in *Cubby*,⁴³² that it is not liable as a publisher for defamatory statements authored by a third party merely by demonstrating that it has not historically performed the editorial functions typically associated with publishers. Essentially, eliminating the distinction between these two types of liability would result in imposing strict liability on all Internet intermediaries for defamatory third-party content.

With respect to furthering the policy goal of compensating victims, a strict-liability approach to intermediary liability has certain benefits

430. No. 31063/94, 1995 WL 323710, at *3–4 (N.Y. Sup. Ct. May 24, 1995).

431. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 617 (2001); see also discussion *supra* Part VII (discussing defamation law's goals).

432. 776 F. Supp. 135 (S.D.N.Y. 1991).

over the traditional common law. Most notably, the law would not provide intermediaries with a perverse incentive to run their operations as absentee landlords, for intermediaries that remove third-party content, and therefore perform a function associated with a traditional publisher, would be held to the same standard of liability as intermediaries who simply do nothing. Thus, strict liability would satisfy one of the more serious criticisms of the common-law regime.

But subjecting Internet intermediaries to strict liability for the defamatory statements of third parties is not a realistic attempt at reform. The Supreme Court, in its landmark decision in *Gertz v. Robert Welch*, has found that laws applying a strict liability standard for defamation are unconstitutional, even if limited to only cases involving private individuals.⁴³³ As a result, barring an amendment to the U.S. Constitution, it is simply not possible to hold an intermediary liable for a defamatory statement without considering the intermediary's mental state or intent.

B. *The Solove Proposal*

Law professor Daniel Solove, in his book *The Future of Reputation*, proposes remedying the Internet defamation problem by replacing § 230 with what he deems a "moderate" approach to intermediary liability.⁴³⁴ Under this system, which seeks to find a balance between speech rights and compensating victims, plaintiffs would have the ability to recover money damages for defamation, invasion of privacy, and similar torts from an Internet intermediary, but damages would be capped at a certain unspecified amount.⁴³⁵ Furthermore, such a lawsuit could only proceed if the plaintiff first entered into mediation or arbitration with the speaker,⁴³⁶ the intermediary and the relevant party did not "take reasonable steps to address the harm"⁴³⁷ to the plaintiff, or "if the damage is irreparable."⁴³⁸ In addition, the law would be designed in a way to "encourage" intermediaries to implement dispute-resolution systems and "establish meaningful ways for people to protect their privacy."⁴³⁹

Professor Solove has argued that the true purpose of his proposal is not to punish intermediaries, but to shape the law in a way that "encourage[s] people to work out their problems among themselves."⁴⁴⁰ Unlike publications appearing in traditional media, Solove notes that

433. 418 U.S. 323, 347 & n.10 (1974).

434. SOLOVE, *supra* note 104, at 113, 120–24.

435. *Id.* at 124.

436. *Id.* at 192.

437. *Id.* at 191.

438. *Id.* at 192.

439. *Id.*

440. *Id.*

"online content can readily be edited and names can be removed," and thus there may be value in forcing intermediaries to enter into mediation⁴⁴¹ with defamation victims before allowing a lawsuit to proceed.⁴⁴² Presumably, an intermediary choosing not to mediate, or mediating but failing to reach an agreement with the plaintiff, would in itself provide the requisite evidence of intent necessary to hold an intermediary liable as a publisher or a distributor.⁴⁴³

Proponents of mandated mediation correctly note that mediation, "by allowing the parties to begin negotiations immediately, without having to wait months or years to appear on a court docket," may greatly reduce economic costs by resulting in a speedier resolution than traditional civil litigation.⁴⁴⁴ Professor Solove is no exception, for he believes that mediation and other forms of alternative dispute resolution may "cut down considerably on the legal costs and allow disputes to be resolved more quickly."⁴⁴⁵ But forcing Internet intermediaries to mediate every complaint about third-party content they ever receive, combined with imposing publisher and distributor liability on intermediaries that do not

441. Mediation is a form of alternative dispute resolution where a disinterested third party—referred to as a "neutral" or "mediator"—helps the parties involved in a dispute "design their own resolution by means of a mutually agreed-upon solution." Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 305–06 (2004). Throughout the mediation process, the neutral "serves as a translator, guiding the parties to reach an agreement," and "expands the parties' available resources by providing an understanding of the complicated issues at hand as well as an unemotional analysis of the underlying problem." *Id.* at 306. In other words, "[m]ediation deflects the focus of the dispute away from rights, winners, and losers" and instead "focuses on the parties' interests and mutual gains," which provides the disputants with an opportunity to "strengthen relationships of trust and respect or terminate the relationship altogether in a manner that minimizes mental anguish as well as monetary costs." *Id.* In order to promote candid and open discussion between the parties, information disclosed and statements made during mediation proceedings are held confidential. Fourth Circuit Mediation Program, <http://www.ca4.uscourts.gov/mediation/about.htm> (last visited Sept. 10, 2008).

442. SOLOVE, *supra* note 104, at 192.

443. Mediation has traditionally been a voluntary process where neither party is compelled to participate. Mediation Services Program, <http://www.sfbar.org/adr/mediation.aspx> (last visited Sept. 10, 2008). However, in recent years many state and federal courts, recognizing mediation's potential to amicably resolve disputes without costly litigation, have established court-sponsored mediation programs for certain types of civil disputes. *See, e.g.*, 4TH CIR. R. 33 (instituting a mandatory mediation program). As of 1996, fifty-one federal district courts had created such court-sponsored mediation programs. ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 17 tbl.1 (1996). It is believed that the passage of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 (2000), which requires every federal district court to implement court-sponsored alternative dispute resolution programs, has caused even more federal district courts to consider court-sponsored mediation. In fact, some courts, such as the Northern District of Illinois, have compelled certain civil litigants to submit their disputes to the mediation process prior to trial. N.D. ILL. R. 16.3.

444. David Allen Bernstein, Note, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 CARDOZO J. CONFLICT RESOL. 139, 157 (2005).

445. SOLOVE, *supra* note 104, at 124.

agree to “take reasonable steps to address the harm” to the plaintiff,⁴⁴⁶ would not actually result in cost savings for the parties involved.

The foundational premise of Solove’s proposal is that intermediaries, due to their role as central collection points of information, are in a good position to reduce the negative effects of third-party defamatory speech, yet, because of their § 230 immunity, refuse to negotiate with defamation victims. According to Professor Solove, those defamation victims, having been completely ignored by intermediaries, have no option but to resort to litigation in order to clear their names. Because “all it will take is for a person’s name to be edited out of the story,”⁴⁴⁷ forced mediation, with publisher or distributor liability imposed on intermediaries that do not agree to this purportedly “reasonable” solution, will result in less litigation and therefore lower costs for defamation plaintiffs, Internet intermediaries, and the taxpayers who fund the judicial system.

But there is no empirical evidence to support the proposition that Internet intermediaries refuse to negotiate with defamation victims or systematically abuse their § 230 immunity. Though Professor Solove provides several anecdotes of situations where individuals were purportedly harmed due to embarrassing information about them appearing on the Internet,⁴⁴⁸ none of Professor Solove’s summaries make any mention of these individuals even requesting that an intermediary remove defamatory or otherwise tortious content, let alone reporting that an intermediary denied such a request. In fact, the examples Solove cites provide evidence that it is unnecessary to subject Internet intermediaries to publisher liability. For instance, Solove describes how the administrator of the Waxy.org blog unilaterally deleted many offensive comments about the Star Wars Kid and came to the Kid’s defense by admonishing his own users⁴⁴⁹:

I’ve turned off new comments in this thread because of the mean-spirited tone, and deleted the most vicious comments. Yes, he’s fat and awkward. *We get it.* Since 90% of the traffic to these videos is coming from gaming, technology, and Star Wars news websites, I’m guessing that most of you weren’t any cooler in junior high school than this poor kid. All you geeks, nerds, and dorks out there need to

446. *Id.* at 191–92.

447. *Id.* at 192.

448. *See id.* at 1–4 (describing the “dog poop girl” incident); *id.* at 44–48 (summarizing the “Star Wars Kid” incident); *id.* at 50–54 (describing the Jessica Cutler/Washingtonienne sex blog scandal); *id.* at 76–78 (describing a blogger shaming a college student on his blog for requesting that he write a plagiarized paper for her); *id.* at 120–21 (discussing the DontDateHimGirl.com website).

449. *Id.* at 46.

think twice before trashing one of your own.⁴⁵⁰

Such deletions by immunized intermediaries are not rare. In fact, several Internet intermediary defendants in well-publicized § 230 cases have removed tortious content about the plaintiff upon request. For instance, in *Zeran v. America Online, Inc.*, the pivotal § 230 case, the court acknowledged that America Online removed the defamatory postings in question after the plaintiff had brought them to its attention, even though it was not required to do so due to its § 230 immunity.⁴⁵¹ Similarly, the defendant in *Carafano v. Metrosplash.com, Inc.* disabled a false profile of an individual purporting to be the plaintiff upon notification of the profile's existence by the plaintiff, and deleted it soon afterwards.⁴⁵² A substantial number of other published judicial opinions in § 230 cases also indicate that the defendant intermediaries had voluntarily removed content yet were sued anyway.⁴⁵³

The natural rebuttal to this information is that it is irrelevant that many intermediaries choose to voluntarily remove content despite their immunity, for the Solove proposal is concerned with Internet intermediaries who choose not to voluntarily remove content, even if they are small in number. Proponents of this approach may also argue that forced mediation would have benefited the defendant in *Carafano*: Since the harm to the plaintiff was probably not irreparable, the defendant's decision to disable the profile would have barred the plaintiff's lawsuit from advancing to such a stage and thus reduced the defendant's attorney's fees. Furthermore, some proponents may believe that content removal may be "too-little, too-late" in certain situations, and individuals such as Kenneth Zeran should have recovered from America Online as a publisher despite its removal of the defamatory posts due to the damage being "irreparable" and because of Zeran's inability to identify the anonymous authors of those posts. None of those counterarguments, however, are persuasive.

It is certainly true that at least some Internet intermediaries immunized by § 230 do not remove content upon a potential plaintiff's request.⁴⁵⁴ However, one must consider the reasons *why* an intermediary may refuse to censor the speech of its users. A critical assumption

450. *Star Wars Kid*, Waxy, <http://waxy.org> (Apr. 29, 2003).

451. 129 F.3d 327, 328–30 (4th Cir. 1997).

452. 339 F.3d 1119, 1122 (9th Cir. 2003).

453. See, e.g., *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1319 (11th Cir. 2006) ("On March 11, 2003, Amazon responded by letter saying that it would voluntarily remove the listing for *Anjos Proibidos* from its websites. The listing with Almeida's image was in fact removed promptly from Amazon's websites."); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985–86 (10th Cir. 2000) (stating that the defendant removed erroneous data provided by two independent third parties).

454. See, e.g., *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007

underlying Professor Solove's proposal is that the § 230 immunity "creates the wrong incentive" for intermediaries by "providing a broad immunity that can foster irresponsibility."⁴⁵⁵ In fact, Solove goes so far as to say that the existence of the § 230 immunity "insulate[s] bloggers" and other intermediaries "from the law."⁴⁵⁶

But it is simply not accurate to say that § 230—or any statutory immunity for that matter—insulates anyone from the law, or to imply that Internet intermediaries can simply utter the magic words "Section 230" and automatically avoid the "massive expenses"⁴⁵⁷ associated with a lawsuit. The fact that literally hundreds of defamation lawsuits have been filed against immunized Internet intermediaries, with many still being filed more than a decade after § 230 has become the settled law of the land, demonstrates that § 230 does not actually shield intermediaries from the expense of defending a lawsuit.⁴⁵⁸ Professor Solove himself readily concedes that "[l]awsuits are costly to litigate, and being sued can saddle a blogger with massive expenses," which may be difficult to pay given that "[b]loggers often don't have deep pockets."⁴⁵⁹ In some jurisdictions, a defendant is not permitted to seek dismissal of a lawsuit based on § 230 immunity until the summary-judgment stage, after discovery has taken place and very significant attorneys' fees have been incurred, for "invocation of Section 230(c) immunity constitutes an affirmative defense," and "parties are not required to plead around affirmative defenses."⁴⁶⁰ However even in the most liberal federal district courts, a defendant cannot raise a § 230 defense until it makes an appearance in court and argues a Rule 12(b)(6) motion to dismiss.⁴⁶¹

Given that § 230 does not relieve intermediaries of the costs of litigation, it is highly unlikely that the existence of the § 230 immunity is what causes Internet intermediaries to refuse deletion requests from plaintiffs. Of course, it is possible that an intermediary with knowledge of the immunity may not grant such a request, believing that § 230 would deter the plaintiff from filing suit. However, as Professor Solove

U.S. Dist. LEXIS 77551, at *3 (D. Ariz. Oct. 10, 2007) ("Sullivan allegedly contacted defendant and asked that his entries be removed from the website, but defendant refused.").

455. SOLOVE, *supra* note 104, at 159.

456. *Id.*

457. *Id.*

458. See discussion *supra* Part VI.

459. SOLOVE, *supra* note 104, at 159.

460. *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004); see also *Doctor's Assocs., Inc. v. QIP Holders, LLC*, No. 3:06-cv-1710(JCH), 2007 U.S. Dist. LEXIS 28811, at *6 (D. Conn. Apr. 19, 2007) (holding that § 230 immunity is an affirmative defense and thus cannot be raised in a Rule 12(b)(6) motion).

461. See, e.g., *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *6 (D. Ariz. Oct. 10, 2007) (allowing a defendant to raise a § 230 defense through a 12(b)(6) motion).

acknowledges, seventy-five percent of defamation plaintiffs are not primarily interested in getting money, and most sue "for purposes such as vindication, reprisal, response, and publicity."⁴⁶² "Many plaintiffs want the gossip or rumor-mongering to stop and to be removed from the site."⁴⁶³ Since a large number of "people resort to the law because they want a way to vindicate their reputations," knowing that they are unlikely to recover money damages from a defendant,⁴⁶⁴ it is not surprising that § 230 does not act as a true deterrent to litigation and lawsuits continue to be filed against immunized intermediaries.

But many intermediaries, even though litigation appears increasingly likely, or perhaps has even been initiated, continue to refuse to remove or edit content. If Professor Solove is correct that plaintiffs in such cases are suing primarily "to salve hurt feelings" or to "vindicate themselves,"⁴⁶⁵ one would expect to see virtually all defamation cases settle, since litigation is expensive and agreeing to remove such content would save a defendant intermediary the hundreds of thousands of dollars in legal fees it would need to incur to argue a Rule 12(b)(6) or summary-judgment motion asserting its § 230 immunity. Though Solove maintains that "[p]eople resort to lawsuits because of a lack of informal means to find resolutions, because there are no other good options,"⁴⁶⁶ it is simply unrealistic to believe that any intermediary facing such daunting legal expenses will nevertheless litigate the dispute until the very bitter end without at least *attempting* to negotiate with the plaintiff.

An intermediary will naturally have an underlying reason for choosing to expend such a large amount of money defending itself in court instead of simply reaching a reasonable settlement with the plaintiff. One must consider that a reasonable settlement may not be an option not due to any fault on the part of the defendant, but due to the plaintiff's unrealistic expectations or unreasonable demands. Not all individuals suing to vindicate their reputations had their reputations damaged because of defamatory statements. In fact, virtually all of the examples Professor Solove cites in his book, from the "dog poop" girl to the Washingtonienne's lover, involve individuals whose reputations were damaged not due to defamatory statements about them appearing on the Internet, but because embarrassing yet truthful information—often information that reflects negatively on their moral character—

462. SOLOVE, *supra* note 104, at 122 (quoting Jerome A. Barron, *The Search for Media Accountability*, 19 SUFFOLK U. L. REV. 789, 789–90 (1985)).

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.*

became public knowledge.⁴⁶⁷ Though most intermediaries would likely have no problem deleting blatantly defamatory postings about an innocent victim who seemingly has done nothing wrong, such as Kenneth Zeran, one could see many intermediaries—particularly those with the resources to defend themselves in court—not perceiving a demand to censor truthful postings about one’s criminal conviction as “reasonable.”⁴⁶⁸

Given this context, it is not likely that exposing Internet intermediaries to the potential of publisher liability for the statements of third-party users would do anything to facilitate informal settlement through negotiation or mediation.⁴⁶⁹ As mentioned above, intermediaries already have a strong incentive to resolve disputes with plaintiffs outside of court, for while § 230 may immunize an intermediary from liability to the plaintiff, the intermediary must still spend a substantial amount of money to successfully assert its § 230 immunity in court. Furthermore, considering that the costs of litigation are already high enough to encourage settlement, it does not seem probable that the specter of publisher liability would provide an intermediary with a greater incentive to settle, for the types of situations where an intermediary may refuse to remove or edit third-party content for a plaintiff are likely the same situations where an intermediary would not be found liable to the plaintiff as a publisher or distributor even if § 230 did not exist—namely, situations where the content in question clearly involves truthful information or protected opinion.

To further examine the impact that potential publisher liability may have on facilitating settlement, one may wish to consider the prevalence of settlement in defamation cases outside of the Internet context, in which the § 230 immunity does not apply. Studies have shown that while ninety-five to ninety-nine percent of all personal-injury cases are typically settled before trial depending on the jurisdiction,⁴⁷⁰ only a

467. Professor Solove would not find truth an acceptable reason for refusing to remove third-party content about an individual, for in his scholarship he has downplayed the importance of truth and the marketplace of ideas. This issue will be further discussed in the following sub-section on notice-based liability.

468. See, e.g., SOLOVE, *supra* note 104, at 10–11 (discussing an individual purportedly harmed because a Google search for his name reveals that he was briefly in prison).

469. This should not be construed as an admission that Internet intermediaries would behave the same way under a publisher-liability regime as they do under § 230. Rather, it is an acknowledgment that litigation costs, rather than the potential for liability, provide the true financial impetus for settlement, even when settlement is unwarranted.

470. See JEFFREY O’CONNELL, *THE LAWSUIT LOTTERY* 84 (1979) (“[M]ost studies confirm that 95 percent of the [personal-injury] cases—perhaps as much as 98 or 99 percent in some jurisdictions—are settled before reaching a verdict.”); see also James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 *HAMLIN J. PUB. L. & POL’Y* 235, 290 (2004) (“[Ninety-five, ninety-seven, ninety-nine] percent

mere fifteen to twenty-five percent of all non-Internet libel cases involving media defendants—the types of cases almost certain to involve holding an intermediary liable as a publisher for the speech of a third party—end in a (typically non-monetary) settlement,⁴⁷¹ with more than seventy-five percent of those cases ending in a verdict in favor of the defendant.⁴⁷² Despite the potential for publisher liability, less than ten percent result in a judgment in favor of the plaintiff.⁴⁷³

One could argue, as Professor Solove has, that Internet intermediaries are not analogous to traditional intermediaries such as newspapers because “online content can readily be edited and names can be removed,” and thus Internet defamation cases are more susceptible to non-monetary settlement than lawsuits involving the traditional media.⁴⁷⁴ However, empirical research suggests that there is some basis for comparison, for the Iowa Libel Research Project—the same study of libel plaintiffs cited by Solove to establish that most primarily seek vindication rather than monetary damages—found that almost seventy-five percent of libel plaintiffs “contended that they would have been sufficiently appeased by a retraction, correction, or apology by the press to refrain from litigation.”⁴⁷⁵ Yet while seventy-five percent of plaintiffs in those cases would cease litigation in exchange for a retraction, correction, or apology—gestures that essentially cost the defendant nothing in terms of money—only fifteen percent of defendants settled, despite the lack of any immunity provision, choosing instead to litigate and incur substantial attorneys’ fees in the process.

One may wonder why such a large percentage of defendants prefer to litigate rather than enter into settlement agreements with defamation plaintiffs, particularly since such settlements would essentially cost the defendants nothing due to no money changing hands. Although there has been no large-scale empirical study into the motives of defamation defendants, interviews with some defamation defendants indicate that they did not wish to settle “because they feel that they did no more than accurately report the facts.”⁴⁷⁶ In one confidential interview, a defendant

of all torts and contract cases are settled.”). *But see* Nicole B. Cásarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 701 (1994) (stating that fifty percent of all tort cases settle).

471. *See* Bezanson, *supra* note 281, at 228 (stating that fifteen percent of libel cases are settled); Cásarez, *supra* note 470, at 701 (stating that twenty-five percent of libel lawsuits are settled).

472. *See* Bezanson, *supra* note 281, at 228.

473. *Id.*

474. SOLOVE, *supra* note 104, at 192.

475. Cásarez, *supra* note 470, at 693 (citing Randall P. Bezanson et al., *The Economics of Libel: An Empirical Assessment*, in *THE COST OF LIBEL*, *supra* note 133, at 21, 25).

476. Clay Calvert & Robert D. Richards, *A Pyrrhic Press Victory: Why Holding Richard*

of a libel case in China revealed that many frivolous defamation cases are not settled “even when doing so would be far cheaper than litigating” because agreeing to a settlement would hurt the defendant’s own reputation and thus make it more advantageous to win in court.⁴⁷⁷ There is no reason to believe that Internet intermediaries are not also concerned with reporting the truth or about protecting their own reputational interests.

Proponents of the Solove approach to publisher liability may argue that even if imposing publisher liability on uncooperative intermediaries does not facilitate additional settlements, the system is still worth implementing because it would reward “good” intermediaries by prohibiting lawsuits against them if they do agree to remove content and if harm to the plaintiff is not irreparable. This approach would ideally have the dual benefit of limiting an intermediary’s attorney’s fees and court costs while simultaneously conserving scarce judicial resources by reducing the number of Internet defamation cases that go before a judge. Professor Solove, for instance, argues that the Internet intermediary defendant in *Carafano v. Metrosplash.com, Inc.*⁴⁷⁸ should not have been held liable as a publisher because, as a host of literally millions of profiles, it could not have known beforehand that a prankster created a fake profile.⁴⁷⁹ Since the intermediary removed the profile upon the plaintiff’s request, Solove believes that the dispute should have ended at that point and the plaintiff should not have been allowed to proceed with a lawsuit against the intermediary.⁴⁸⁰

But contrary to Professor Solove’s assertion, there is no way to prevent a determined plaintiff from initiating and proceeding with a lawsuit against a defendant, even if the cause of action is frivolous. As mentioned earlier in this section, an Internet intermediary cannot immediately terminate a defamation lawsuit merely by uttering the magic words “Section 230.” In most jurisdictions, the intermediary would have to hire an attorney to litigate a Rule 12(b)(6) motion to dismiss,⁴⁸¹ while in other jurisdictions the intermediary would not be able to dismiss the lawsuit on § 230 grounds until after discovery has taken

Jewell Is a Public Figure Is Wrong and Harms Journalism, 22 LOY. L.A. ENT. L. REV. 293, 323 (2002) (explaining why journalists disdain defamation plaintiffs such as Richard Jewell and explaining why the Atlanta Journal-Constitution did not enter into a settlement agreement with him).

477. Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L.J. 33, 92 n.381 (2006).

478. 339 F.3d 1119 (9th Cir. 2003).

479. SOLOVE, *supra* note 104, at 156.

480. *Id.* at 157.

481. *See, e.g.*, *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, No. 07-956-PHX-FJM, 2007 U.S. Dist. LEXIS 77551, at *5–6 (D. Ariz. Oct. 10, 2007).

place and a summary-judgment motion has been argued.⁴⁸² If a defendant's § 230 immunity, which is far broader and easier to apply than the limited immunity Solove is proposing for intermediaries that negotiate or mediate with the plaintiff, is not automatically applied by the court and requires proactive action by the defendant, certainly Solove's much narrower immunity would also not be considered by the court until it was raised by the defendant in a motion.

Once one takes this into account, there is no indication that *Carafano* would have turned out any better for the intermediary defendant under the Solove approach than under § 230. In order to enforce its immunity, the *Carafano* defendant had to win a motion for summary judgment in district court, and then fight off the plaintiff's appeal of that summary-judgment victory in the Ninth Circuit.⁴⁸³ Under the Solove proposal, the defendant would once again have to argue a motion in district court, asserting that it is immune because it engaged in informal dispute resolution with the plaintiff and reasonably accommodated the plaintiff by removing the fake profile in a timely manner. The plaintiff, however, would naturally argue that the defendant intermediary is not immune, either because the intermediary did not reasonably accommodate the plaintiff (perhaps because the deletion was not fast enough) or the damage to the plaintiff is irreparable, and thus it should be allowed to proceed against it regardless of any remedial action by the defendant after the fact.

The very existence of any exception to an intermediary's immunity—let alone two highly fact-specific exceptions such as the existence of irreparable harm or a defendant's purported failure to be reasonable enough—provides a plaintiff with a strong incentive to file suit anyway in order to determine if a court will actually find that the defendant is immune, which, rather than conserving scarce judicial resources, would have the opposite effect. When one considers that Solove's proposed limited immunity would be more difficult for an intermediary to argue and establish in court than § 230 immunity, it is easy to envision the *Carafano* defendant spending an even greater amount of money on attorneys' fees under this alternate immunity regime.

Finally, a proponent of the Solove approach may argue that the true purpose of publisher liability is to compensate victims for irreparable harm stemming from defamatory statements made by third parties. Though § 230 allows a defamation victim to recover monetary damages from the original author of a defamatory statement, the anonymous nature of much Internet speech ensures that, in at least some situations, a

482. See, e.g., *Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004).

483. *Carafano*, 339 F.3d at 1122.

defamation victim will not be able to recover damages from the original defamer due to that individual remaining anonymous. Perhaps the most notable example of such an individual is Kenneth Zeran, the plaintiff in *Zeran v. America Online, Inc.*,⁴⁸⁴ who was never able to identify the individual who posted the defamatory messages that ruined his reputation and caused chaos in his personal life. Furthermore, even when the original author of a defamatory statement can be identified, the individual may lack the resources necessary to satisfy the judgment,⁴⁸⁵ and thus the victim will continue to go uncompensated unless another party, such as the intermediary, is also held liable.

It is impossible to read Kenneth Zeran's story and not feel considerable sympathy for him and his ordeal. Few would argue that it is socially desirable to have people like Zeran literally have their businesses destroyed because of an anonymous prankster's seemingly random decision to make him the target of a continuous series of defamatory Internet postings. It should go without saying that if these anonymous attackers are ever identified, the law should require them to compensate Zeran for the considerable damage done to his life and career.

But as the old adage goes, two wrongs do not make a right. While Zeran was clearly an innocent victim, so was America Online. America Online could not have foreseen the incident, nor did it benefit in any way from this anonymous prankster impersonating Kenneth Zeran on its message boards. On the contrary, America Online also incurred costs as a result of that individual's tortious actions, having to expend considerable time, money, and manpower removing the defamatory postings, dealing with negative publicity and, in the end, having to defend against a defamation lawsuit. Though America Online is not nearly as sympathetic a figure as Kenneth Zeran, and its damages may seem trivial in comparison to what he suffered, it too is a victim here. Requiring America Online, another victim, to bear the full costs of this incident is just as morally and socially undesirable as forcing Kenneth Zeran to go without compensation and would also provide anonymous pranksters with an easy way to force intermediaries that they dislike out of business.⁴⁸⁶

484. 129 F.3d 327 (4th Cir. 1997).

485. *E.g.*, SOLOVE, *supra* note 104, at 122 (summarizing a situation where a woman won a \$11.3 million verdict against an individual over defamatory Internet statements, but did not collect any of the damages and ultimately lost money pursuing the case).

486. For instance, if intermediaries were held liable as publishers every time an anonymous defamer could not be identified by the plaintiff, one could easily envision malicious, technologically savvy individuals deliberately defaming people known to be litigious through the use of a particularly hated intermediary, with the intention of forcing that intermediary to incur

One must consider that there is significant precedent for immunizing intermediary institutions from liability for the actions of third parties. As a general rule, the owner of a business establishment “is not and cannot be an insurer of a guest or patron against personal injuries inflicted by another person on the premises, other than his servants or agents.”⁴⁸⁷ As a result, some individuals who are physically injured or lose money in robberies where the robber is never caught also find themselves in a situation where they cannot receive compensation from anyone, for it would be unjust to force another third party—the business owner, who often too is a victim—to bear the full cost of damages resulting from the incident, even if that owner has the monetary means to provide that compensation.⁴⁸⁸

One must also keep in mind that outrageous factual situations mirroring the *Zeran* case appear to be very rare. While some individuals who know what they are doing may indeed be able to commit tortious acts on the Internet with impunity by effectively concealing their identities, in practice this level of Internet anonymity is not very common. Though some may be concerned about “defamation haven” websites that make use of “anonymizing” technology in order to make their users untraceable, the boasts by such websites are often unsupported by facts, as recently demonstrated by one such website whose owner touted the untraceability of its users in one magazine interview only to have the FBI arrest one of its users several days later after easily tracing his identity as part of an investigation into a mass murder threat posted on the website.⁴⁸⁹

Furthermore, in most cases, imposing publisher liability on an intermediary should not be necessary even when the speaker of a defamatory statement happens to be anonymous. The Iowa Libel Research Project has shown that most defamation victims initiate lawsuits not out of a desire to recover money damages, but for non-monetary purposes such “to clear the air and re-establish their reputations.”⁴⁹⁰ In these

substantial losses due to having to compensate the defamed individual for the damage caused by the anonymous postings.

487. *Coca v. Arceo*, 376 P.2d 970, 973 (N.M. 1962).

488. See, e.g., *Wilson v. Wal-Mart Stores, Inc.*, No. 97-2024, 1997 U.S. App. LEXIS 17055, at *2 (10th Cir. July 9, 1997) (affirming a grant of summary judgment finding that a store is not liable for damages resulting from a robbery at gunpoint in its store parking lot).

489. Compare Juicy Campus Privacy and Tracking Policy, <http://www.juicycampus.com/posts/privacy-policy> (last visited Sept. 10, 2008) (“[This site] does not require personally identifiable information from our users when they read or post messages to the Site’s gossip board.”), with *Student Arrested After Threats To Attack Campus*, CNN.com, Dec. 9, 2007, <http://edition.cnn.com/2007/US/12/09/blogger.threat.ap/index.html> (stating that a student was arrested after police and university officials traced a threatening message posted on Juicy Campus to that individual’s computer).

490. Cásarez, *supra* note 470, at 668.

cases, the mere act of filing a lawsuit will provide the plaintiff with the victory it desires.⁴⁹¹ If such an overwhelming majority of defamation plaintiffs do not file suit to recover money damages, then in most cases it should not be necessary to impose liability on an intermediary or any other actor, for a plaintiff will receive the vindication it desires simply by filing a lawsuit against the anonymous John Doe defendant, even if that defendant is never identified. In other words, a no-fault-defamation tort can more effectively achieve this same goal, but without the negative externality of harming the marketplace of ideas.

That said, there clearly are situations where a defamation victim, such as Kenneth Zeran, has suffered serious harm and should be entitled to monetary damages. Even if these cases are extremely small in number, some may feel a solution is still required. But it is not necessary to “solve” this problem by punishing intermediaries who may themselves be victims. One can think of a multitude of possible ways to compensate individuals such as Kenneth Zeran without forcing the affected intermediary to pay the bill. But as mentioned in the last Part, Internet service providers—either voluntarily or through a government mandate—may require that their customers purchase insurance that would compensate them in the event of serious irreparable injury caused by individuals who cannot be identified. Rather than simply leaving open the potential for all intermediaries to be subject to publisher liability, legislators should explore more narrowly tailored solutions to the “Kenneth Zeran” problem that would not chill speech.⁴⁹²

C. Notice-Based Liability

Only a small minority of § 230 critics continues to argue that Internet intermediaries should be subject to publisher-based liability for content authored by their users. Today, most opponents of the statute have proposed repealing § 230 and replacing it with a new safe-harbor statute modeled after the Digital Millennium Copyright Act (DMCA).⁴⁹³ The DMCA,⁴⁹⁴ which Congress passed “out of a desire to encourage the international market for digital works,”⁴⁹⁵ allows an Internet intermediary to qualify for immunity from liability for the copyright infringement of third parties, but only under a certain set of circumstances. Under the

491. See SOLOVE, *supra* note 104, at 122.

492. See discussion *supra* Part VII.

493. See, e.g., Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-Poster,”* 9 B.U. J. SCI. & TECH. L. 407, 431 (2003) (arguing that § 230 should be replaced with a notice-based statute modeled after the DMCA).

494. 17 U.S.C. § 512 (2000).

495. Duran, *supra* note 384, at 126.

DMCA, an intermediary will qualify for the safe harbor only if it did not play a role in selecting or modifying the material at issue, did not financially benefit from the act of copyright infringement, and did not have knowledge that the material was infringing.⁴⁹⁶ But most significantly, an Internet intermediary will lose its DMCA immunity if it does not expeditiously take action after being informed by the copyright owner or other third party that it is hosting infringing material⁴⁹⁷ or if it discovers infringing material on its own and ignores it.⁴⁹⁸

Replacing § 230 with a notice-based framework modeled on the DMCA is, in essence, a proposal to apply the common law of distributor liability (but not publisher liability) to all Internet intermediaries.⁴⁹⁹ Though the *Zeran* court dismissed the idea of applying distributor liability to Internet intermediaries as impractical, the court's reasoning has come under significant criticism from those who believe that, while partial immunity from publisher liability may be necessary, complete immunity from liability is unwarranted. Proponents of a notice-based approach typically criticize § 230 by disputing the validity of Congressional and judicial assumptions about the Internet medium. The remainder of this section shall briefly identify and discuss these criticisms.

1. THE CHILLING-EFFECT ASSUMPTION

One author, in an article published just a few months after the *Zeran* decision, contested the *Zeran* court's assumption that defamation liability for third-party message-board postings would have a significant chilling effect:

Although the cost of starting a bulletin board on the Internet is within the reach of many individuals, and imposing distributor liability on operators of bulletin boards may result in an award of damages that would render an individual bankrupt, the fact is that the most significant players in the game are AOL, a publicly owned company with a market value of \$6.5 billion . . . and Microsoft Network, which is owned by Microsoft Corp., a company with a market value of \$148 billion.⁵⁰⁰

This criticism, and others similar to it, fails in that it is not a forward thinking analysis. This author, for instance, wrongly assumed that the most significant players in the Internet message-board industry in

496. 17 U.S.C. § 512(b)(2)(A), (c)(1)(A)–(B).

497. *Id.* § 512(c)(1)(A)(iii).

498. *See id.* § 512(b)(2)(E).

499. *See* Paul Ehrlich, Note, *Communications Decency Act § 230*, 17 BERKELEY TECH. L.J. 401, 414–15 (2002) (stating that applying the DMCA framework to the defamation context would be “a return to distributor liability”).

500. Sheridan, *supra* note 387, at 174–75 (footnotes omitted).

1997 would remain the dominant players in perpetuity. While multi-billion-dollar companies such as AOL and Microsoft did have a stranglehold over the message-board market in 1997, this is certainly no longer the case. Of the top 150 message boards on the Internet ranked by number of total posts, only one—Xbox Forums, ranked number 123 and owned by Microsoft⁵⁰¹—is run by a multi-billion-dollar company, and almost none are even owned by companies worth a million dollars.⁵⁰² In fact, the overwhelming majority of the most popular Internet message boards are run by individuals who would become bankrupt if a judgment for distributor liability were imposed on them.

Furthermore, as discussed in Part IV, empirical research demonstrates that broad-based defamation laws chill legitimate speech regardless of the wealth of the speaker or intermediary.⁵⁰³ Though large Australian and American newspapers both possess the resources necessary to defend themselves in court, Australian newspapers were significantly more “chilled” compared to their American counterparts, in that Australia’s more liberal defamation laws deterred the nation’s newspapers from reporting on political and corporate corruption.

In addition to failing to account for changes in the message-board industry, the author wrongly assumed that Internet message boards would remain the dominant method of user-generated content on the Internet. Today, blogs have clearly displaced message boards as the vehicle of choice for publishing vast amounts of information with little editorial oversight, and the most popular blogs, like the most popular message boards, are also not owned by multi-billion-dollar corporations. Not surprisingly, the most recent scholarship regarding Internet defamation law has focused not on message-board owners, but on bloggers.⁵⁰⁴ Given the extent of this demographic shift, criticisms of the chilling-effect assumption based on mid-1990s industry demographics are clearly flawed.⁵⁰⁵

2. THE TECHNOLOGICAL ASSUMPTION

Others have criticized § 230 by arguing that Congressional assumptions about Internet technology were incorrect or flawed. Most notably, Judge Berzon prefaced her majority opinion in *Batzel v. Smith* by observing that “[t]here is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply

501. Xbox Forums, <http://forums.xbox.com> (last visited Sept. 10, 2008).

502. See Forums Rankings, *supra* note 258.

503. See discussion *supra* Part IV.

504. See, e.g., Anthony Ciolli, *Bloggers as Public Figures*, 16 B.U. PUB. INT. L.J. 255, 269–82 (2007); Reynolds, *supra* note 144, at 1162–68; Troiano, *supra* note 384, at 1467–82.

505. See discussion *supra* Part V.

differently in cyberspace than in the brick and mortar world.”⁵⁰⁶

One author has recently expressed similar sentiments, arguing that Congress erred in believing that the Internet needed any special protection at all, since “courts had difficulty fitting telegraph, radio, and television into the traditional defamation framework because their technical workings initially confounded the legal community,” and yet the common law “changed to focus on the impact of the transmitted speech and not the utilized medium when evaluating defamation claims.”⁵⁰⁷ This author also did not accept the *Zeran* court’s assumption that monitoring content generated by third parties would pose a significant technological or economic burden, particularly in blog comment sections, since “determining what is and what is not a defamatory statement is mainly a matter of common sense.”⁵⁰⁸

Such criticisms, however, reflect a misunderstanding of Congressional intent. Congress clearly did not pass § 230 because it was ignorant of how Internet technology works, or did not understand how Internet speech would fit into the traditional defamation framework—on the contrary, Congress realized that allowing courts to fit the Internet into the traditional framework would result in highly undesirable consequences. After all, one must remember that § 230 was crafted as a direct response to the *Stratton* decision, which had done nothing more than apply existing common-law precedent to the Internet medium.⁵⁰⁹ Congress clearly believed that the outcome of *Stratton* was undesirable, and thus passed legislation to specifically overrule that decision. Although some authors may disagree with Congress’s policy decision and may have preferred retaining the common law over implementing § 230, it is disingenuous to claim that Congress passed § 230 merely because it was confused or blinded by a new and unfamiliar technology.

It is similarly inaccurate for Judge Berzon and others to claim that the technological features of cyberspace did not require a potential re-examination of previous defamation-law principles. As discussed earlier, the common law of defamation has a very long history of changing with the development of new technologies.⁵¹⁰ After all, one could argue that the invention of the printing press did not *have* to result in different liability regimes for slander and libel. One could use the same reasoning to argue that there was nothing inherent in television and radio technology that would require a departure from the long-standing legal principle

506. *Batzel v. Smith*, 333 F.3d 1018, 1020 (9th Cir. 2003).

507. Troiano, *supra* note 384, at 1465.

508. *Id.* at 1479–80.

509. See discussion *supra* Part III.

510. See discussion *supra* Part II.

that defamatory statements transmitted through the spoken word should be treated as slander.

The rapid deployment of information to a potentially unlimited audience at virtually no cost is one of the inherent characteristics of the Internet that distinguishes it from other media. Even highly regulated versions of the Internet, such as the heavily censored Internet experience offered in China,⁵¹¹ retain this key defining characteristic. To claim that this core technological aspect of the Internet is not significant enough to warrant re-consideration of defamation law crafted when rapidly transmitting information to a potentially unlimited audience at virtually no cost was nothing but science fiction greatly underestimates the lasting impact the Internet will have on American society.

Finally, claiming that all Internet intermediaries—particularly bloggers, who may earn little or no revenue from their activities—do not face any technological or economic hurdles in screening third-party content does nothing other than show ignorance of both current Internet technology and the situation of such intermediaries. Although “many blog-building sites provide users with a special feature to monitor incoming comments before publication,”⁵¹² any blog owner who has reached a modicum of success knows that heavily pre-screening third-party content is a Herculean task, particularly when the blog owner wishes to build an active user community similar to those found at Red-State.com or DailyKos.com.

It is also highly inaccurate to claim that “properly monitor[ing] the information on [a] blog is not a burdensome task because determining what is and what is not a defamatory statement is mainly a matter of common sense.”⁵¹³ One cannot imagine how a blogger—or any Internet intermediary—could possibly know whether a blog comment stating that Person A had sex with Person B is true, or whether a comment that Person Y beats his wife is defamatory. Though such comments may be distasteful, one cannot use “common sense” to determine whether such statements are true or false. Such a determination can only be made through a detailed investigation, which is far beyond the means of many Internet intermediaries and would most certainly pose a significant burden on owners, rather than just a “small burden.”⁵¹⁴

Opponents of a strong intermediary immunity—particularly those who place a very high value on privacy interests—may argue that blog-

511. Kathleen E. McLaughlin, *China's Model for a Censored Internet*, CHRISTIAN SCI. MONITOR, Sept. 22, 2005, at 01.

512. Troiano, *supra* note 384, at 1480.

513. *Id.* at 1479–80.

514. *Contra* Duran, *supra* note 384, at 124.

gers and the general public should not be concerned with the truth in all instances. According to Professor Solove, "There are many 'truths' that are not worth much effort to find out. For example, there is a true answer to the number of paperclips I have in my office, but this information does not have much value."⁵¹⁵ Most notably, Solove, perhaps in an allusion to the Washingtonienne incident, asserts that "[t]he truth about a private person's personal life is often worth little or nothing to the general public."⁵¹⁶

But there is an obvious rebuttal to Solove's argument, in that only the marketplace can determine whether the general public perceives any value in knowing about a private individual's personal life. After all, if the general public has no concern about the number of paperclips in Professor Solove's office, one would not expect to find robust discussion of the topic on the Internet, and any fringe websites devoted to the subject would likely languish in Internet obscurity. However, if there are hundreds of discussion-board threads seriously debating the number of paperclips in his office, is this not evidence that the topic actually has value? The marketplace of ideas, like any other marketplace, is driven by supply and demand, and a central planner cannot serve as an arbiter of value without censoring certain pieces of information that the general public deems important.

3. THE EMERGING TECHNOLOGY ASSUMPTION

Some scholars have also claimed that § 230, even if it was necessary in 1996, is no longer necessary today because the Internet is no longer an emerging technology, but a pervasive and indispensable technology. One author, for instance, noted that between 1997 and 2003 Internet use rose from 22.1% of the American adult population to sixty-three percent of the American adult population.⁵¹⁷ Furthermore, the author notes that "the online retail industry expected to sell roughly \$120 billion worth of goods in 2004," and "[t]he number of Americans who purchased something online more than doubled" between 2000 and 2004.⁵¹⁸ Because these trends demonstrate that "the Internet has shown strong, sustainable growth," this author and others believe that it no longer needs the so-called special treatment that § 230 provides.⁵¹⁹

But this argument fails to account for the fact that the Internet itself is just a *medium*. Just as there are many different genres of programming

515. SOLOVE, *supra* note 104, at 132.

516. *Id.*

517. Duran, *supra* note 384, at 124.

518. *Id.*

519. *Id.*

that take advantage of the television medium, the Internet medium can host very different types of content. Congress clearly intended not only to promote the Internet as a medium but also to promote specific content within that medium. For instance, § 230(a)(3) states that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁵²⁰ This provision conveys the fact that Congress, in passing § 230, did not only wish to encourage the Internet medium’s development, but more specifically, encourage “political discourse” and “cultural development” within the Internet medium.

Repealing § 230 may not cause more than a handful of individuals to cease their use of the Internet. However, repealing § 230 would have a considerable impact on *how* individuals use the Internet. Many bloggers, discussion-board owners, and other Internet intermediaries, fearing defamation liability after the repeal of § 230, would cease providing their services, thus reducing the amount of “political discourse” and “cultural development” that will take place. Similarly, Internet users would be less likely to post comments on discussion boards, blog comment sections, UseNet, chat rooms, and other interactive services that are most conducive to the robust exchange of ideas, which would then further reduce demand for such services and cause even more bloggers and other intermediaries to exit the market.⁵²¹ In other words, repealing § 230 would radically transform the Internet from an interactive and robust marketplace of ideas to a mere conduit of passive non-controversial information.

Furthermore, one must keep in mind that the Internet is not exclusive to the United States. Because the Internet is an international medium that has “made Beijing, Bangalore and Bethesda next door neighbors,”⁵²² any burdensome regulations the United States government places on Internet intermediaries, such as replacing § 230 with a notice-and-take-down system, have the potential to negatively impact the competitiveness of American Internet companies that provide services where there is a high risk of third parties making defamatory statements. Though the United States currently is among the most business-friendly countries when it comes to shielding websites, search engines, and other Internet intermediaries from lawsuits seeking recovery for the speech of others, repealing § 230 and instituting a DMCA-like system

520. 47 U.S.C. § 230(a)(3) (2000).

521. See Ciolli, *supra* note 504, at 277.

522. Anthony Ciolli, *International Students in a Post-Globalization World: A Critical Analysis*, 5 GEO. J.L. & PUB. POL’Y 415, 416 (2007).

would certainly make the United States a less attractive place for intermediaries.

While it may be unlikely that established American intermediaries, such as Google and MySpace, would immediately leave the country if § 230 were repealed, such a scenario would provide an opening for intermediaries based exclusively in foreign nations that possess protections similar to § 230 to reduce Google's market share and profits by providing Americans with an uncensored search engine experience without having to continuously engage in high cost litigation. This phenomenon has already occurred in the wake of the DMCA, where file-sharing intermediaries based in nations with more liberal copyright laws, such as Sweden,⁵²³ and without any offices or employees in the United States, have continued to thrive—even while deliberately targeting an American audience—while American intermediaries have either exited the market voluntarily or been sued out of business.⁵²⁴ However, it is possible that American start-up companies and small businesses, which may have their innovative ideas hampered by legal constraints and expensive litigation, would be most adversely affected if a notice-and-take-down system were adopted in the United States.⁵²⁵

D. *Retraction as Complete Remedy*⁵²⁶

While some scholars hope to see courts scale back the protections offered by § 230, others believe that § 230 does not go far enough in promoting an online marketplace of ideas. Among these scholars is Glenn Reynolds who, in his contribution to the Harvard Law School "Bloggership" symposium, proposes that courts should treat defamatory Internet speech—particularly speech posted on blogs—as slander rather than libel in order to promote more equitable outcomes.⁵²⁷

Blog speech, according to Reynolds, has more in common with the spoken word than a newspaper publication. Unlike errors in newspapers and other print media, blog errors "can be corrected within minutes,"⁵²⁸ and thus Reynolds believes defamatory statements would not "circulate widely among those who don't know better."⁵²⁹ Blogs, unlike newspapers and the broadcast media, exist in a "low-trust culture," and individ-

523. See, e.g., About the Pirate Bay, <http://thepiratebay.org/about> (last visited Sept. 10, 2008).

524. See, e.g., Michael Ingram, *LokiTorrent Caves to MPAA*, SLYCK NEWS, Feb. 10, 2005, <http://www.slyck.com/news.php?story=661>.

525. See discussion *supra* Part VI.

526. Portions of this sub-section are taken from Ciolli, *supra* note 63.

527. Reynolds, *supra* note 144, at 1165.

528. *Id.* at 1163.

529. *Id.* at 1164.

uals are unlikely to view any particular blog as authoritative.⁵³⁰ Furthermore, individuals defamed by blogs or other “low cost” Internet entities have a greater ability to respond to the accusations made against them than individuals defamed in “high cost” media such as newspapers or television. Because of these fundamental differences, Reynolds concludes that it would be inappropriate for courts to hold bloggers to the same liability standards as “traditional” media outlets.⁵³¹

The Reynolds proposal, though well-intentioned, would result in greater aggregate harm to the blogosphere (and the Internet as a whole) than maintaining the status quo. In his analysis, Reynolds wrongly assumes that the blogosphere is a culturally homogeneous community, when in reality the blogosphere is a highly fractured entity where no one core set of values or norms has been universally accepted. Reynolds also fails to acknowledge that the blogosphere is not an insular community: While blogs do interact with each other, they also frequently interact with traditional websites, discussion boards, and other new media that do not share the same norms as “citizen journalist” bloggers and are not subject to the same reputational incentives or disincentives. Furthermore, Reynolds bases his analysis on the mistaken belief that the Internet is a low-authority medium, ignoring the important role that search engines play in establishing authority. Finally, Reynolds does not consider the devastating impact his proposal would have—both on defamation victims and the Internet as an information resource—when combined with existing § 230 immunities.

1. THE BLOGOSPHERE: HETEROGENEOUS, NOT HOMOGENEOUS

In his paper, Reynolds identifies several “cultural values” of the blogosphere that he believes make defamatory statements less likely to cause lasting reputational harm. Bloggers, unlike newspapers, rarely make unsubstantiated factual statements, for the blogosphere is a “low-trust culture” where bloggers who do not cite their sources will not be considered credible. Similarly, “speedy correction of factual errors” with “the same degree of prominence as the original error” has been adopted as a norm for the same reason.⁵³²

Though such values may apply to Reynolds’s own blog and those like it,⁵³³ they do not apply to the entire blogosphere. Daniel Solove correctly observes that the average blogger is not a citizen journalist, but

530. *Id.* at 1159.

531. *See id.* at 1166.

532. *Id.* at 1160.

533. *See id.* at 1163–64 (describing the error-correction policy Reynolds uses for InstaPundit.com and stating that this “approach is representative” of other blogs even though there may be some exceptions).

a diarist.⁵³⁴ Rather than practicing journalism or producing scholarship, the average blogger writes about her personal life, which includes relaying gossip.⁵³⁵ Such “diary” blogs, by their very nature, reject citizen-journalist norms for gossip—particularly gossip about the lives of private figures—often lacking substantiation, with readers solely relying on the author’s assertion that the statement is not an outright lie.

One must recognize that diary bloggers are unlikely to adopt citizen-journalist norms in the future. The benefits blogging confers on diarists differ from the benefits citizen journalists receive. Blog readership levels are significantly more important to citizen journalists. Citizen-journalist blogs provide their owners with greater potential for readership-based advertising revenue. Although citizen-journalist blogs make up only a small fraction of the blogosphere, they are heavily over-represented on BlogAds.com and other advertising networks.⁵³⁶ In fact, citizen-journalist blogs are often able to charge significantly higher rates than non-citizen-journalist blogs that receive a comparable number of weekly page views.⁵³⁷ Citizen-journalist bloggers are also disproportionately represented among bloggers who receive monetary benefits outside of advertising. For every diary blogger, such as Jeremy Blachman, who has received a book deal due to his blog,⁵³⁸ multiple citizen-journalist bloggers obtain similar deals.⁵³⁹ Many citizen-journalist bloggers also seek to wield influence over public affairs or to achieve greater professional recognition or notoriety.⁵⁴⁰

Since high readership levels are likely to result in tangible monetary and non-monetary benefits for citizen journalists, one can understand why citizen-journalist blogs have developed cultural norms that seek to maximize trust and ensure that readers continue to visit citizen-journalist blogs on a frequent basis. But most diary bloggers do not have these same ambitions—only a small handful seeks financial gain or publicity.⁵⁴¹ The majority of diary bloggers view their blogs as a release, or a way to vent about their problems. Though some of these bloggers may

534. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195, 1196–97 (2006).

535. *Id.*

536. See BlogAds, <http://www.blogads.com/order%20> (last visited Sept. 10, 2006) (listing advertising rates for member blogs).

537. For example, as of September 10, 2008, the “Crooks and Liars” citizen-journalist blog charged advertisers at a rate that was almost double the rate charged by “TuckerMax,” a diary blog with a similar number of page views. *Id.*

538. JEREMY BLACHMAN, ANONYMOUS LAWYER (2006).

539. See, e.g., JEROME ARMSTRONG & MARKOS MOULITSAS ZÚNIGA, CRASHING THE GATE (2006); ANA MARIE COX, DOG DAYS (2006); GLENN REYNOLDS, AN ARMY OF DAVIDS (2006).

540. See Christine Hurt & Tung Yin, *Blogging While Untenured and Other Extreme Sports*, 84 WASH. U. L. REV. 1235, 1248 (2006).

541. In fact, many diary bloggers may find publicity undesirable.

enjoy attention, attention is not their primary motivator: They would continue blogging whether they receive twenty or 200,000 hits a week. Diary bloggers, because they do not value readership, have little incentive to cease making unsubstantiated statements or to engage in speedy corrections.

Furthermore, Reynolds wrongly assumes that all blogs are active. Bloggers, for a wide variety of reasons, often abandon their blogs, and thus no longer remove or correct defamatory statements. Blog abandonment rates are high even among citizen-journalist blogs—at least 114 legal blogs created since 2005 are no longer active.⁵⁴² Because victims may not discover defamatory Internet statements immediately, one cannot craft laws or policies with the assumption that all blogs are updated in perpetuity and will actively comply with certain norms. The blogosphere is a heterogeneous entity, with citizen-journalist blogs and diary blogs, as well as active blogs and inactive blogs, and thus Reynolds is wrong to assume that citizen-journalist blog norms apply to anything beyond the small portion of the blogosphere that he is most familiar with.

2. THE BLOGOSPHERE: AN INTERACTIVE, NOT INSULAR, COMMUNITY

Reynolds correctly observes that “bloggers link to other people, and other people . . . link to them.”⁵⁴³ However, the blogosphere is not an insular community. Not only do bloggers link to other bloggers, but a wide variety of other Internet media link to and cite blogs, ranging from traditional websites to decentralized media such as discussion forums and UseNet newsgroups.⁵⁴⁴ As one might expect, salacious or tawdry blog posts are especially likely to receive attention beyond the blogosphere.⁵⁴⁵ Victims of the most harmful defamatory statements, then, would have to seek corrections not only from blogs but also from non-blogs that have reproduced the information. This is problematic, both for technical and cultural reasons.

Blog technology not only provides an author with the ability to correct errors within minutes, but even appends corrections to the origi-

542. *Inactive Legal Blogs*, Law X.0, <http://3lepiphany.typepad.com> (Mar. 23, 2006).

543. Reynolds, *supra* note 144, at 1165.

544. See, e.g., AutoAdmit Forum: Volokh Writes onto Law Review, http://www.autoadmit.com/thread.php?thread_id=413612&mc=16&forum_id=2 (last visited Sept. 10, 2008) (publicizing Posting of Eugene Volokh to Volokh Conspiracy, <http://www.volokh.com> (May 9, 2006, 02:14 EST)); Posting of propertyprof to The Faculty Lounge, <http://www.thefacultylounge.org> (May 26, 2008, 12:41 EST) (referencing Posting of Daniel J. Solove to Concurring Opinions, <http://www.concurringopinions.com> (May 26, 2008, 00:09 EST)).

545. See, e.g., AutoAdmit Forum: Penn People, http://www.xoxoth.com/thread.php?thread_id=368754&mc=15&forum_id=2 (last visited Sept. 10, 2008).

nal post.⁵⁴⁶ But not all Internet media share these features. Decentralized communication media, such as UseNet and discussion boards, often do not allow the original author to edit messages that have already been posted. The discussion boards at issue in *Zeran*, for instance, to this day do not allow authors to remove or update messages after they have been made. Defamation victims may find it difficult to have such posts removed even if the discussion-board software allows authors to edit their own messages. Unlike blogs, which almost always prominently display a blogger's e-mail address or some other contact information, most message boards do not publish user e-mail addresses—and even when users have the option of providing an e-mail address, only a minority of users actually use this feature.

Thus, defamation victims, unable to obtain retractions or removals from discussion forums and other decentralized Internet media, would have to rebut the accusations on their own. But technological differences between Internet media also make this problematic. Although a small number of discussion boards use a “tree” format, where all messages in a thread appear on the same page,⁵⁴⁷ the vast majority use a “flat” format, where a small number of posts—often ten to fifteen—appear on each page, with readers having to manually visit multiple pages in order to see all the posts in the same thread.⁵⁴⁸ Those who own large websites know that secondary and tertiary pages receive substantially fewer hits than primary pages—while the first page of a “flat” discussion-board thread might receive 50,000 hits, the second page may only receive 10,000, with only 5,000 viewing the third page, and so on. Similarly, search engines such as Google are significantly more likely to index and prominently display the first page in a thread than subsequent pages. As a result, more individuals will see the original defamatory statement than the defamation victim's response. Furthermore, many victims may not even have an opportunity to respond. A growing number of discussion boards and mailing lists are becoming “gated communities,” where site administrators—for a variety of reasons—have previously disabled new user registration but allowed the general public to view conversations between current members.⁵⁴⁹

Given the diversity of message boards, mailing lists, newsgroups, wikis, and other Internet media, it is difficult to make generalizations

546. Reynolds, *supra* note 144, at 1163.

547. See, e.g., AutoAdmit, <http://www.autoadmit.com> (last visited Sept. 10, 2008).

548. See, e.g., Law School Discussion: Pre-Law Discussion, <http://www.lawschooldiscussion.org/prelaw> (last visited Sept. 10, 2008).

549. Sites that have disabled new registrations in the past include Toon Zone Forum, <http://forums.toonzone.net> (last visited Sept. 10, 2008), and College Confidential: College Discussion, <http://talk.collegeconfidential.com> (last visited Sept. 10, 2008).

about their culture. However, it is safe to say that citizen-journalist norms have not been accepted; in fact, decentralized Internet media more closely resemble the content of “intemperate” blog comment sections than citizen-journalist blogs.⁵⁵⁰ Users and owners of decentralized Internet media have even less incentive to adopt citizen-journalist norms than diary bloggers. Users have no monetary or reputational incentives to refrain from reposting defamatory blog posts on a message board. Though owners naturally experience greater reputational incentives than their users, a discussion forum or mailing list’s content is significantly less likely to negatively reflect on its owner’s reputation than a blog’s content would reflect on its owner, for blogs are inherently personal creations while decentralized Internet media are expected to primarily rely on third-party content, much of which the owner is unlikely to ever see. Since blogs interact with discussion boards and others that do not share the same norms, defamation law must not treat the blogosphere as an insular community, but take these interactions into account.

3. THE MYTH OF THE LOW-AUTHORITY INTERNET

The Internet has often been described as a “low authority” medium. Unlike newspapers, radio, television, and other traditional media, the Internet does not speak with a “voice of authority.”⁵⁵¹ According to Reynolds, individuals are not likely to “change an opinion of another person, famous or obscure, solely because of something read on a blog” or other Internet website, and thus courts should treat Internet defamation as slander rather than libel.⁵⁵²

But this idea of a “low authority” Internet is predicated on two false assumptions. Search engines, rather than undercutting authority, serve to solidify or establish authority. Similarly, although the Internet does provide defamation victims with the ability to tell their side of the story, this concept of victim rebuttals has been highly romanticized and is not effective in practice, particularly when applied to private figures who lack a strong pre-existing Internet presence.

“Search engines like Google,” according to Reynolds, “have the effect of undercutting authority by making the full story readily available.”⁵⁵³ While Reynolds concedes that search engines will sometimes provide incorrect, or even defamatory, information, he argues that “no individual item will stand alone as authoritative.”⁵⁵⁴ Reynolds illustrates

550. Reynolds, *supra* note 144, at 1158–59.

551. *Id.* at 1165.

552. *Id.*

553. *Id.*

554. *Id.*

this point by using himself as an example—although a Google search for “Glenn Reynolds” will turn up multiple webpages and blog posts claiming that Reynolds “put[s] puppies in blenders to make a refreshing energy drink.”⁵⁵⁵ Reynolds believes “few people will be misled” since these pages make up only a small minority of the pages that come up in Google and other search engines when someone searches for his name.⁵⁵⁶

But *how* is Google able to “mak[e] the full story readily available”⁵⁵⁷ when one searches for Glenn Reynolds’s name? While Google has made many technological advances in recent years, it has not yet created an omniscient, omnipotent, and benevolent search engine that provides its users with an objective assessment of every person whose name is typed into its search box. Google, like most other search engines, automatically generates its results using a complex formula that takes into account factors such as the number of times the search term appears on the page and how many, and what type of websites link to the page.⁵⁵⁸ And, of course, Google is limited to webpages that actually exist.

So why does a search for “Glenn Reynolds” generate only a miniscule number of untrue or defamatory posts? It has absolutely nothing to do with Google “undercutting authority” or “making the full story available.” Rather, these search results are merely a reflection of Reynolds’s status as a public figure and Internet celebrity. Reynolds, as the author of a best-selling book and owner of one of the most popular blogs on the Internet, attracts a significant amount of attention on the Internet, not just on his own popular website, but on many others as well. In contrast, imao.us—the website speculating on Reynolds’s energy-drink preferences—has not achieved even a fraction of Reynolds’s notoriety, is linked to by fewer websites, and rarely has its content reported elsewhere, at least when compared to Reynolds. It should come as no surprise that the energy-drink claim barely shows up in a Google search for Reynolds—that would be the case even if the claim was completely true. When the subject of a search engine query is an Internet Goliath such as Reynolds, who is linked to and discussed by other Goliaths and wannabe-Goliaths seeking his approval or attention, it should not come as a surprise that a post or two by an Internet David does not rank highly in Google.

555. *Id.*

556. *Id.* at 1166.

557. *Id.* at 1165.

558. Search engines, however, may sometimes deviate from these formulas by making manual adjustments to a webpage’s overall rank. Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188, 191 (2006).

Reynolds argues that self-publishing and Google make it “pretty easy for the objects of defamation to reply,” and thus the very foundation for libel law no longer exists, for libel law at its core assumes that the relationship between defendants and plaintiffs is a “one-way megaphone, with media defendants doing the speaking, and libel plaintiffs effectively voiceless except to the extent that they can enlist the power of the state through litigation.”⁵⁵⁹ But in practice, Google and other search engines do quite the opposite of what Reynolds claims. Rather than undercutting authority, Google and its brethren promote existing authority by strongly favoring established websites in their page-rank algorithms. Similarly, search engines, by rewarding quantity over quality, discriminate against minority views.

Obviously, a public figure such as Glenn Reynolds greatly benefits from the way search engines like Google operate, for defamatory Internet statements are unlikely to gain a significant foothold in their search-engine results. But what about the many private figures that have fallen victim to defamatory Internet statements, particularly those with no Internet presence, or an Internet presence significantly weaker than their defamer?

Such victims would not view Google as a great equalizer, but as an impediment to getting their story widely disseminated. Any blog or website they create will begin with a very low page-rank relative to the blogs and websites defaming them, and thus likely not appear until the second or third page of search engine results for their name (or perhaps not even appear at all). Furthermore, since blogs and webpages live or die based on the number of links they receive, and since the number of links a blog or webpage receives is often dependent on how often it is updated, victims would have to perpetually update their blogs—likely by discussing topics unrelated to the defamation—in order to raise their page-rank and improve their search-engine placement. In other words, victims of Internet defamation face a *de facto* requirement of establishing a strong and consistent Internet presence if they wish to have their response rank just as highly as the original defamatory statement—and even then they may not be successful if their defamer’s blog has as high a page-rank and as many back-links as InstaPundit or DailyKos.

But an Internet defamation victim’s response blog would not just have to displace or surpass the original defamatory statement. Reynolds romanticizes Google as a two-way megaphone without considering the many third parties that repeat the defamer’s false statements. These third parties may include other bloggers, message boards, or even blog aggregators that automatically repost the content of multiple blogs on yet

559. Reynolds, *supra* note 144, at 1166.

another blog. Because of these third parties, even if a defamation victim's response blog rose to the highest rank in Google, a search for her name may still display nine webpages that repeat the defamation on the first page of results. Thus, to truly put herself on equal footing with her defamer, such a defamation victim would have to create *multiple* blogs or websites correcting the original defamation, and then ensure that all those blogs or websites maintain high ranks in Google and other search engines—a truly Herculean task, particularly for someone with no pre-existing Internet presence prior to the defamation!

4. THE SLANDER TREATMENT AND § 230: A DANGEROUS COMBINATION

Reynolds concludes that “because of the nature of blogs and blog readership, a swift correction should be seen as *entirely remedying the problem*.”⁵⁶⁰ Such a policy, in the absence of other legislation, would not be objectionable. However, Reynolds's policy, when combined with § 230 immunities, would have the practical effect of completely eliminating defamation victims' ability to recover damages for actual harm to their reputations resulting from defamatory blog speech.

Suppose a popular blogger posts a defamatory remark about an individual. Because this blog is well-read and this story is particularly salacious, many other bloggers soon repeat this information on their own blogs—citing the original source—and within a short time the defamatory statements are also reprinted on several message boards, mailing lists, and other Internet media. The victim, upon discovering the defamation, contacts the original blogger, who, knowing that a “swift correction” would “entirely remedy[] the problem,”⁵⁶¹ immediately removes the post. Although some citizen-journalist bloggers take similar corrective measures, some only make token gestures, such as posting a correction in the comments section, with many diary bloggers and message-board posters not posting corrections at all. Furthermore, even though the original post was deleted, it takes several weeks to disappear from Google and other search engines. While the victim decides to create a blog to respond to the allegations, it takes a long time for the victim's blog to appear in search engines, and when it finally is indexed it maintains a perpetually low page-rank, since it is infrequently linked to and infrequently updated, for the victim has no interest in maintaining an active Internet presence except to respond to the defamatory statement. As a result, the victim's response blog does not appear until the second or third page in Google's search results, with the first couple of pages

560. *Id.* at 1167 (emphasis added).

561. *Id.*

filled with links to blogs and message boards with high page-ranks that report the original defamatory statement. Risk-averse employers, who run Google searches on their job applicants, may decide to not hire this individual on the basis of the many websites containing this information.

Under current law, this victim would retain the ability to sue the original blogger for libel and receive general damages even if he could not prove economic harm. But under Reynolds's proposal, he would have no recourse. Because of § 230, the victim cannot recover damages from the bloggers and message-board users who reprinted a third party's statements but did not follow citizen-journalist norms and issue a retraction or correction. However, because of the original blogger's "swift correction," the victim cannot recover damages from the original defamer either. In fact, the victim would have a difficult time recovering damages even if the original blogger did not provide a correction: If defamatory blog speech is treated as slander rather than libel, the victim would have to prove special damages in order to recover *any* damages unless the defamatory statement fell into one of the slander per se categories. Unless Congress repeals § 230, an idea that Reynolds does not support, Reynolds's proposal would completely bar any recovery for virtually all defamatory Internet speech—a clearly undesirable outcome.

E. *Conditional Immunity*

Other scholars, recognizing the need to immunize Internet intermediaries from both publisher and distributor liability for the defamatory statements of third parties but also believing that such immunity may result in inequitable outcomes, have proposed various safe-harbor schemes that they allege would preserve the benefits of § 230 while simultaneously reducing some of § 230's negative externalities. These proposed safe harbors borrow from the DMCA and other notice-based regimes in that the intermediary would only be eligible for immunity if it fulfilled certain enumerated obligations. But unlike the DMCA and common-law distributor liability, the obligation would not involve participation in a notice-and-take-down system or require the intermediary to aid any particular individual, but would rather require the intermediary to engage in (or refrain from) certain activities that would theoretically make the Internet a better place.

There is currently no consensus among proponents of such regimes as to what condition an Internet intermediary should fulfill in order to maintain § 230 immunity for all third-party postings. However, several scholars have proposed a diverse array of ideas. Orin Kerr, for instance, recently proposed that web-based intermediaries who wish to maintain § 230 protections must agree to de-index their websites from Google

and other search engines so that defamatory postings on immunized websites would not spread to the Internet at large and, in theory, reduce the aggregate amount of harm done to innocent third parties.⁵⁶² Others have proposed to tie § 230 immunity to issues that are only tangentially—if at all—related to the statute's negative externalities. But while conditional immunity has the allure of a moderate middle ground between two conflicting positions, reformulating § 230 in such a way would not improve on the current state of affairs.

1. CONDITIONAL IMMUNITY IS INEFFICIENT

Regardless of the actual condition, a conditional-immunity system clearly possesses a significant advantage over a notice-and-take-down regime, in that an Internet intermediary who wishes to take advantage of the safe harbor is neither required to devote a substantial amount of continuous effort responding to and investigating every complaint it receives, nor given an incentive to automatically delete even the most innocuous content just because someone has requested removal. Because immunity would apply if the condition precedent is met regardless of the facts surrounding any particular third-party posting, it is less likely, relative to a DMCA or common-law system, that an intermediary would censor the speech of its users solely out of fear of potential liability.⁵⁶³

But this strength of a conditional-immunity approach is also related to one of its greatest weaknesses—its inefficiency. For example, Professor Kerr's proposal to link an intermediary's § 230 immunity to search-engine coverage is clearly intended to reduce the spread of defamatory information on the Internet by making it more difficult to access. However, is such a conditional-immunity system the most efficient way of furthering this goal? If search engines such as Google are so powerful and bring about such significant social harm by promulgating harmful speech, would it not be more efficient to regulate the conduct of search engines directly, rather than creating a system of indirect regulation?

Indirect regulation, by seeking to influence a third party's behavior in hopes that it will have the desired effect on the primary target, has the potential to ultimately be undermined or made ineffective if the third party does not behave as expected or if the primary target changes its character in order to become less reliant on the third party. Under ideal circumstances, the Kerr proposal would result in websites containing

562. Posting of Orin Kerr to Volokh Conspiracy, <http://volokh.com> (Apr. 16, 2007, 17:11 EST).

563. But immunizing an intermediary from liability is not in itself sufficient to deter such censorship. See discussion *supra* Part VI.

harmful or defamatory material voluntarily choosing to “withdraw from the commons of the searchable Internet.”⁵⁶⁴ But such ideal circumstances are unrealistic. Even if websites that contain defamatory postings remove themselves from search engines, it is likely that many innocuous and beneficial websites will also exclude themselves in an attempt to avoid litigation, thus reducing the overall value of Google and other search engines.

In addition, Professor Kerr’s conditional-immunity proposal is predicated on the ability of websites to remove themselves from search engines through the robots.txt protocol. While all major search engines currently respect robots.txt and other opt-out protocols,⁵⁶⁵ if too many websites exclude themselves in order to retain § 230 immunity, it is possible that search engines, in order to continue to provide a valuable service to their users, will cease recognizing robots.txt and not allow any websites to voluntarily exclude themselves. Furthermore, even if Congress passed an additional law demanding that search engines recognize robots.txt, one could expect foreign search engines, seeking to obtain a competitive advantage over their American rivals, to not recognize this protocol and provide Internet users with a true search experience. Given that search engines and other potential subjects of indirect regulation can circumvent indirect regulation in such ways, it would be more effective for the government to, if necessary, directly regulate search engines rather than instituting a conditional-immunity scheme.

2. CONDITIONAL IMMUNITY CANNOT BE UNIVERSALLY OFFERED

As discussed earlier, § 230 protection applies to a diverse range of online activities.⁵⁶⁶ Despite the vast array of online media shielded by the statute, many proposals advocating changes to § 230 assume that allegedly defamatory statements are contained on a website, and that the individual seeking § 230 immunity is an administrator who has complete control over that website. But that is not always the case. The *Barrett v. Rosenthal* litigation, for instance, involved granting § 230 immunity to an individual who reposted a third party’s defamatory statements to a non-web medium—UseNet—that had no central administrator who could remove the content.

Because online media are diverse, and § 230 protection currently exists to both administrators and users of such services, it is difficult to envision a conditional-immunity system that would apply to all those

564. James Grimmelman, *Don't Censor Search*, 117 YALE L.J. POCKET PART 48, 50 (2007), <http://yalelawjournal.org/images/pdfs/582.pdf>.

565. See *id.* at 49.

566. See discussion *supra* Part III.

who possess immunity under current law. For instance, if Professor Kerr's proposal were enacted, many of those currently immunized by § 230 would not have the option to make a trade-off between § 230 protections and search-engine placement, since only a select group of administrators have the technical ability to use the robots.txt protocol to exclude their websites from search engines. Thus, an individual who links or reposts content in the comments section of another person's blog, while currently protected under § 230, would not have the option of immunity under the Kerr proposal, since such an individual would not have the administrative access necessary to prevent his comment from appearing in a search engine.

Similarly, conditional-immunity proposals rarely recognize that most websites involve more than one level of administrator. To use a simple example, an individual who creates a blog on Blogspot or another free blogging service will have ownership control over his blog and should generally have the technical ability to use robots.txt to remove his blog from search engines. However, the blog's owner is not the only entity that could be liable for a third party's defamatory statement if § 230 immunity did not exist. Under the common law, Blogspot, as the hosting provider of the blog, would be liable to a defamation plaintiff as a distributor if it received notice that a defamatory statement existed yet did not remove the post. As a result, Blogspot and the blog's owner have conflicting interests—while the owner may wish to waive § 230 immunity and keep his blog in search engines in order to obtain more traffic, Blogspot may wish to avoid even the possibility of litigation, but under the Kerr proposal could not do so unless all of the blogs it hosted were removed from search engines. Given the difference in bargaining power between the parties, one could expect Blogspot and other hosting providers to refuse to provide services to individuals unless they removed their websites or blogs from search engines, effectively killing search as a means of finding information on the Internet.

3. CONDITIONAL IMMUNITY CROWDS OUT MARKET-BASED SOLUTIONS

The underlying premise behind a conditional-immunity scheme is that § 230, as currently constructed, creates negative externalities that harm the Internet. The Kerr proposal, for instance, presupposes that § 230 makes search engines less useful by filling them with false or inaccurate search results that make it more difficult for their users to find truthful information about a person.

Kerr and other scholars are correct that search engines indexing libelous or misleading websites reduce the value of those search engines for users seeking accurate information about the subject of their search

query. But is intervention by the federal government necessary to solve this problem? As James Grimmelmann succinctly summarizes, “Fundamentally, search engines don’t want to mislead their users with half-truths and libel; they want to present information in a useful context.”⁵⁶⁷ Because search engines have a vested interest in improving the quality of their own product, a government-mandated “solution” to this problem “might inhibit the development of better, more helpful responses,” by search engines and other stakeholders.⁵⁶⁸

Such potential free market solutions are not difficult to envision. Jarret Cohen, the President of AutoAdmit.com, has proposed that Google and other search engines “allow individuals to attach responses to . . . search results for their name,” which “would allow for private citizens, upon verifying their identities and perhaps signing an affidavit, to appeal to Google in a streamlined fashion and provide explanations for prospective employers, dates, and other interested parties for search results that they believe are damaging to their reputations.”⁵⁶⁹ Cohen further states that several companies, such as Naymz.com, have attempted to remedy the problem of false and misleading Google search engine results by “giv[ing] individuals the opportunity to purchase free Google AdWords ads with their own name as a keyword, ensuring that at least one ‘good’ link will appear on the first page of Google results” for a search of their name.⁵⁷⁰ In other words, Cohen argues that search engines can remedy this problem simply by providing individuals with the ability to “respond[] to bad speech with more speech.”⁵⁷¹

Cohen’s free market proposal is not unrealistic. In fact, several months after Cohen’s article was published, Google announced that it would voluntarily adopt a virtually identical “right of rebuttal” system with regard to its Google News service, which allows users to search articles in more than 4,500 English-language news sources.⁵⁷² Under this rebuttal system, Google News will “allow[] individuals and groups cited in stories it carries to post comments about the articles through the Google News service.”⁵⁷³ After verifying the identities of those who make such comments, Google will display the comments “alongside links to the articles.”⁵⁷⁴

But such innovative free market solutions to the potential negative

567. Grimmelmann, *supra* note 564, at 50.

568. *Id.*

569. Cohen, *supra* note 100.

570. *Id.*

571. *Id.*

572. Delaney & LaVallee, *supra* note 420.

573. *Id.*

574. *Id.*

externalities caused by § 230 may not be possible if a conditional-immunity regime became part of the United States Code. As critics of § 230 readily acknowledge, federal statutes are notoriously slow to change, and often stick around long after some believe they no longer fulfill their original purpose. A voluntary right of rebuttal or other innovative solution that would simultaneously enhance the value of search engines and provide victims of false or misleading Internet speech the ability to set the record straight would not be nearly as effective if Professor Kerr's conditional-immunity system became law prior to its adoption by major search engines. That search engines have figured out a way to deal with inaccurate search results would not impact the conditional-immunity system—until the conditional-immunity statute is repealed or amended, Internet intermediaries would have to choose between § 230 immunity and allowing their websites to be indexed in search engines, regardless of any new developments that might make the conditional-immunity statute no longer necessary.

4. CONDITIONAL IMMUNITY DOES NOT ADDRESS ALL EQUITY CONCERNS

Conditional-immunity schemes, by their very nature, are concerned with equity or fairness. Professor Kerr's conditional-immunity proposal, for instance, is grounded in the belief that it is unfair for individuals to have defamatory or misleading information about them be easily accessible on the Internet, and thus Internet intermediaries must choose between either limiting the dissemination of such information or potentially being subject to tort liability.

But powerful yet uncaring Internet intermediaries facilitating harm to individuals' online reputations through their actions or inactions is not the only problem of equity that arises from § 230. One must yet again consider the converse situation, of wealthy, well-connected individuals and corporations using the threat of litigation to silence the legal, or even socially beneficial, speech facilitated through low or non-profit Internet intermediaries owned by individuals of modest means who cannot afford to hire an attorney to raise a § 230 defense in court. As discussed in Part VI, only a fee-shifting provision can remedy this particular problem.

X. SUMMARY AND CONCLUSION

It would be an understatement to say that the Internet has merely had a profound impact on American society. The development and widespread use of the Internet medium has fundamentally changed journalism, politics, business, academia, and many other institutions. Tort

law, and in particular the law of defamation, has not been immune from such change, with this new Internet medium forcing Congress and the courts to struggle with the previously uncontroversial issue of intermediary liability for the statements of third parties.

As the prior Parts have illustrated, there is seemingly inherent tension between free speech principles and compensating victims of defamatory Internet speech. But the immunity from vicarious liability in tort actions that Congress has granted Internet intermediaries through § 230 of the Communications Decency Act remains necessary and should not be repealed. On the contrary, this Article has established that Congress must revisit § 230 not to weaken it, but to strengthen it. As one law professor correctly observed, “Intermediaries do not and cannot reasonably expect to capture anything like the full social value of the uses that pass through their system,” and thus, “[i]f we impose the full social costs of harm from third party postings on intermediaries, . . . they will respond by inefficiently restricting the uses that third parties can make of the Internet.”⁵⁷⁵ Without the addition of an attorneys’ fee-shifting provision, defamation plaintiffs will continue to file or threaten to file frivolous lawsuits against immunized Internet intermediaries—particularly bloggers and other intermediaries of modest means who cannot afford to litigate on behalf of a third-party user—as a means of bullying them into unfairly censoring their users’ speech and inhibiting the free marketplace of ideas on the Internet.

But at the same time, government should acknowledge the growing need for a more effective remedy for victims of Internet defamation than the traditional defamation torts. Given that the overwhelming majority of defamation lawsuits are filed for reasons other than to obtain monetary damages from the defendant, and in most cases filed solely to vindicate the plaintiff’s reputation, Congress and state legislatures should authorize the creation of a no-fault-defamation tort which would allow victims of defamatory Internet speech to receive the remedy they desire without burdening intermediaries or even speakers with costly and unavoidable litigation.

Some may remain skeptical or dismissive of these proposed changes because they do not resolve the dilemma of how to handle the problem of individuals such as Kenneth Zeran, who suffer economic loss due to defamatory statements made by anonymous speakers who cannot be identified. But as mentioned earlier, one can find numerous examples in tort law where courts and legislatures have decided that some individuals—even those who have suffered serious injuries or irreparable harm—cannot use tort law to recover damages from another

575. Lemley, *supra* note 400, at 112.

entity for the actions of a third party because doing so may be inequitable or otherwise against public policy.⁵⁷⁶ Just as victims of a hit-and-run driver cannot recover from the owner of a road or highway when the actual tortfeasor cannot be identified, even if their injuries are serious, those who are injured due to defamatory statements on the information superhighway should not recover from an intermediary who is not the author of those statements.

This does not mean that implementing these proposals necessitates that those such as Zeran must go without compensation for their injuries. Rather, it means that victim compensation and ensuring a free marketplace of ideas on the Internet are two distinct policy goals that do not necessarily have to be in tension with each other. As mentioned during the earlier discussion of conditional-immunity proposals, when seeking to solve one problem through regulation, it is more efficient to choose a path of direct regulation rather than indirect regulation, for direct regulation is more likely to actually solve the problem. In other words, immunizing Internet intermediaries—and awarding them attorneys' fees if they are sued despite their immunity—and compensating victims of anonymous attacks are not mutually exclusive.

To illustrate this point, consider this example: What if the anonymous postings about Kenneth Zeran had not appeared on an America Online message board in 1995, but in the comments section of a blog in 2005? While Zeran, if his lawsuit had been successful, would have likely recovered sufficient monetary damages from America Online to make him whole, he likely would still have not been adequately compensated if the defendant intermediary had been a blogger who generates no revenue from his blog and merely operates his blog as a hobby while working a typical job for a salary of \$40,000 a year. In fact, it is likely that, based on other lawsuits against blogger defendants that have resulted in judgment for the plaintiff, in the absence of any statutory immunity, Zeran still would have recovered absolutely nothing if the defendant had been a blogger, and in fact may have lost money in the pursuit.⁵⁷⁷ Given the shift from the era of the walled-garden Internet service providers of the 1990s to the age of Web 2.0 in the 2000s, it is more likely than not that even if no immunity for intermediaries existed, many defamation victims who have suffered tangible economic loss or other irreparable harm due to an anonymous speaker's actions would be

576. See discussion *supra* Part V.

577. Cf. SOLOVE, *supra* note 104, at 122 (summarizing a situation where a woman won a \$11.3 million verdict against a blogger over defamatory Internet statements, but did not collect any of the damages and ultimately lost money pursuing the case because the blogger was effectively judgment-proof due to her lack of financial resources).

no better off—and perhaps even worse off—than they are today even if they had the option of recovering damages from an intermediary.

Though defamation law could be shaped to promote the goal of deterrence, imposing liability on intermediaries will not actually further the goal of preventing harm. As the previous Part illustrated, intermediaries are poor gatekeepers of defamatory information, and imposing penalties on intermediaries will not prevent defamatory statements from being initially published, but merely punish intermediaries for conduct that they cannot be reasonably expected to control.⁵⁷⁸ The government can achieve a more meaningful level of deterrence not by targeting intermediaries, but taking affirmative steps to reduce the negative impact that defamatory Internet speech may have on individuals, which would greatly reduce the “benefits” of defaming someone online and result in a lower level of defamation.

The solution, then, is to treat preserving the online marketplace of ideas and victim compensation as separate issues that demand separate solutions. Even proponents of holding intermediaries more accountable, such as Professor Solove, believe that “[f]ar too often, courts aren’t adequately penalizing litigants for filing baseless lawsuits,” and that “plaintiffs should be penalized” if their “case lacks merit.”⁵⁷⁹ Given the propensity of some individuals and corporations to threaten—and actually file—frivolous lawsuits against intermediaries for the purpose of bullying them into censoring negative yet truthful information posted by their third-party users,⁵⁸⁰ something must be done to ensure that intermediaries do not feel coerced into taking the same action that Congress hoped to prevent by passing § 230. A fee-shifting provision provides the best, and most direct, solution to that particular problem.

Similarly, the Internet has resulted in a class of individuals who, though having been legitimately defamed on the Internet, have not actually suffered economic damages, let alone any irreparable harm. Although such individuals largely initiate litigation in order to clear their name or as a means of preventing future harm from taking place, the traditional defamation torts do not provide these plaintiffs with an efficient way of achieving their goals, for defamation defendants—even if they themselves acknowledge that the statements are untrue, or in the absence of a lawsuit would not care enough about the statement to defend it—feel compelled to fight the litigation in order to avoid monetary damages and to protect their own reputational interests. Creating a

578. See discussion *supra* Part IX.

579. E-mail from Daniel J. Solove, Assoc. Professor of Law, George Washington Univ. Law Sch., to Anthony Ciolli (Jan. 26, 2008, 11:14 EST) (on file with author).

580. See discussion *supra* Part VII.

new no-fault-defamation tort would provide the best, and most direct, solution to this problem and allow most Internet defamation victims to actually achieve the vindication they desire without forcing defendants to participate in litigation that, in the absence of monetary damages or other imposition of fault, they would not care about.

The Kenneth Zeran problem, too, can be best resolved through separating the goal of victim compensation from the issue of intermediary liability, and thus implementing a direct solution to the problem that does not conflict with speech interests. Just as states have adopted hit-and-run motorist statutes or other statutes to compensate victims where the tortfeasors cannot be identified, one could envision similar laws passed to compensate individuals such as Zeran. Similarly, the government could institute a regime where Internet users are required to carry some form of Internet defamation insurance that—perhaps after successful litigation of a John Doe lawsuit against the unknown defamer—would compensate them for their injuries. In any event, it is not necessary—and indeed, counterproductive—to view victim compensation as a goal that can only be furthered by undercutting the free marketplace of ideas on the Internet, or vice versa.

These proposed solutions are certainly not perfect. Furthermore, given technology's propensity to change rapidly and with little warning, it is expected that additional problems will arise in the future that will make these solutions outdated and require still more novel solutions. Nevertheless, these proposals are the best of many imperfect alternatives, and American society would be changed for the better if they were implemented.