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# APPS TOO: MODIFYING INTERACTIVE COMPUTER SERVICE PROVIDER IMMUNITY UNDER SECTION 230 OF THE COMMUNICATIONS DECENCY ACT IN THE WAKE OF “ME TOO”

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## TABLE OF CONTENTS

INTRODUCTION.....	886
I. BACKGROUND .....	889
A. HISTORY OF THE COMMUNICATIONS DECENCY ACT .....	889
B. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT .....	890
C. CURRENT CLIMATE: THE “ME TOO” MOVEMENT AGAINST SEXUAL HARASSMENT AND ASSAULT .....	892
II. OVERBROAD INTERPRETATIONS OF SECTION 230 HAVE STIFLED OPPORTUNITIES FOR LEGAL RECOURSE .....	893
A. INTERNET CONTENT PROVIDER ANALYSIS: THE “NEUTRAL” OR “PASSIVE” ASSISTANCE TEST .....	893
B. COURT INTERPRETATIONS OF THE TERM “PUBLISHER” IN THE CONTEXT OF SECTION 230 .....	895
1. The Narrow “Disseminator or Propagator” Interpretation.....	896
2. The “Traditional Editorial Functions” Inquiry.....	897
3. The Broad “Overall Design and Operation” Interpretation .....	898
a. Modern Case Study: <i>Herrick v. Grindr</i> .....	899
C. CONCERNS AND CONSIDERATIONS PRESENT IN SECTION 230 ANALYSIS .....	900
1. Free Speech and Regulatory Concerns Guide Courts’ Analyses .....	900
a. Regulatory Challenges .....	902

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b. The Role of the User .....	903
2. An ICSP's Incentives Assume a Limited Role in Section 230 Analysis .....	904
a. Section 230's "Good Samaritan" Language Is Rarely Addressed.....	905
III. MODIFICATION OF SECTION 230 DOCTRINE IS NECESSARY TO PROTECT INTERNET USERS FROM SEXUAL OFFENSES ENABLED BY INSUFFICIENT USER SAFETY PROTOCOLS.....	906
A. A NARROWING OF THE SCOPE OF SECTION 230 IMMUNITY IS BEST SUITED FOR THE JUDICIARY .....	908
B. POTENTIAL APPROACHES TO MODIFICATION OF THE SECTION 230 DOCTRINE.....	909
1. Adopting a Narrower Interpretation of "Publisher" Conduct .....	910
2. Elevating the "Good Samaritan" Language of Section 230.....	911
3. Enforcing a Combined Approach .....	912
C. ANALYZING THE PROPOSED APPROACH IN LIGHT OF COURTS' KEY CONCERNS.....	913
1. Modification of the Section 230 Immunity Doctrine Will Not Jeopardize Free Speech .....	913
2. Narrower Section 230 Immunity Better Correlates with Modern Views of User Accountability .....	915
3. Evaluations of "Good Samaritan" ICSP Behavior Will Help Guide Courts' Analyses .....	917
a. Industry Standards Will Provide a Workable Benchmark for Courts .....	919
CONCLUSION .....	920

## INTRODUCTION

*In 1999, an anonymous Internet user posted a fake personal profile of actor Christianne Carafano on the Internet dating service Matchmaker.com.<sup>1</sup> It stated that she was looking for a "hard and dominant man" with "a strong sexual appetite" who could control her "in and out of bed," and included Carafano's telephone number and home address.<sup>2</sup> Driven out of her home for several months due to the barrage of harassment and threats of sexual violence that followed, Carafano filed suit against Matchmaker.<sup>3</sup> Her claims were dismissed.<sup>4</sup>*

*In 2005, thirteen-year-old Julie Doe created a profile on the popular*

1. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).

2. *Id.*

3. *Id.* at 1122.

4. *Id.* at 1120–21.

social networking website MySpace.com.<sup>5</sup> By simply clicking a box indicating that she was eighteen years old, Julie's profile was made public, prompting nineteen-year-old MySpace user Pete Solis to contact her. After communicating online for a period of time, they met in person, where Solis sexually assaulted the child. Julie's mother filed suit against MySpace for failing to adequately protect her daughter.<sup>6</sup> Her claims were dismissed.<sup>7</sup>

In 2016, an ex-boyfriend of Matthew Herrick used the dating app Grindr to post false profiles of Herrick, claiming that he was interested in fetishistic sex and directing other users to his home and workplace.<sup>8</sup> Users were transmitted maps of Herrick's location and told that his resistance to their advances was part of his rape-fantasy role play.<sup>9</sup> Over a ten-month period, more than 1,400 men arrived in person at Herrick's home and workplace, looking for sex.<sup>10</sup> After notifying Grindr dozens of times of the abuse and receiving no response, Herrick filed suit against the app.<sup>11</sup> His claims were dismissed.<sup>12</sup>

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This Note examines the status of interactive computer service provider ("ICSP") liability under section 230 of the federal Communications Decency Act of 1996<sup>13</sup> (the "Act" or the "CDA") within the context of the "Me Too" movement against sexual harassment and sexual assault. Section 230 has long provided a safe harbor for web-based businesses, shielding online services from legal claims premised on the words or actions of their users. While section 230 has played an instrumental role in promoting the growth of the Internet, much has changed since it was passed two decades ago. In light of these changes, section 230 must be reassessed. This Note will argue that current interpretations of the scope of section 230 immunity wrongfully deny individuals who have been sexually harassed or assaulted an opportunity to hold online services accountable for causing or exacerbating their harms. A reinterpretation of the section 230 doctrine is necessary to align the CDA with modern views regarding the role of the Internet user and

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5. Doe v. Myspace Inc., 528 F.3d 413, 416 (5th Cir. 2008).

6. *Id.*

7. *Id.* at 418.

8. Herrick v. Grindr, LLC, 306 F. Supp. 3d 579, 584–85 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x. 586 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019).

9. *Id.* at 585.

10. Carrie Goldberg, Herrick v. Grindr: *Why Section 230 of the Communications Decency Act Must Be Fixed*, LAWFARE (Aug. 14, 2019, 8:00 AM), <https://www.lawfareblog.com/herrick-v-grindr-why-section-230-communications-decency-act-must-be-fixed> [<https://perma.cc/9ZHF-T76Z>].

11. *Grindr*, 306 F. Supp. 3d at 584–85.

12. *Id.* at 584.

13. 47 U.S.C. § 230 (2018).

the responsibility of technology companies to deter sexual misconduct.<sup>14</sup>

Part I of this Note will briefly discuss the CDA's background and legislative history, as well as a New York Supreme Court decision, *Stratton Oakmont v. Prodigy Services Co.*,<sup>15</sup> that partially inspired the adoption of the section 230 safe harbor. It will examine the social and political landscape surrounding the enactment of the CDA in 1996—a time when the Internet was in its infancy—and contrast the Act's history with the modern “Me Too” era.

Part II will offer an analysis of the disjunctive court interpretations of section 230 of the Act, a provision that extends immunity to interactive computer service providers for claims that treat the ICSP as a “publisher” of third-party content. Specifically, it will examine three interpretations of the term “publisher” within the meaning of the Act: a narrow, textual interpretation that greatly constricts the scope of section 230 immunity; a discretionary interpretation based on an ICSP's “traditional editorial functions”;<sup>16</sup> and a broad interpretation that provides the widest breadth of immunity. This analysis will demonstrate that while some courts have attempted to narrow section 230's reach and reign in ICSP immunity, most have followed the trend toward an ultrabroad interpretation of the provision. Part II will also discuss key concerns and considerations of courts undertaking section 230 analysis and examine the effect these interpretations have had on whether certain online services are afforded protection from liability.

Part III will then focus on the observation that plaintiffs who bring claims related to sexual harassment or sexual assault against web-based social networking and dating services are provided little opportunity for legal recourse under current section 230 doctrine. It will argue that, with the “Me Too” movement maintaining momentum as a powerful national and global cultural force, courts can and should incorporate changing perspectives about online businesses' accountability for mitigating sexual misconduct on their platforms through some modification of the section 230 doctrine. This may be achieved through judicial adoption of a narrower interpretation of “publisher” conduct within the meaning of the Act, or by courts placing an elevated focus on section 230's “Good Samaritan” language. Ultimately, this Note will advocate a combination of both approaches.

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14. While a shift in judicial interpretation of section 230 would undoubtedly affect the viability of various types of claims against ICSPs, this Note focuses solely on claims involving sexual harassment and sexual assault.

15. *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2018).

16. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

## I. BACKGROUND

### A. HISTORY OF THE COMMUNICATIONS DECENCY ACT

The federal Communications Decency Act was first introduced in February 1995 by Senator James Exon to address what was viewed as a growing issue of widespread pornography and obscenity on the Internet.<sup>17</sup> The bill Exon proposed was an amendment to the federal Telecommunications Act, which extended the “antiharassment, indecency, and antiobscenity restrictions” that the law imposed on telephones to interactive computer services, making it illegal to knowingly send or display sexually indecent content online in a manner available to minors.<sup>18</sup> The bill was swiftly met with opposition from some lawmakers and interest groups, who resisted “any attempt to meddle with the Internet” and who believed the Act represented a “violation of free speech and . . . of the right of adults to communicate with each other.”<sup>19</sup> In opposition to the CDA due to these concerns, as well as alarm over a 1995 New York Supreme Court decision, *Stratton Oakmont v. Prodigy Services Co.*,<sup>20</sup> Representatives Christopher Cox and Ron Wyden proposed The Online Family Empowerment Amendment (“the Cox-Wyden Amendment”) to Exon’s bill, parts of which would eventually become section 230 of the CDA as it stands today.<sup>21</sup>

In *Stratton Oakmont*, the court held that an online bulletin board service provider could be held liable for defamatory content posted by users on its platform because the website proactively monitored, screened, and removed offensive user content, thereby serving as an editor and publisher of all posted content and assuming legal responsibility for it.<sup>22</sup> In contrast, a 1991 New York case, *Cubby, Inc. v. CompuServe, Inc.*, held that an ICSP that did not review third-party user content evaded liability for libel since it did not know of and had no editorial control over defamatory content posted on its forums.<sup>23</sup> In conjunction with this decision, *Stratton Oakmont* somewhat perplexingly suggested that an online service that does nothing to monitor or

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17. Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 52–53 (1996).

18. *Id.* at 57–58.

19. *Id.* at 65–67; see also Craig Bicknell, *CDA: From Conception to Supreme Court*, WIRED (Mar. 19, 1997, 5:00 AM), <https://www.wired.com/1997/03/cda-from-conception-to-supreme-court> [https://perma.cc/84H8-CP2U].

20. *Stratton Oakmont v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2018).

21. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 410 (2010); Cannon, *supra* note 17, at 67–69.

22. *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at \*3, \*10, \*12–14.

23. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139–40 (S.D.N.Y. 1991).

screen for problematic content can never be legally responsible for the content of its users, while a service that takes good-faith steps to monitor and screen such content necessarily subjects itself to potential liability.<sup>24</sup>

The Cox-Wyden Amendment was a direct response to *Stratton Oakmont*.<sup>25</sup> The Amendment was proposed to encourage online services to take proactive measures to increase online safety and monitor for objectionable content without fear of heightened liability.<sup>26</sup> It would allow private ICSPs to address the problem of widespread online indecency, while promoting the Representatives' policy goal of fostering the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services."<sup>27</sup> Despite the considerable opposition to the CDA, Congress passed the Telecommunications Act of 1996 in February of that year, which included the Communications Decency Act as well as the Cox-Wyden Amendment.<sup>28</sup> It was signed into law by President Clinton on February 8, 1996.<sup>29</sup> Before the law took effect, however, the United States Supreme Court in *Reno v. ACLU* struck down many portions of the CDA as unconstitutional.<sup>30</sup> The Cox-Wyden Amendment—now known as section 230 of the CDA—was one portion of the legislation that survived.<sup>31</sup>

#### B. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Section 230 of the Communications Decency Act<sup>32</sup> is perhaps the most consequential piece of legislation regarding regulation of the Internet, lauded by commentators for allowing the Internet as we know it today to flourish.<sup>33</sup> The provision significantly restricts the scope of potential liability for interactive computer service providers based on content transmitted by third-party users of the service as well as the ICSP's good-faith actions to restrict access to objectionable material transmitted by users.<sup>34</sup> The term "interactive computer service" refers to "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server," including most websites and Internet-based apps.<sup>35</sup>

24. See Ardia, *supra* note 21, at 407–09; Cannon, *supra* note 17, at 61–63.

25. See Ardia, *supra* note 21, at 410.

26. *Id.*

27. *Id.* (quoting 47 U.S.C. § 230(b)(2) (2018)).

28. *Id.* at 410–11.

29. *Id.* at 411.

30. See *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

31. Ardia, *supra* note 21, at 411.

32. 47 U.S.C. § 230 (2018).

33. See, e.g., *Section 230 of the Communications Decency Act*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/H7BK-B6QH>].

34. See *id.*

35. 47 U.S.C. § 230(f)(3); see also *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y.

Section 230 is titled “Protection for private blocking and screening of offensive material.”<sup>36</sup> Section 230(b) lists its policy objectives, which include promoting the continued development of the Internet, preserving the free market of the Internet, encouraging technological innovation that maximizes user control over online content, removing “disincentives for the development and utilization of blocking and filtering technologies,” and ensuring enforcement of federal laws that address online obscenity, stalking, and harassment.<sup>37</sup> Section 230(c) of the Act dictates how these policy goals may be achieved. Under the heading “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” section 230(c)(1) states: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>38</sup> Section 230(c)(2) restricts civil liability for any “provider or user of an interactive computer service” on the basis of “any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>39</sup> Further, section 230(e) provides 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” the section.<sup>40</sup>

These provisions overrule *Stratton Oakmont* by granting interactive online services that make efforts to monitor and screen content immunity from legal actions based on user content generated or transmitted on their platforms.<sup>41</sup> The Act explicitly does not permit ICSP immunity from liability for certain offenses, including violations of federal criminal law, intellectual property law, communications privacy law, and federal sex trafficking law.<sup>42</sup> However, courts have increasingly interpreted section 230 to broadly restrict the scope of potential civil and state law liability for ICSPs, creating an expansive safe harbor for web-based businesses against a wide variety of claims.<sup>43</sup>

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2018), *aff'd*, 765 F. App'x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019); *Section 230 of the Communications Decency Act*, *supra* note 33 (“The protected intermediaries include . . . basically any online service that publishes third-party content.”).

36. 47 U.S.C. § 230 (2018).

37. *Id.* § 230(b)(1)–(5).

38. *Id.* § 230(c)(1).

39. *Id.* § 230(c)(2)(A).

40. *Id.* § 230(e)(3).

41. *See* Ardia, *supra* note 21, at 410.

42. 47 U.S.C. § 230(e)(1)–(5).

43. Ardia, *supra* note 21 at 452. Courts have applied section 230 to various claims, including “invasion of privacy, misappropriation, tortious interference, civil liability for criminal law violations, general negligence, and negligent failure to remove information after notification.” *Id.* (footnotes omitted).

C. CURRENT CLIMATE: THE “ME TOO” MOVEMENT AGAINST SEXUAL HARASSMENT AND ASSAULT

The origins of the Communications Decency Act reflect a desire in the early stages of the Internet to shield young users from what was viewed as a growing prevalence of obscene and offensive content online.<sup>44</sup> While this backdrop is important in understanding the basis for the legislation, this Note examines the CDA in the context of the movement against sexual harassment and sexual assault driven by the viral “Me Too” campaign (“MeToo”), which rose to prominence in October 2017. The movement was originally founded in 2006 by civil rights activist and sexual assault survivor Tarana Burke to connect survivors of sexual violence, particularly minorities and low-income individuals, to necessary resources.<sup>45</sup> MeToo gained national and global momentum after sexual assault and rape allegations against successful Hollywood producer Harvey Weinstein were made public,<sup>46</sup> prompting actor Alyssa Milano to invite women who had been sexually harassed or assaulted to use the hashtag #MeToo on Twitter.<sup>47</sup> One year later, the hashtag had been shared more than 19 million times on Twitter in multiple languages.<sup>48</sup>

MeToo ushered in a global conversation around sexual misconduct that has permeated nearly every field, from arts and entertainment, to sports, to news and media<sup>49</sup>—prompting companies across industries to react and adapt to new cultural understandings.<sup>50</sup> Major players in the technology industry have responded to societal pressures, with ride-sharing apps Uber and Lyft ending mandatory arbitration for victims of sexual assault against

44. See Cannon, *supra* note 17, at 53–55.

45. *History & Vision, ME TOO*, <https://metoomvmt.org/about> [<https://perma.cc/U842-VWVU>]; see also *#MeToo: A Timeline of Events*, CHI. TRIB. (Dec. 6, 2019, 11:56 AM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmllstory.html> [<https://perma.cc/3UNE-U7XX>].

46. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://nyti.ms/2xVPfVW> [<https://perma.cc/NVC4-DDDE>].

47. Elizabeth Chuck, *#MeToo: Hashtag Becomes Anti-Sexual Harassment and Assault Rallying Cry*, NBC NEWS (Oct. 16, 2017, 8:32 PM), <https://www.nbcnews.com/storyline/sexual-misconduct/me-too-hashtag-becomes-anti-sexual-harassment-assault-rallying-cry-n810986> [<https://perma.cc/LV4Z-QD5C>]; Abby Ohlheiser, *How #MeToo Really Was Different, According to Data*, WASH. POST (Jan. 22, 2018, 1:22 PM), <https://www.washingtonpost.com/news/the-intersect/wp/2018/01/22/how-metoo-really-was-different-according-to-data> [<https://perma.cc/2KS5-PAHW>].

48. Monica Anderson & Skye Toor, *How Social Media Users Have Discussed Sexual Harassment Since #MeToo Went Viral*, PEW RES. CTR. (Oct. 11, 2018), <https://pewsr.ch/2NABkuU> [<https://perma.cc/9YY8-P2NF>].

49. See *#MeToo: A Timeline of Events*, *supra* note 45.

50. *American Business and #MeToo*, ECONOMIST (Sept. 27, 2018), <https://www.economist.com/business/2018/09/27/american-business-and-metoo> [<https://perma.cc/H6KF-B439>]; Elisabeth Buchwald, *In the Wake of #MeToo, More U.S. Companies Reviewed Their Sexual Harassment Policies*, MARKETWATCH (July 14, 2018, 7:03 PM), <https://www.marketwatch.com/story/in-the-wake-of-metoo-more-than-half-of-companies-have-reviewed-their-sexual-harassment-policies-2018-07-10> [<https://perma.cc/83HY-TV23>].



the companies or their drivers<sup>51</sup> and tech behemoths Google and Facebook also terminating forced-arbitration policies.<sup>52</sup> State legislatures have also reviewed and amended laws in the wake of MeToo, exploring provisions such as barring employers from preventing employees from speaking out publicly, extending or ending statutes of limitations, and banning forced-arbitration clauses in employment contracts.<sup>53</sup> If the teachings of MeToo and related movements<sup>54</sup> prove persistent, this shift in understanding may extend to interpretations of ICSP accountability under section 230 of the CDA, potentially carving out new avenues for legal recourse for plaintiffs who have historically been denied relief.

## II. OVERBROAD INTERPRETATIONS OF SECTION 230 HAVE STIFLED OPPORTUNITIES FOR LEGAL RECOURSE

Part II of this Note will examine the body of caselaw involving section 230 of the CDA. Section II.A will discuss the first inquiry for courts assessing a section 230 defense: whether an ICSP has served as a “provider” of unlawful or offensive third-party content, thus precluding immunity from liability under the Act’s safe harbor. Section II.B will then discuss a separate inquiry that arises once the “provider” test has been passed: whether the ICSP is impermissibly being treated as a “publisher” of the content in question. Drawing from this body of law, Section II.C aims to identify certain factors and themes present in courts’ reasoning. This discussion of the interpretative approaches to section 230 analysis will help explain why plaintiffs who have attempted to bring claims against online services for enabling sexual misconduct are rarely able to achieve legal success.

### A. INTERNET CONTENT PROVIDER ANALYSIS: THE “NEUTRAL” OR “PASSIVE” ASSISTANCE TEST

An important inquiry for courts confronted with an assertion of section 230 immunity is whether the ICSP is a “provider” of the offensive or

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51. Emily Stewart, *Uber and Lyft Are Getting Rid of Tactics That Keep Sexual Assault Victims Silent*, VOX (May 15, 2018, 3:10 PM), <https://www.vox.com/technology/2018/5/15/17355702/uber-driver-arbitration-nondisclosure-sexual-harassment-assault> [<https://perma.cc/AK56-6GKP>].

52. Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018, 1:42 PM), <https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claim-s-why-more-companies-could-follow> [<https://perma.cc/3DEE-BSHA>].

53. *American Business and #MeToo*, *supra* note 50; Alexia Fernández Campbell, *California Approves a Law that Helps Sexual Harassment Survivors Sue Employers*, VOX (Aug. 28, 2018, 8:30 AM), <https://www.vox.com/2018/8/28/17777128/california-me-too-bill-mandatory-arbitration> [<https://perma.cc/GU4T-JTQJ>].

54. See *#MeToo: A Timeline of Events*, *supra* note 45 (referencing MeToo-related movements including the antiharassment coalition “Times Up” and the annual Women’s March).

unlawful content in question—and thereby subject to potential liability—or merely a publisher of content created by another provider.<sup>55</sup> The basis for this distinction is the text of the Act itself. The CDA defines “internet content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>56</sup> When coupled with section 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by *another* information content provider”), it is clear that ICSPs are only shielded from liability for publishing content generated by third-party users, and not from publishing content that the ICSP itself helped develop.<sup>57</sup> Because online services often implement tools that facilitate user content creation (for example, questionnaires, text boxes, and drop-down menus designed to elicit certain responses from users),<sup>58</sup> courts have had to delineate the boundary line where mere publishing ends and content creation begins. This has led to adoption by several courts of a “neutral” or “passive” assistance test: under section 230 of the CDA, an online service cannot be liable as a provider of content where it merely provided *neutral* tools to facilitate the creation of the content by a third-party user.<sup>59</sup>

This analysis originates from *Fair Housing Council v. Roommates.com, LLC*, in which the Ninth Circuit held that the defendant ICSP (an online forum for housing-rental listings) was not entitled to section 230 immunity because it had crossed the line from publishing user content to developing the content.<sup>60</sup> In order to access the website’s marketplace, prospective users were *required* to answer questions via drop-down menu about their gender, sexual orientation, and family status, which the plaintiffs argued violated federal and state housing discrimination laws.<sup>61</sup> By mandating that users provide the discriminatory information and providing a limited set of responses, the website stepped outside its role as “a passive transmitter of information provided by others” and became a “developer” of the unlawful

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55. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009) (confirming that there is no “dispute that the ‘information content’ . . . at issue in this case was provided by another ‘information content provider’ ” before moving on to publisher analysis).

56. 47 U.S.C. § 230(f)(3) (2018).

57. 47 U.S.C. § 230(c)(1) (emphasis added); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (“[Section 230] immunity applies only if the interactive computer service provider is not also an ‘information content provider,’ which is defined as someone who is ‘responsible, in whole or in part, for the creation or development of’ the offending content.” (quoting 47 U.S.C. § 230(f)(3))).

58. See *Roommates*, 521 F.3d at 1165.

59. *Id.* at 1169. See also *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Ardia*, *supra* note 21, at 463.

60. *Roommates*, 521 F.3d at 1161, 1166.

61. *Id.* at 1162, 1165.

content.<sup>62</sup>

The court in *Roommates* further extrapolated that an ICSP is responsible for developing illegal content and thereby unentitled to section 230 protection if it “contributes materially” to the content’s alleged unlawfulness.<sup>63</sup> This reasoning permitted the court to allow for potential liability related to Roommates’ search engine functionality, which was “designed to steer users based on discriminatory criteria.”<sup>64</sup> This opinion is significant in two ways. First, it suggests that courts may, to some degree, consider an ICSP’s purpose and intentions in determining whether it should be afforded protection from liability. Second, it suggests that operational and functional features of an ICSP’s design are not automatically shielded from liability under the Act, which, as will be explained further, has particular relevance in cases against ICSPs involving sexual harassment or assault.

#### B. COURT INTERPRETATIONS OF THE TERM “PUBLISHER” IN THE CONTEXT OF SECTION 230

If a court determines that an ICSP did not serve as a “provider” of the offending user content, it must decide whether a plaintiff’s allegations impermissibly treat the ICSP as a “publisher” of that content.<sup>65</sup> As discussed above, section 230 of the CDA bars claims that treat an interactive computer service provider as a publisher or speaker of third-party content.<sup>66</sup> This provision has led to substantial interpretive challenges, as the term “publisher” is not defined in the Act<sup>67</sup> and the U.S. Supreme Court has not weighed in on how it should be interpreted.<sup>68</sup> Courts have thus provided various interpretations of what rightfully falls under the umbrella of publisher conduct. The following analysis of caselaw identifies three potential interpretations of section 230, sometimes used in conjunction with one another: (1) a controversial, narrow interpretation of “publisher” that encompasses only the dissemination of specific content; (2) a discretionary interpretation of “publisher” as one who carries out “traditional editorial functions”; and (3) an expansive interpretation that encompasses nearly all activities related to maintaining an interactive user platform.

An important inquiry and focus of this Note is whether ICSP activity

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62. *Id.* at 1166.

63. *Id.* at 1168.

64. *Id.* at 1167.

65. *See supra* note 55 and accompanying text.

66. *See supra* Section I.B.

67. *See* 47 U.S.C. § 230(f) (2018).

68. *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 219 (Wis. Ct. App. 2018), *rev’d*, 926 N.W.2d 710 (Wis. 2019), *cert. denied*, 140 S. Ct. 562 (2019).

related to overall design, operation, and user functionality reasonably falls within the ambit of “publisher” conduct under each interpretation. As will be discussed further, the answer to this inquiry bears greatly on a plaintiff’s ability to bring suit against an ICSP for enabling sexual misconduct.

### 1. The Narrow “Disseminator or Propagator” Interpretation

A 2018 opinion from the Wisconsin Court of Appeals offers a narrow interpretation of the term “publisher” within the meaning of section 230 of the CDA,<sup>69</sup> which breaks somewhat radically from other courts’ interpretations and was subsequently rejected by the Supreme Court of Wisconsin. This interpretation restricts the scope of publisher conduct to the specific act of transmitting or spreading online particular content or information provided by a third-party user.<sup>70</sup> Thus, under this construction, an ICSP is subject to liability so long as the plaintiff does not allege that his or her harm arose *directly* from the third-party content itself (for example, as it would in a defamation or obscenity suit).<sup>71</sup>

The underlying suit was brought by a daughter of a deceased shooting victim against the creator and operator of Armslist.com, an online firearms marketplace.<sup>72</sup> The plaintiff argued that the website’s design and operational features facilitated illegal firearm sales, which allowed the victim’s killer to unlawfully purchase the murder weapon.<sup>73</sup> Specifically, the plaintiff pointed to features of the site that facilitated illegal transactions, such as user ability to limit search results to “private” sellers that are not required to conduct background checks, the lack of a user registration requirement, and the absence of restrictions imposed on buyers, which allowed online purchasers to evade certain state legal requirements.<sup>74</sup> The complaint thereby argued that Armslist’s own conduct in regard to the *design and operations* of its website caused the plaintiff’s harm, rather than the firearm advertisement posted by the seller itself.<sup>75</sup>

In interpreting the term “publisher” and thus determining the scope of section 230 immunity, the court focused on the phrase “of any information” in the Act’s text, finding that the term “publisher” is directly and inextricably linked to this phrase.<sup>76</sup> According to the court, Armslist could only be

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69. *See id.* at 221.

70. *Id.*

71. *Id.*

72. *Id.* at 213–14.

73. *Id.* at 214–16.

74. *Id.* at 216.

75. *Id.* at 221.

76. *Id.* Recall that the Act prohibits an ICSP from being “treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (2018) (emphasis

protected under section 230 if the plaintiff's theory of liability was based on the "specific act of publishing or speaking" *the particular content* provided by either the purchaser or seller of the firearm on the website.<sup>77</sup> In other words, the court viewed the term "publisher" as solely referring to one who "disseminat[es] or propagat[es]" specific information.<sup>78</sup> This interpretation declines to sweep into the ambit of protected publisher conduct "all actions of websites that could be characterized as publishing activities or editorial functions," including website design and functionality.<sup>79</sup> Rather, under this interpretation, the term "publisher" refers only to the singular instance where an ICSP disseminates particular user content.<sup>80</sup>

## 2. The "Traditional Editorial Functions" Inquiry

While the narrow definition of "publisher" posited by the Wisconsin Court of Appeals has been rejected by its reviewing court, the Ninth Circuit in *Barnes v. Yahoo!* adopted a more influential interpretation that focuses less on the specific act of publishing particular words and more on the general duties derived from an ICSP's "status or conduct" as a publisher.<sup>81</sup> Under this interpretation, a court must determine if the action complained of falls within the traditional functions of one whose business is publication.<sup>82</sup> This includes "all publication decisions, whether to edit, to remove, or to post" with respect to content provided by third-party users.<sup>83</sup> In adopting this analysis, the court in *Barnes* approved and supplemented a Fourth Circuit interpretation of "publisher"<sup>84</sup> found in *Zeran v. American Online*, which specified that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."<sup>85</sup>

added).

77. *Armslist*, 913 N.W.2d at 221–22.

78. *Id.* at 221. The word "disseminate" means "to spread abroad as though sowing seed" or "to disperse throughout." *Disseminate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disseminate> [https://perma.cc/YC9V-RY58]. The word "propagate" means, most relevantly, "to cause to spread out and affect a greater number or greater area" or "to transmit . . . through a medium." *Propagate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/propagate> [https://perma.cc/8XB6-P83E].

79. *Armslist*, 913 N.W.2d at 222.

80. *Id.* The California Court of Appeal in *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148 (Ct. App. 2009) also considered—and rejected—a similarly narrow interpretation: that publisher protection under section 230 extends "only to claims 'stemming from harms caused by the defendant's republication of inherently offensive or harmful content.'" *Id.* at 153 (quoting Brief of Appellants at 39, *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148 (Ct. App. 2009) (No. B205643)).

81. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

82. *Id.* at 1102–03.

83. *Id.* at 1105.

84. *Id.* at 1102.

85. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

In *Barnes*, the Ninth Circuit determined that a plaintiff's negligent undertaking claim against the web service provider Yahoo (arising from its failure to remove harassing profiles posted by the plaintiff's former boyfriend, which contained explicit images along with open solicitations for sex)<sup>86</sup> was barred under the CDA because the undertaking Yahoo failed to perform—removing the profiles—was quintessential publisher conduct.<sup>87</sup> The opinion therefore represents an interpretation of publisher conduct that extends beyond the act of transmitting specific content and includes other activities traditionally exercised by those in the business of publishing: specifically, editorial discretion to remove, edit, or delay posting of third-party content online. This interpretation leaves open the question of whether an ICSP's design and operational features reflect traditional “editorial” choices that are protected by section 230.

### 3. The Broad “Overall Design and Operation” Interpretation

A 2016 opinion from the First Circuit, *Doe v. Backpage.com, LLC*<sup>88</sup> responded to the inquiry above, establishing an expansive interpretation of publisher conduct by expressly including an ICSP's decisions regarding the design, operation, and functionality of its platform under the “publisher” umbrella. The *Backpage* plaintiffs (three women who were advertised in the classified advertising website's “Escorts” section while minors and as a result, were trafficked and raped)<sup>89</sup> brought suit against the website for engaging in conduct “designed to facilitate sex traffickers' efforts” in order to profit from the traffickers' advertisements.<sup>90</sup> Similar to *Armslist*, the plaintiffs pointed to specific measures Backpage took or forewent to make transactions easier for sex traffickers, such as not requiring phone number or email verification, allowing users to “hide” their emails, stripping photos used in advertisements of their metadata, and accepting anonymous payments.<sup>91</sup> The court determined that each of these policies and practices fell squarely under the ambit of publisher conduct for the purposes of section 230 analysis, and therefore could not be a basis of liability.<sup>92</sup> Implementing the “traditional editorial functions” analysis above, the First Circuit reasoned that the plaintiffs' claims attacked features that were “part and parcel of the overall design and operation of the website” and “reflect[ed] choices about

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86. *Barnes*, 570 F.3d at 1098.

87. *Id.* at 1103. However, the plaintiff was able to proceed with a claim based on a theory of promissory estoppel because she sought to hold Yahoo liable for failing to remove the content not as a publisher, but as a “counter-party to a contract.” *Id.* at 1107–09.

88. *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

89. *Id.* at 15, 17.

90. *Id.* at 16.

91. *Id.* at 16–17, 20.

92. *Id.* at 20.

what content can appear on the website and in what form.”<sup>93</sup>

a. Modern Case Study: *Herrick v. Grindr*

This broad interpretation of publisher conduct has gained traction in other courts. In *Armslist*, the Wisconsin Supreme Court relied on *Backpage* in ultimately rejecting the lower court’s narrow interpretation of “publisher,”<sup>94</sup> finding that claims based on a website’s design are indistinguishable from claims based on its monitoring of user content, “no matter how artfully pled.”<sup>95</sup> Another prominent case, *Herrick v. Grindr*,<sup>96</sup> similarly embraces this approach, providing an important glance into the state of liability for online dating services. Herrick, a former user of a dating app for gay and bisexual men, sued the app after his ex-boyfriend used it to post fraudulent profiles of Herrick that directed other users to his home and workplace to act out fetishistic and violent sex fantasies.<sup>97</sup> Despite notifying Grindr approximately one hundred times of the abuse, Herrick received only automated responses from the company, and Grindr did not take any steps to remove the profiles.<sup>98</sup> Herrick argued, *inter alia*, that the design of the app enabled his harassment because it did not incorporate commonly-used technological features that would protect users from fraudulent and harassing activity.<sup>99</sup> He also argued that Grindr was aware that its platform was susceptible to misuse, yet it failed to warn users of potential harm.<sup>100</sup>

The district court, in a decision affirmed by the Second Circuit, concluded that the app was shielded from liability under section 230 for all causes of action.<sup>101</sup> It echoed *Roommates* in finding that Herrick’s claims regarding the app’s alleged design defects and failure to warn were fundamentally “based on content provided by another user” (his ex-boyfriend), and that Grindr’s only role in developing that content was through “neutral assistance.”<sup>102</sup> The court also found that the claims were inextricably linked to, and inseparable from, an allegation that Grindr failed to monitor and remove fraudulent content.<sup>103</sup> Approving the reasoning in

93. *Id.* at 21.

94. *See supra* Section II.C.1.

95. *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 724–26 (Wis.), *cert. denied*, 140 S. Ct. 562 (2019).

96. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018), *aff’d*, 765 F. App’x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

97. *Id.* at 584; Goldberg, *supra* note 10.

98. *Grindr*, 306 F. Supp. 3d at 585; Andy Greenberg, *Spoofed Grindr Accounts Turned One Man’s Life into a ‘Living Hell,’* WIRED (Jan. 31, 2017, 2:57 PM), <https://www.wired.com/2017/01/grinder-lawsuit-spoofed-accounts> [<https://perma.cc/LZX4-DQB6>].

99. *Grindr*, 306 F. Supp. 3d at 584.

100. *Id.* at 585.

101. *Id.* at 584.

102. *Id.* at 589.

103. *Id.* at 590–91.

*Backpage*, the court found that Grindr’s operational features “bear on [its] ability to search for and remove content posted to the app – exactly the sort of ‘editorial choices’ that are a function of being a publisher.”<sup>104</sup>

The outcomes in both *Grindr* and *Armslist* reveal that the trend toward an ultrabroad interpretation of publisher conduct under section 230 remains in force, despite calls for greater accountability for online platforms.<sup>105</sup> While the plaintiffs in both cases appealed to the United States Supreme Court for review of their decisions, both petitions for certiorari were denied in 2019.<sup>106</sup>

### C. CONCERNS AND CONSIDERATIONS PRESENT IN SECTION 230 ANALYSIS

Although courts have been in nearly unanimous agreement that section 230 of the CDA should afford online platforms broad protection,<sup>107</sup> a lack of consensus on proper interpretation of the provision reveals that doctrinal lines have not yet been fully settled upon.<sup>108</sup> This Section provides a brief analysis of some of the frequently cited caselaw in this area, shedding light on some of the factors involved in courts’ decisionmaking.

#### 1. Free Speech and Regulatory Concerns Guide Courts’ Analyses

The First Amendment right to freedom of speech<sup>109</sup> has always underlain discussions of the CDA and continues to today. At its earliest stages, the CDA was harshly criticized by opponents who considered it a violation of free speech.<sup>110</sup> The Act emerged at a time when the Internet was

104. *Id.* at 591.

105. See Ambika Kumar Doran et al., *Grindr and Armslist Cases Reaffirm Core Protections for User-Generated Content*, JDSUPRA (May 17, 2019), <https://www.jdsupra.com/legalnews/grindr-and-armslist-cases-reaffirm-core-55499> [<https://perma.cc/2L9G-K84S>] (authors are practicing attorneys at Davis Wright Tremaine LLP).

106. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579 (S.D.N.Y. 2018), *aff’d*, 765 F. App’x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019); *Daniel v. Armslist, LLC*, 926 N.W.2d 710 (Wis.), *cert. denied*, 140 S. Ct. 562 (2019).

107. *Doe v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016); see also *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, J., dissenting) (“[T]he majority upends the settled view that interactive service providers enjoy broad immunity when publishing information provided by third parties.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“[R]eviewing courts have treated § 230(c) immunity as quite robust . . . .”); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *FORDHAM L. REV.* 401, 407, 409 (2017) (“[H]undreds of decisions have extended § 230 immunity, with comparatively few denying or restricting it.”).

108. See *Ardia*, *supra* note 21, at 450–52, 474–75; Michal Lavi, *Evil Nudges*, 21 *VAND. J. ENT. & TECH. L.* 1, 35–46 (2018) (highlighting uncertainties in the applicability of section 230 immunity); Goldberg, *supra* note 10.

109. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . . .”).

110. See *supra* note 19 and accompanying text.



new and its impact unforeseen; attempts to regulate this new frontier were unwelcome due to fear of squandering its potential and hindering its growth.<sup>111</sup> In the period of backlash over *Stratton Oakmont*, which in part inspired the Cox-Wyden Amendment as a means of shielding ICSPs from extensive liability,<sup>112</sup> most major interactive online services were bulletin boards designed for users to express ideas, thoughts, and opinions—online behavior that is unquestionably tethered to protected free speech.<sup>113</sup> In this context, if ICSPs were to be held legally responsible for defamatory postings on their bulletins, they would undoubtedly need to shut down their services or overcensor user content in order to avoid liability.

These concerns have carried over into modern analyses of section 230 of the CDA. Courts appear reluctant to hold online services legally responsible for isolated incidents of harassment that occur on their platforms,<sup>114</sup> especially if the ICSP was notified of a particular user’s specific bad act and failed to adequately address or respond to it.<sup>115</sup> On the other hand, online services that engage in more systemic patterns of conduct with far-reaching implications, such as the pervasive housing discrimination in *Roommates*, may be more vulnerable to liability.<sup>116</sup> Resistance to allowing liability for ICSPs that fail to remove objectionable content upon notice from a harmed party derives from the free speech concerns described above. In *Zeran*, the Fourth Circuit opined that if ICSPs could be subjected to liability each time they were notified of defamatory content and failed to remove it, they would be incentivized to remove all content upon notification,

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111. See Cannon, *supra* note 17, at 90–91.

112. See *supra* Section I.A.

113. Citron & Wittes, *supra* note 107, at 411–12.

114. See, e.g., *Herrick v. Grindr LLC*, 765 F. App’x 586, 588–89 (2d Cir.) (granting section 230 protection to a web-based dating app on which the plaintiff suffered a “campaign of harassment.”), *cert. denied*, 140 S. Ct. 221 (2019); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415–16 (5th Cir. 2008) (granting section 230 protection to a social networking website in cases where minor plaintiffs were sexually assaulted by adults met on the site); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120–21 (9th Cir. 2003) (granting section 230 protection to an online dating service on which the plaintiff was harassed by a user who created fraudulent profiles); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (granting section 230 protection to an interactive service provider in case where the plaintiff was victimized by an online hoax); *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 149 (Ct. App. 2009) (granting section 230 protection to a social networking website in cases where minor plaintiffs were sexually assaulted by adults met on the site).

115. See *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1098 (9th Cir. 2009); *Carafano*, 339 F.3d at 1122; *Zeran*, 129 F.3d at 328; *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018), *aff’d*, 765 F. App’x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

116. See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (discussing how the website was designed to “force users to participate in its discriminatory process”); see also *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 715 (Wash. 2015) (denying section 230 protection to *Backpage.com* in suit brought to “bring light to . . . how children are bought and sold for sexual services online”).

regardless of whether removal is actually warranted.<sup>117</sup> This, the court reasoned, would result in a chilling of online speech, in direct contravention of Congress's intentions.<sup>118</sup>

a. Regulatory Challenges

Courts' analyses of section 230 immunity are further complicated by the unique composition of the online universe. The Internet's confluence of speech, expression, and commerce has posed questions as to how, where, and by whom it should be regulated.<sup>119</sup> While the First Amendment does not prevent Congress from reasonably regulating commercial speech, it places a premium on personal expression.<sup>120</sup> The federal government has therefore faced challenges with how online speech and commerce should be regulated, and the resistance that inevitably comes with it.<sup>121</sup>

Since the Internet was mainly a vehicle for communication and expression at the time the CDA was enacted, ICSP immunity was deemed necessary to promote the policy goal of encouraging its development.<sup>122</sup> As the availability of web-based platforms and apps has diversified, however, courts have considered the application of section 230 immunity to a variety of online services with different functions and business models. The caselaw suggests that some courts may be more reluctant to grant section 230 protection to ICSPs that serve as online marketplaces or seek to connect users for transactional commercial purposes,<sup>123</sup> while online services connecting users for social or romantic purposes are frequently afforded protection from liability.<sup>124</sup>

Courts' potential willingness to extend liability to commerce-based online services comports with a societal expectation that government

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117. *Zeran*, 129 F.3d at 333.

118. *Id.*; see also Todd G. Hartman, *The Marketplace vs. the Ideas: The First Amendment Challenges to Internet Commerce*, 12 HARV. J.L. & TECH. 419, 445–48 (1999).

119. See Hartman, *supra* note 118, at 441–44 (discussing conflicts between the regulation of online commerce and online speech in the early days of the Internet).

120. See *id.* at 420–21.

121. *Id.* at 422–24.

122. See *supra* Section I.A

123. See, e.g., *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016) (denying section 230 protection to a networking site for the modeling industry); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (denying section 230 protection to an online housing forum); *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 715–16 (Wash. 2015) (denying section 230 protection to a classified advertising website).

124. See, e.g., *Herrick v. Grindr LLC*, 765 F. App'x 586, 588–89 (2d Cir.) (granting section 230 protection to a “web-based ‘hook-up’ application”), *cert. denied*, 140 S. Ct. 221 (2019); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1120–21 (9th Cir. 2003) (granting section 230 protection to a match-making website); *Doe v. MySpace, Inc.*, 528 F.3d 413, 415, 418 (5th Cir. 2008) (granting section 230 protection to a social networking website); *Doe II v. Myspace Inc.*, 96 Cal. Rptr. 3d 148, 149 (Ct. App. 2009) (same).

regulation of physical businesses is necessary to protect consumers—an understanding that potentially paves the way for courts to accept similar oversight of online services that facilitate commercial transactions online.<sup>125</sup> On the other hand, there is a competing expectation that personal affairs, including social and romantic relationships, are the subject of self-regulation (or for minors, parental regulation), making third-party policing of this sphere less intuitive.<sup>126</sup> This balancing of interests bleeds free speech concerns into considerations of individual accountability.

b. The Role of the User

Because the implications of forcing interactive online services to regulate their users' content are significant, courts accept that responsibility for online behavior must be imposed on the user in some circumstances. This concept is expressly touched upon in some court opinions involving social networking and dating services. In addressing the plaintiff's fraud claim in *Grindr*, for example, the district court stressed that Grindr's terms of service impose obligations on the app's users not to engage in impermissible conduct, while Grindr itself claims no obligation to monitor such conduct.<sup>127</sup> In this context, the onus is on users to moderate and police their own activity, and the risks associated with noncompliance fall on the users and not the service itself—a structure the court appears reluctant to disrupt.<sup>128</sup>

A 2008 Fifth Circuit opinion, *Doe v. MySpace*, also explicitly appeals to the idea of personal (or parental) accountability for online conduct, suggesting that social media users or their guardians are more appropriately positioned to protect users from predatory behavior than are the services themselves.<sup>129</sup> This illustrates the debate that courts, regulators, and policymakers grapple with in balancing the need to protect Internet users from known harms with the notion that individuals have a right to self-expression online and must accept some degree of responsibility for

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125. See *Roommates*, 521 F.3d at 1164 n.15.

126. For an argument of this point, see Nicholas P. Dickerson, Comment, *What Makes the Internet So Special? And Why, Where, How and By Whom Should Its Content Be Regulated?* 46 HOUS. L. REV. 61, 75, 98–100 (2009).

127. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 595–96 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

128. See *id.*

129. *Doe v. MySpace*, 528 F.3d at 420–21. The following statement of the District Court from a preliminary hearing is illustrative:

I want to get this straight. You have a 13-year-old girl who lies, disobeys all of the instructions, later on disobeys the warning not to give personal information, obviously, [and] does not communicate with the parent. More important, the parent does not exercise the parental control over the minor. The minor gets sexually abused, and you want somebody else to pay for it?

*Id.* at 421 (alteration in original) (quoting Transcript of Record, *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (No. 07-50345)).

engaging in activities that contain inherent risks.

## 2. An ICSP's Incentives Assume a Limited Role in Section 230 Analysis

An additional observation from the caselaw is that an online service's purpose has some relevance to section 230 analysis, but this consideration is limited. ICSPs that maintain a specific motive or interest in the alleged wrongdoing—or that are active participants in the wrongdoing—may be less likely to receive the statute's protection.<sup>130</sup> Conversely, online services that have no interest in the alleged wrongdoing and maintain explicit policies against the conduct (whether or not these policies are ultimately enforced) are frequently shielded from liability.<sup>131</sup> Social media and dating services will nearly always fall into the latter category, as these services have nothing to gain from rampant harassment on their platforms.

Discussion of an ICSP's purpose or incentives tends to occur, if at all, when a court implements the “neutral or passive assistance” test from *Roommates* to determine whether or not an ICSP helped develop the offending content.<sup>132</sup> In denying section 230 immunity to the housing website, the Ninth Circuit in *Roommates* emphasized that the website's search function was purposefully “designed to achieve illegal ends.”<sup>133</sup> Similarly, in *J.S. v. Village Voice Media Holdings*, the Supreme Court of Washington found that the plaintiffs' state law claims for damages against Backpage.com survived a motion to dismiss, stressing the importance of “ascertain[ing] whether in fact Backpage designed its posting rules to induce sex trafficking,” of which the plaintiffs were victims.<sup>134</sup> One element of this consideration may be whether the online service intended to profit from unlawful activity,<sup>135</sup> although this factor is ultimately irrelevant to the

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130. See *supra* note 63 and accompanying text.

131. See, e.g., *Doe v. MySpace*, 528 F.3d at 416 (discussing various measures employed by the website to protect users in case granting section 230 protection); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003) (discussing dating site's policy prohibiting members from posting personal information and practice of reviewing member photos for impropriety in case granting section 230 protection); *Grindr*, 306 F. Supp. 3d at 586 (describing Grindr's terms of service prohibiting users from fraudulent and harassing behavior in case granting section 230 protection).

132. See *supra* Section II.A.

133. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).

134. *J.S. v. Vill. Voice Media Holdings, LLC*, 359 P.3d 714, 718 (Wash. 2015) (emphasis added).

135. See, e.g., *Roommates*, 521 F.3d at 1165, 1167 (finding that because discriminatory housing screening is prohibited offline, Congress did not intend to “make it lawful to profit from it online”); *J.S. v. Vill. Voice*, 359 P.3d at 718 (discussing how Backpage's website is designed to facilitate sex trafficking so the website can “continue to profit from those advertisements” (quoting Second Amended Complaint for Damages at 13, *J.S. v. Vill. Voice Holdings, LLC*, No. 3:12-cv-06031-BHS, 2013 U.S. Dist. LEXIS 29881 (W.D. Wash. Mar. 5, 2013))); see also *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 215 (Wis. Ct. App. 2018) (discussing that the defendant “saw a commercial opening” and created Armslist.com after several major websites prohibited firearm sales), *rev'd*, 926 N.W.2d 710 (Wis.), *cert. denied*, 140 S. Ct. 562 (2019).

determination of whether an ICSP is afforded immunity under section 230.<sup>136</sup>

a. Section 230’s “Good Samaritan” Language Is Rarely Addressed

Evaluation of an ICSP’s incentives may also be relevant to the “Good Samaritan” language of section 230 and the Act’s stated policy to “remove disincentives for the development and utilization of blocking and filtering technologies.”<sup>137</sup> These elements of section 230 suggest that Congress intended to protect online intermediaries that take good-faith steps to prevent the proliferation of objectionable content, incorporating a normative consideration into the determination of ICSP liability. However, courts do not appear to put much stock in this consideration. Various courts have provided section 230 immunity to good and bad actors alike,<sup>138</sup> and no clear doctrinal understanding of what makes an ICSP a “Good Samaritan”—nor the language’s legal relevance—has emerged.<sup>139</sup> This also may be driven by free speech considerations. There is some concern that holding online services to a heightened standard of conduct would promote Internet censorship by forcing smaller websites that lack sufficient resources to shut down.<sup>140</sup> Providing the section 230 safe harbor to all ICSPs without the qualifier of “Good Samaritan” conduct ensures that the highest volume of Internet speech is protected.<sup>141</sup>

Additionally, drawing the line between a “Good Samaritan” ICSP that is entitled to protection and a “Bad Samaritan” ICSP that is not could present interpretive challenges. For example, Grindr maintains a “system of digital and human screening tools” to protect users from dangerous conduct, and its Terms of Service prohibit users from stalking, harassing, abusing, and threatening others on the app.<sup>142</sup> The service also reserves the right to delete and ban accounts that violate its safety policies.<sup>143</sup> Thus, on its face, Grindr appears to take a well-intentioned stance against the type of abusive behavior the plaintiff in *Herrick v. Grindr* suffered.

136. *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 U.S. Dist. LEXIS 101890, at \*10 (N.D. Cal. Dec. 17, 2008).

137. 47 U.S.C. § 230(b)(4), (c) (2018).

138. *See Citron & Wittes, supra* note 107, at 417; *see also Armslist*, 926 N.W.2d 723 (“[T]he allegation of intent is ‘a distinction without a difference’ and does not affect CDA immunity.” (quoting *Doe v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016))), *cert. denied*, 140 S. Ct. 562 (2019).

139. *See Citron & Wittes, supra* note 107, at 416–18 (discussing potential legal interpretations of “Good Samaritan” activity).

140. *See* Brief of Electronic Frontier Foundation & Center for Democracy & Technology as Amici Curiae in Support of Defendants-Appellees at 8–9, *Herrick v. Grindr LLC*, 765 F. App’x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019) (No. 18-396) [hereinafter EFF Amicus Brief].

141. *See Ardia, supra* note 21, at 391 (“[A]ny increase in baseline liability for intermediaries will impact their willingness to facilitate potentially injurious speech.”).

142. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 586 (S.D.N.Y. 2018), *aff’d*, 765 F. App’x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

143. *Id.*

The crux of the Herrick's failure to warn claim, however, was that Grindr's policies are effectively window dressing with little practical value, and the app fails to notify users of the actual risks associated with its use.<sup>144</sup> Herrick also argued that Grindr failed to utilize common technologies, such as image recognition software and "geofencing," which could help prevent harassment.<sup>145</sup> Amici for the plaintiff argued along similar lines, asserting that although Grindr maintains terms of service similar to other dating apps, it does not have mechanisms that effectively address harassment and fails to police abuse to the extent other services do.<sup>146</sup> Since Grindr does not follow "industry standards to protect users from abuse" but rather "appears to do nothing," they contend that it is not entitled to "Good Samaritan" immunity under section 230.<sup>147</sup>

These dissonant interpretations of Grindr's terms and policies illustrate the challenges that may arise for courts in considering whether an ICSP acted as a Good Samaritan. In light of the uncertainty in this area and the history of affording broad section 230 immunity to ICSPs regardless of their intentions, courts seem to ignore this element of the Act altogether.

### III. MODIFICATION OF SECTION 230 DOCTRINE IS NECESSARY TO PROTECT INTERNET USERS FROM SEXUAL OFFENSES ENABLED BY INSUFFICIENT USER SAFETY PROTOCOLS

As it stands, section 230 analysis provides little opportunity for legal recourse for individuals who have suffered sexual harassment or sexual assault potentially enabled by the policies and conduct of web-based social networking and dating services.<sup>148</sup> These types of interactive services do not facilitate commercial transactions between users; rather, they promote social, romantic, and sexual interactions that fit more comfortably in the private sphere, making government oversight less intuitive and placing a

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144. *Id.* at 585–86.

145. *Id.*

146. Brief of Amici Curiae Electronic Privacy Information Center in Support of Appellant & Urging Reversal at 8–14, *Herrick v. Grindr LLC*, 765 F. App'x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019) (No. 18-396) [hereinafter EPIC Amicus Brief]; *see also* Ari Ezra Waldman, *Law, Privacy, and Online Dating: "Revenge Porn" in Gay Online Communities*, 44 *LAW & SOC. INQUIRY* 987, 1002–03 (2019) (comparing Grindr's safety features and policies with those of another popular dating app).

147. EPIC Amicus Brief, *supra* note 146, at 10–11.

148. Victims of online sexual harassment face threats of immediate physical danger and ongoing psychological trauma. *See* Danielle Keats Citron, *Sexual Privacy*, 128 *YALE L.J.* 1870, 1924–28 (2019) (discussing the harms that can follow from online invasions of sexual privacy). *See generally* Azy Barak, *Sexual Harassment on the Internet*, 23 *SOC. SCI. COMPUTER REV.* 77 (2005) (discussing the prevalence and effects of online sexual harassment).

greater focus on personal user responsibility.<sup>149</sup> Additionally, plaintiffs' claims against these types of services tend to involve isolated instances of harassment that run afoul of the platform's terms and conditions, rather than purposeful, systematic wrongful conduct on the part of the ICSP.<sup>150</sup> As seen in *Grindr*, most social networking and dating sites maintain policies against abusive behavior and do not materially benefit from the unlawful actions of harassing third parties.<sup>151</sup>

Consistent broadening of section 230's scope has also led several courts to adopt an interpretation of "publisher" conduct that places safety features and user protection policies within the confines of the provision's protection from liability.<sup>152</sup> Plaintiffs who suffer sexual harassment or assault as a result of online activity are generally barred from asserting claims that the ICSP was aware of and could have implemented measures to prevent or reduce the likelihood of the harm, but did not do so. Courts have dismissed these claims through the "traditional editorial functions" analysis discussed in Section II.B, finding that claims asserting a failure to implement reasonable safety features are equivalent to asserting that the ICSP failed to screen and remove content, a traditional publisher function.<sup>153</sup> Additionally, in at least one case, a court has rejected the claim that there is a standard of "heightened accountability" for an ICSP that is aware its services are being used to commit acts of sexual violence.<sup>154</sup> Particularly in cases where a victim cannot identify his or her harasser because of online anonymity, this leaves little or no opportunity for justice available.<sup>155</sup>

This Part will argue that to allow for greater legal recourse for survivors of sexual offenses in line with new cultural understandings of the MeToo era, a shift in section 230 immunity doctrine is needed. Changing the doctrine is not merely desired, it is in fact "a matter of life or death for victims of stalking and violence caused and exacerbated by computer technologies

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149. See Teodora Pasca, *Online Dating Apps Have a Major Problem with Sexual Harassment—But Solutions Must Start Offline*, THIS (Sept. 27, 2018), <https://this.org/2018/09/27/online-dating-apps-have-a-major-problem-with-sexual-harassment-but-solutions-must-start-offline> [<https://perma.cc/KTT4-J8LH>].

150. See *id.*

151. *Id.*

152. See Citron & Wittes, *supra* note 107, at 404 ("[Section 230's] overbroad interpretation has left victims of online abuse with no leverage against site operators whose business models facilitate abuse.").

153. See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102–03 (9th Cir. 2009); *Herrick v. Grindr LLC*, 765 F. App'x 586, 590 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 221 (2019); *Beckman v. Match.com*, 2:13-CV-97 JCM (NJK), 2013 U.S. Dist. LEXIS 78839, at \*11–12 (D. Nev. May 29, 2013), *aff'd in part and rev'd in part*, 668 F. App'x 759 (9th Cir. 2016).

154. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 592 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir.), *cert. denied*, 140 S. Ct. 221 (2019).

155. See Citron, *supra* note 148, at 1929–31, 1943; see also *Ardia*, *supra* note 21, at 432; *Barak*, *supra* note 148, at 83.

unimagined when Congress passed the law in 1996.”<sup>156</sup>

A. A NARROWING OF THE SCOPE OF SECTION 230 IMMUNITY IS BEST SUITED FOR THE JUDICIARY

This Section will demonstrate that the judiciary is the governmental branch best suited to limit section 230 immunity for online services in a way that better aligns with new cultural understandings. However, it is worth considering the possibility that the doctrine could be modified by the legislature. Congress could amend the CDA in a way that reigns in the scope of immunity that courts have historically provided ICSPs under section 230. This could be achieved by statutorily defining the term “publisher” in a way that formally distinguishes conduct that facilitates user speech and content-sharing (publisher conduct) from that which helps users navigate real-world social and commercial interactions (nonpublisher conduct). A refined definition that captures a specific, narrower range of ICSP conduct could allow for more successful claims against online services that allegedly help facilitate acts of sexual misconduct through their platforms. However, as website and app technology continues to become more complex, involving mechanisms such as artificial intelligence and ad-targeting algorithms, capturing the scope of an ICSP’s “publisher” conduct textually may prove challenging.<sup>157</sup>

Alternatively, the legislature could explore amending the CDA in a way that carves out a specific exception for crimes of sexual violence. Congress made a similar move in early 2018 by passing the two-bill package “Fight Online Sex Trafficking Act”<sup>158</sup> and “Stop Enabling Sex Traffickers Act”<sup>159</sup> (“FOSTA-SESTA”), which amends section 230 of the CDA to allow for liability against ICSPs that facilitate or promote sex trafficking. FOSTA-SESTA arose in part from public outcry over *Doe v. Backpage*<sup>160</sup> and the continued lack of legal or criminal accountability for the advertising website’s nefarious conduct.<sup>161</sup> However, the law was met with strong opposition from victims’ rights groups as well as pro-Internet and pro-speech advocates, who feared it could overcensor online speech, cause smaller

156. Goldberg, *supra* note 10.

157. See Lavi, *supra* note 108, at 19–20; Adi Robertson, *What Happens Next in the Housing Discrimination Case Against Facebook?*, VERGE (Apr. 2, 2019, 1:09 PM), <https://www.theverge.com/2019/4/2/18286660/facebook-hud-housing-discrimination-case-section-230-legal-defense> [https://perma.cc/2FBA-RYS8].

158. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018).

159. Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong. (2017).

160. See *supra* Section II.B.3.

161. *What You Can Do: The Battle*, I AM JANE DOE, <https://www.iamjanedofilm.com/join-us> [https://perma.cc/KJW6-9HXF].



websites to shut down, and force sex workers to the dark web.<sup>162</sup> Just a year after its enactment, several lawmakers moved to reexamine the law and evaluate its effectiveness.<sup>163</sup> The controversy surrounding FOSTA-SESTA casts doubts as to whether a further legislative amendment would be the best course of action to address the issue of ICSP accountability for sexual harassment and sexual assault claims.<sup>164</sup>

Given these challenges, the best opportunity for change exists in the judiciary. As discussed in Part II, strict doctrinal lines concerning section 230 of the CDA have not yet been fully drawn, and courts often balance competing interests in favor of heavily-weighted free speech concerns. In response to the emerging view of sexual violence as a far-reaching public issue rather than a strictly-confined private matter,<sup>165</sup> judicial interpretations of the CDA can and should shift in way that helps provide survivors of sexual assault and harassment an avenue for legal recourse against web-based services that enable unlawful behavior through their platforms.

#### B. POTENTIAL APPROACHES TO MODIFICATION OF THE SECTION 230 DOCTRINE

This Section explores two ways in which section 230 analysis could be modified in the courts. First, potential ICSP liability could be expanded through judicial adoption of a narrower interpretation of the term “publisher,” providing a check on unfettered ICSP immunity which has been advocated for by some scholars.<sup>166</sup> Second, courts could limit immunity only to online services that meet certain standards of conduct, giving credence to

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162. See, e.g., *ACLU Letter Opposing SESTA*, ACLU, <https://www.aclu.org/letter/aclu-letter-opposing-sesta> [<https://perma.cc/BK9J-Z9F3>]; David Greene, *EFF Sues to Invalidate FOSTA, an Unconstitutional Internet Censorship Law*, ELECTRONIC FRONTIER FOUND. (June 28, 2018), <https://www.eff.org/deeplinks/2018/06/eff-sues-invalidate-fosta-unconstitutional-internet-censorship-law> [<https://perma.cc/X7EC-GNQW>]; Miles McCain, *FOSTA-SESTA Is Now Law—Where Does that Leave the Internet?*, PRIVACY NEWS ONLINE (May 29, 2018), <https://www.privateinternetaccess.com/blog/2018/05/fosta-sesta-is-now-law-where-does-that-leave-the-internet> [<https://perma.cc/8AEG-P9GJ>]; Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (July 2, 2018, 1:08 PM), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> [<https://perma.cc/X3CU-TUBW>]; Siouxsie Q, *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, ROLLING STONE (May 25, 2018, 7:01 PM), <https://www.rollingstone.com/culture/culture-features/anti-sex-trafficking-advocates-say-new-law-cripples-efforts-to-save-victims-629081> [<https://perma.cc/B4K6-BFQN>].

163. David McCabe & Kate Conger, *Stamping Out Online Sex Trafficking May Have Pushed It Underground*, N.Y. TIMES (Dec. 18, 2019, 11:58 AM), <https://nyti.ms/35C5vLM> [<https://perma.cc/X9JP-BXMZ>].

164. See *id.*

165. See Anna North, *7 Positive Changes That Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [<https://perma.cc/U4MD-EXST>].

166. See, e.g., Citron & Wittes, *supra* note 107 (arguing that section 230 immunity is too sweeping and should be modified).

the largely ignored “Good Samaritan” language of section 230(c). Ultimately, the most effective method would be adoption of both approaches.

### 1. Adopting a Narrower Interpretation of “Publisher” Conduct

First, courts could restrict the scope of section 230 immunity by adopting a narrower interpretation of the term “publisher” within the meaning of the Act. This approach would require rejection of the ultrabroad *Doe v. Backpage* “overall design and operations” construction of publisher conduct<sup>167</sup> and the adoption of a more tailored analytical approach.

As one potential option, more courts could endorse the interpretation advanced by the Wisconsin Court of Appeals in *Armslist*, which restricts publisher conduct to the specific act of transmitting user content and outwardly rejects broader consideration of an ICSP’s editorial functions, operations, and platform design.<sup>168</sup> Under this interpretation, claims alleging that an online service failed to implement reasonable safety measures to protect users and third parties from foreseeable sexual misconduct, similar to the allegations in *Grindr*, would likely survive a motion to dismiss. Because such claims are not centered upon the specific objectionable content posted but rather on the service’s overall design and functionality, they would not treat the ICSP as a “publisher” within the meaning of the Act.

Widespread adoption of this narrow definition is unlikely, however, particularly given the Supreme Court of Wisconsin’s rejection of this proposed interpretation.<sup>169</sup> As discussed in Part II, publisher immunity under section 230 has historically been construed broadly, and courts would likely be reluctant to break from this precedent. Indeed, the lower court’s opinion in *Armslist* denying immunity to the website represented a fairly radical departure from the leading case law and received some backlash by commentators prior to its reversal.<sup>170</sup>

A more preferable approach to interpretation of the term “publisher” would involve courts retaining the “traditional editorial functions” analysis

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167. See *supra* Section II.B.3.

168. *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 223–24 (Wis. Ct. App. 2018), *rev’d*, 926 N.W.2d 710 (Wis.), *cert. denied*, 140 S. Ct. 562 (2019).

169. See *supra* note 95 and accompanying text.

170. See Eric Goldman, *Wisconsin Appeals Court Blows Open Big Holes in Section 230—Daniel v. Armslist, TECH. & MARKETING L. BLOG* (Apr. 25, 2018), <https://blog.ericgoldman.org/archives/2018/04/wisconsin-appeals-court-blows-open-big-holes-in-section-230-daniel-v-armslist.htm> [<https://perma.cc/E7GQ-UACV>]; Y. Peter Kang, *4 Recent Personal Injury Rulings That Matter for Tech Cos.*, LAW360 (June 25, 2018, 5:40 PM), <https://www.law360.com/articles/1056345> [<https://perma.cc/7DUV-YNKT>]; Media & Entm’t Law Grp., *Gun Sales Platform Seeks Reversal of Ruling That Undermines Protections for Website Owners*, BALLARD SPAHR LLP (July 2, 2018), <https://www.ballardspahr.com/alerts/publications/legalalerts/2018-07-02-gun-sales-platform-seeks-reversal-of-ruling.aspx> [<https://perma.cc/U5LS-W4HM>].

that has gained traction in several circuits,<sup>171</sup> but rejecting the premise of *Backpage* and *Grindr* that an ICSP's design and operational features, including safety technology and policies, fall within the scope of such functions.<sup>172</sup> This approach would require courts to focus more narrowly on the Fourth Circuit's language in *Zeran* (defining quintessential editorial functions as decisions to publish, retract, delay or alter content)<sup>173</sup> and infer that an ICSP's design, operations, and functionality do not reflect "traditional" editorial choices. This construction makes sense given the reality of the Internet today. Platform design does more than facilitate the screening, editing, and posting of user content; it significantly "influences, restricts, and directs behavior" of users on the platform.<sup>174</sup> Under this slightly narrower interpretation of publisher conduct, plaintiffs who have suffered sexual harassment or sexual assault would be able to bring claims against online services for failing to implement safety features and policies related to the interactions they actively facilitate among users.

## 2. Elevating the "Good Samaritan" Language of Section 230

A second method of reinterpreting the scope of section 230 immunity would encourage courts to place a greater focus on the "Good Samaritan" language of the statute,<sup>175</sup> an approach that has also been advocated for by some courts and commentators.<sup>176</sup> As discussed in Part II, courts sometimes consider and acknowledge an online service's incentives in determining whether to afford it immunity under the Act, as seen in *Roommates*. However, this consideration is rarely given much weight, and appears largely unconnected to the "Good Samaritan" text of section 230. Courts have gone so far as to repeatedly provide immunity to ICSPs that *know* their services are being used for nefarious purposes, illustrating the lack of import that the "Good Samaritan" language currently carries.<sup>177</sup>

Courts could reign in the scope of section 230 immunity by restricting its application solely to "Good Samaritan" ICSPs, meaning those "providers or users engaged in good faith efforts to restrict illegal activity."<sup>178</sup> This would not only deny immunity to services that intentionally facilitate

171. See *supra* Section II.C.2.

172. See *supra* Section II.C.3.

173. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

174. Waldman, *supra* note 146, at 1001–02; see also Lavi, *supra* note 108, at 14–15.

175. 47 U.S.C. § 230(c) (2018) ("Protection for 'Good Samaritan' blocking and screening of offensive material.").

176. See generally Citron & Wittes, *supra* note 107 (arguing that courts should place a greater focus on the "Good Samaritan" language of section 230).

177. See *Daniel v. Armslist*, 926 N.W.2d 710, 726 (Wis.), *cert. denied*, 140 S. Ct. 562 (2019).

178. Citron & Wittes, *supra* note 107, at 416.

unlawful conduct (such as the infamous Backpage.com), but also those that are aware of such activity yet fail to take meaningful measures to address it.<sup>179</sup>

Promoting adherence to the principles of “Good Samaritan” ICSP conduct would benefit users and bring current section 230 doctrine more in line with its policy goals. While one of Congress’s objectives in enacting the CDA was to “remove *disincentives* for the development and utilization of blocking and filtering technologies,”<sup>180</sup> judicial interpretations of section 230 have done the opposite, removing ICSPs’ *incentives* to block and filter by affording them immunity from liability regardless of whether they take reasonable steps to monitor user conduct.<sup>181</sup> If courts begin to withhold section 230 immunity from ICSPs that have failed to act as “Good Samaritans”—meaning that they have not taken reasonable regulatory measures to protect individuals from known harms—plaintiffs who suffer from sexual harassment or sexual assault enabled by web-based services may have greater leeway in bringing claims against negligent ICSPs.<sup>182</sup>

### 3. Enforcing a Combined Approach

Either judicial adoption of a narrower interpretation of the term “publisher” within the meaning of section 230 or an elevated focus on the “Good Samaritan” language of the provision may be sufficient to increase ICSP accountability for facilitating sexual harassment or assault. However, a combination of the two approaches would be the most effective method of responding to the MeToo movement’s call for greater accountability in mitigating sexual misconduct. First, the reconfigured “publisher” prong would prevent courts from dismissing plaintiffs’ claims on the basis of ineffective user safety features. Second, the “Good Samaritan” prong would provide a standard by which courts could evaluate these allegedly deficient features, using applicable industry baselines to determine whether the ICSP acted reasonably to protect its users from known harms. This could likely be established in the early stages of litigation. In *Grindr*, for example, the

179. *See id.* at 417–18.

180. 47 U.S.C. § 230(b)(4) (emphasis added); *see also* *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007), *aff’d*, 528 F.3d 413 (5th Cir. 2008) (“[Section 230(c)(2)(A)] reflects Congress’s recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all.”).

181. Citron, *supra* note 148, at 1931; Waldman, *supra* note 146, at 1007; Richard M. Guo, Note, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH L.J. 617, 637 (2008); Patricia Spiccia, Note, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VAL. U. L. REV. 369, 405 (2013).

182. The way in which this “Good Samaritan” analysis could play out in the courts is discussed *infra* Section III.C.

plaintiff could have easily demonstrated that the app failed to take any action in response to his numerous reports of abuse, while similar apps like Scruff and Jack'd, which the plaintiff also used, immediately and effectively responded to his claims.<sup>183</sup>

Of course, these changes would not ensure that a plaintiff who has suffered sexual harassment or assault would ultimately prevail against an ICSP in court, but they would allow more plaintiffs to proceed past the dismissal stage. Such an approach would allow section 230 to operate with more flexibility in response to changing societal norms and could be administered in a way that addresses and alleviates the key concerns associated with narrowing the scope of ICSP immunity under section 230.

### C. ANALYZING THE PROPOSED APPROACH IN LIGHT OF COURTS' KEY CONCERNS

As discussed in Part II, courts' determinations of whether an ICSP is entitled to immunity under section 230 of the CDA are colored by certain factors: the importance of protecting free speech, the appropriate role of the user, and the purpose or incentives of the online service. This Section will revisit these considerations and argue that the suggested modification of the doctrine discussed above will not exacerbate courts' concerns.

#### 1. Modification of the Section 230 Immunity Doctrine Will Not Jeopardize Free Speech

Judicial adoption of a narrower interpretation of “publisher” conduct that excludes an ICSP's adoption of user safety features and policies does not threaten freedom of expression. While broad immunity was viewed as necessary to the preservation of free speech online during the burgeoning days of the Internet, these extreme prophylactic measures are no longer required. The phenomenal growth of web-based services—from social networking platforms to e-commerce sites to home and ride-sharing apps—makes clear that the existence of the Internet is no longer under threat.<sup>184</sup> Additionally, claims alleging insufficient user safety features and technologies do not go to the heart of the type of content-based activity that warrants protection. Adoption of a heightened level of accountability for online services that facilitate actual human interactions among users, rather than merely provide a platform for user expression, is a reasonable and necessary element of the Internet's progression. However, interpretations of section 230 of the CDA have failed to evolve with the times.

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183. Goldberg, *supra* note 10.

184. See Citron & Wittes, *supra* note 107, at 410–12.

Professor Danielle Keats Citron and Benjamin Wittes provide insight into this phenomenon, discussing how online businesses in the on-demand economy that “have little to do with free expression,” such as Airbnb and e-Bay, have been able to reap the benefits of section 230 immunity simply because they operate online instead of as physical businesses.<sup>185</sup> A shift away from an ultrabroad interpretation of “publisher” conduct makes sense in the “on-demand economy” as well as in the context of online social networking and dating services, many of which exist fundamentally to connect human beings rather than to curate and publish user content.<sup>186</sup> As Professor Ari Ezra Waldman explains, “[dating a]pps like Tinder and OkCupid are overtly predicated on transferring to the physical world a connection that originated online.”<sup>187</sup> While free speech proponents argue that section 230 protection is still necessary in these contexts to avoid “incentivizing platforms to dramatically curtail what people can discuss on line” and stifling protected speech,<sup>188</sup> interactive services like dating apps are less akin to publications offering content and more like real-life communities that require adequate regulation and oversight.<sup>189</sup> They should be treated as such.

Moreover, the type of free speech considerations present in early cases like *Zeran*—which dealt with defamatory comments on an online bulletin board—are not nearly as relevant in modern cases alleging insufficient user protection technologies and policies. Social networking services, which form interactive communities “primarily structured around people,” did not gain mainstream popularity until more than half a decade after the CDA was passed in 1996.<sup>190</sup> The “traditional editorial functions” interpretation of publisher conduct advocated for in *Zeran* in 1997 likely would not have anticipated the inclusion of modern safety technologies like “geofencing”<sup>191</sup> within this category. Therefore, while section 230 should remain in effect to ensure that online services are not held legally responsible for the expression

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185. *Id.* at 412.

186. See Cheryl J. Eisner, Note, *MySpace in a Post-Grokster World: Digital Finger Pointing for Offenses Perpetrated Through Use of Social Networking Sites After MGM v. Grokster*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 467, 467 (2008).

187. Waldman, *supra* note 146, at 990.

188. See, e.g., EFF Amicus Brief, *supra* note 140, at 5.

189. This is apparent in Grindr’s “About” page, which describes the service as “the largest social networking app for gay, bi, trans, and queer people” with “millions of daily users who use our location-based technology in almost every country in every corner of the planet.” The service describes itself as “a safe space where you can discover, navigate, and get zero feet away from the queer world around you.” *About*, GRINDR, <https://www.grindr.com/about> [<https://perma.cc/PT7V-TDLN>].

190. Guo, *supra* note 181, at 620, 631.

191. Geofencing uses “global positioning (GPS) or radio frequency identification (RFID) to define a geographic boundary. . . . [O]nce this ‘virtual barrier’ is established, the administrator can set up triggers that send a . . . notification when a mobile device enters (or exits) the specified area.” Lauryl Chamberlain, *GeoMarketing 101: What Is Geofencing?* (Mar. 7, 2016, 11:22 AM), <https://geomarketing.com/geomarketing-101-what-is-geofencing> [<https://perma.cc/WJK4-Q4Z4>].

of their users, the measures these services take (or fail to take) to protect individuals within their communities should not be protected in the same way. These actions do not fit squarely within the confines of “editor” or “publisher” conduct and should not be shielded entirely from legal scrutiny.

## 2. Narrower Section 230 Immunity Better Correlates with Modern Views of User Accountability

A narrow interpretation of publisher conduct that omits safety policies and features is also better aligned with current understandings of sexual misconduct as a widespread, systemic issue that cannot and should not be addressed solely by individual users. Although courts have willingly granted section 230 immunity to ICSPs in situations involving individualized private harms,<sup>192</sup> MeToo’s recognition of sexual harassment and assault as both a private and public issue paves the way for courts to view free speech concerns in this context differently. As discussed, cases dismissing harassment claims on section 230 grounds often echo the concern in *Zeran* that requiring ICSPs to adequately respond to every alleged instance of harassing content would unreasonably chill free speech.<sup>193</sup> While this frames the issue in an individualized manner, a proposed reinterpretation of “publisher” that separates safety features and policies from other “editorial functions” would allow courts to focus less on an ICSP’s *specific* response to an allegation of harassment and more on whether the ICSP’s *overall* operations demonstrate a reasonable standard of care to its users.<sup>194</sup> This would minimize free speech concerns associated with egregious individual claims and better reflect modern understandings of sexual violence as a public, systemic issue requiring a more muscular, collective response.

This proposed new approach to section 230 doctrine is also better aligned with emerging understandings of personal user accountability and ICSP oversight.<sup>195</sup> Online dating services have begun addressing the threat of sexual harassment and sexual assault inherent in their platforms, which should be recognized as an admission that these services are to some extent accountable for the safety of their users.<sup>196</sup> While some courts have considered the personal accountability of the user in section 230 analysis,<sup>197</sup> new cultural understandings set forth by the MeToo movement, particularly

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192. *See supra* Section II.C.1.

193. *See id.*

194. *See* Citron, *supra* note 148, at 1953; Citron & Wittes, *supra* note 107, at 419–20 (advocating for a “reasonableness” approach to section 230 immunity).

195. *See* Goldberg, *supra* note 10 (discussing “society’s current debate about the responsibility internet companies bear for the harm their technologies arguably propagate”).

196. *See infra* Section III.C.3.

197. *See supra* Section II.C.1.b.

regarding power disparities,<sup>198</sup> call for an adjustment of this perspective and a mitigation of the role of the user in sexual harassment and assault cases brought against ICSPs.<sup>199</sup>

Shifting the power structure is not a new concept. Perceptions of online accountability and responsibility continue to evolve in response to public concern around pervasive public harms.<sup>200</sup> This is most notable in the context of protecting children from predatory behavior of online strangers, a call to action which both inspired the CDA in its earliest stages and has incentivized online services to bolster child-safety protections. In the early 2000s, for example, the social networking service MySpace<sup>201</sup> took proactive measures to more vigorously protect young users in response to public pressures that emerged from reports of rampant use of the service by sexual predators.<sup>202</sup> This included raising the age of users whose profiles are automatically set to “private” from fourteen to eighteen, dedicating more of its customer service force to monitoring for offending profiles, strengthening coordination with law enforcement, and creating an industry-leading database to cross-reference registered sex offenders with MySpace users.<sup>203</sup>

In the MeToo era, condemnation of business practices that enable sexual misconduct has some parallels to previous public discourse around accountability for the safety of young Internet users. This suggests that perceptions of personal responsibility for sexual harassment or assault suffered as a result of online behavior have become out of touch with emerging views of ICSP accountability. As more people urge businesses to shoulder the burden of minimizing sexual harassment and assault, these changing perspectives should be reflected in interpretations of section 230 immunity for online platforms.

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198. See North, *supra* note 165.

199. As Carrie Goldberg, plaintiff’s attorney in *Grindr* has stated:  
Tech companies today wield unimaginable power and influence and offer services that didn’t even exist in 1996 . . . Yet internet companies not only use Section 230 to shield themselves from liability for anything users post on their platforms; they also think that immunity extends to cover any and all decisions they make about how their products operate—even if those decisions cause users harm.

Goldberg, *supra* note 10.

200. See *Children Internet Safety*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-ceos/children-internet-safety> [<https://perma.cc/5BXY-2KHK>] (discussing dangers to children posed by Internet technology and providing national and local resources for maximizing Internet safety).

201. MYSPACE, <https://myspace.com> [<https://perma.cc/8U5P-JLFJ>].

202. See, e.g., Sam Jones, *MySpace Removes 90,000 Sex Offenders*, GUARDIAN (Feb. 4, 2009, 10:01 AM), <https://www.theguardian.com/technology/2009/feb/04/myspace-social-networking-sex-offenders> [<https://perma.cc/2K49-Z9V5>].

203. See, e.g., Anne Barnard, *MySpace Agrees to Lead Fight to Stop Sexual Predators*, N.Y. TIMES (Jan. 15, 2008), <https://www.nytimes.com/2008/01/15/us/15myspace.html> [<https://perma.cc/Y5ZY-699Z>]; Jones, *supra* note 202; see also Guo, *supra* note 181, at 621–22, 638–41.



### 3. Evaluations of “Good Samaritan” ICSP Behavior Will Help Guide Courts’ Analyses

A heightened focus on the “Good Samaritan” language of section 230 of the CDA better aligns with the policies and legislative history of the Act; however, there may be questions about how it could be practically implemented. While some online services clearly operate as “Bad Samaritans,” categorizing relatively good-intentioned social networking or dating services may not be so easy, as evidenced by the disparate evaluations of Grindr’s policies and Terms of Service.<sup>204</sup> However, if courts decide to place greater emphasis on this analysis, they need not grasp at straws. Courts can and should more carefully consider industry standards in determining whether an ICSP has taken reasonable measures to ensure user safety, thus qualifying as a “Good Samaritan” within the meaning of the Act. This is a benchmark that will necessarily move as standard business practices and consumer expectations evolve.<sup>205</sup>

Since the MeToo movement incited a surge of conversation around sexual violence and demanded that businesses better address and prevent instances of sexual harassment and assault,<sup>206</sup> technology leaders have already begun to crystallize a role and responsibility for online services in this initiative.<sup>207</sup> Strides made by leaders in this area will likely set new and more rigorous standards for online safety for web-based social networking and dating services, which competitors will be incentivized to meet. Courts should consider these developments within the context of section 230 analysis and more reticently extend immunity to ICSPs that fall short of the mark. Enforcement, or at least acknowledgment, of changing industry standards by the courts would also provide another incentive for interactive online services to take user protection seriously.

This is particularly relevant with respect to web-based dating services. Online dating has become a billion-dollar industry,<sup>208</sup> with approximately 15 percent of American adults reporting using online dating services in 2015.<sup>209</sup> The number of adults ages eighteen to twenty-four using these services has

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204. See *supra* Section II.C.

205. Citron, *supra* note 148, at 1953.

206. See *supra* Section I.C.

207. See *infra* notes 216–218 and accompanying text; see also Buchwald, *supra* note 50.

208. Quentin Fottrell, *10 Things Dating Sites Won’t Tell You*, MARKETWATCH (Aug. 19, 2015, 12:19 PM), <https://www.marketwatch.com/story/10-things-dating-sites-wont-tell-you-2013-02-08> [https://perma.cc/3UAZ-N4ZJ].

209. Aaron Smith, *15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps*, PEW RES. CTR. (Feb. 11, 2016), <https://www.pewresearch.org/internet/2016/02/11/15-percent-of-american-adults-have-used-online-dating-sites-or-mobile-dating-apps> [https://perma.cc/VWG2-B3YD].

tripled between 2013 and 2015,<sup>210</sup> and the overall popularity of online dating services has likely grown further since.<sup>211</sup> But with greater ubiquity comes greater publicity, awareness, and accountability for missteps. Online dating services present risks of exposing users and third parties to toxic, harassing, and sexually violent behavior,<sup>212</sup> and these services have come under fire from media and interest groups for insufficiently protecting users from threatening activity.<sup>213</sup> Risks of online harassment are especially significant for women, people of color, and sexual minorities.<sup>214</sup> With the influx of MeToo-related rhetoric on the national and global stage, ICSPs providing social or romantic services will likely find it difficult to avoid addressing public concerns about sexual assault or harassment that may be enabled by their platforms.<sup>215</sup>

Indeed, several online dating services have already heeded the call for more stringent user protections. In July 2018, Match Group, the parent company of popular dating platforms Match.com, Tinder, OkCupid, and Plenty of Fish, announced the creation of an advisory board aimed at preventing sexual assault, with members including MeToo founder Tarana Burke.<sup>216</sup> The board will convene several times a year to advise the company

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210. *Id.*

211. See J. Clement, *Online Dating in the United States – Statistics & Facts*, STATISTA (March 20, 2019), <https://www.statista.com/topics/2158/online-dating> [<https://perma.cc/XQP5-URN7>] (finding that 31 percent of U.S. internet users aged eighteen to twenty-nine are currently using or have used dating websites or apps as of April 2017); *Over 50% of Couples Will Meet Online by 2031*, EHARMONY: LOVE DECODED, <https://www.eharmony.co.uk/dating-advice/online-dating-unplugged/over-50-of-couples-will-meet-online-by-2031> [<https://perma.cc/KL96-77GT>] (predicting that more than 50 percent of couples in the UK will have met online by 2031 and 70 percent by 2040).

212. See Alyssa Murphy, Note & Comment, *Dating Dangerously: Risks Lurking Within Mobile Dating Apps*, 26 CATH. U. J.L. & TECH. 100, 109–14 (2017) (discussing increase in crimes including rape, stalking, and sexual exploitation of children linked to online dating apps); Darla Murray, *How to Prevent Your Worst Online Dating Nightmare*, COSMOPOLITAN (Jan. 15, 2018), <https://www.cosmopolitan.com/sex-love/a14465018/dating-apps-safety-features> [<https://perma.cc/AV9Z-8JNM>] (providing tips for readers to avoid “dating app horror stories [that] are common for women”).

213. See EPIC Amicus Brief, *supra* note 146, at 10–11; Brent Holmes, *How Rejected Men Use Dating Apps to Torment Women*, VICE (May 25, 2017, 8:30 AM), [https://www.vice.com/en\\_us/article/8x4jbg/when-harassers-use-tinder-and-bumble-to-dox-and-women](https://www.vice.com/en_us/article/8x4jbg/when-harassers-use-tinder-and-bumble-to-dox-and-women) [<https://perma.cc/DA5S-D775>]; Cassie Werber, *Nobody Knows How Dangerous Online Dating Really Is—And Dating Sites Won’t Talk About It*, QUARTZ (Mar. 31, 2017), <https://qz.com/890320/nobody-know-how-dangerous-online-dating-really-is-and-dating-sites-wont-talk-about-it> [<https://perma.cc/W36E-MMC7>].

214. Citron, *supra* note 148, at 1890–92, 1908; Waldman, *supra* note 146, at 987–88.

215. See Maureen Horcher, Comment, *World Wide Web of Love, Lies, and Legislation: Why Online Dating Websites Should Screen Members*, 29 J. MARSHALL J. COMPUTER & INFO. L. 251, 273 (2012); Amelia Tait, *#MeToo: The Changing Face of Dating Apps*, GQ (Feb. 12, 2018), <https://www.gq-magazine.co.uk/article/metoo-dating-apps-bumble> [<https://perma.cc/Q2AB-MQ82>].

216. *Feel Secure Online: Social Media, Dating Apps, and Technology*, RAINN (Jan. 7, 2019), <https://www.rainn.org/news/feel-secure-online-social-media-dating-apps-and-technology> [<https://perma.cc/ALG5-LSM8>]; Melissa Locker, “Me Too” Founder Tarana Burke is Joining Match Group’s New Sexual Assault Advisory Board, FAST COMPANY (July 19, 2018), <https://www.fastcompany.com/90205043/me-too-founder-tarana-burke-is-joining-match-groups-new-sexual-assault-advisory-board> [<https://pe>

on how to improve safety on its platforms and potentially recommend new safety measures.<sup>217</sup> Among other online dating players, new safety features and entirely new platforms have emerged in the aftermath of MeToo, with the explicit goal of making online dating safer.<sup>218</sup>

a. Industry Standards Will Provide a Workable Benchmark for Courts

The concept of “Good Samaritan” behavior does not exist in a vacuum; thus, courts should consider these evolving standards of ICSP behavior in the context of section 230 analysis. Holding all ICSPs to the highest standard of conduct would not be prudent in light of the free speech concerns implicated with Internet regulation, as smaller platforms that do not have the resources of Match Group<sup>219</sup> would potentially choose to shut down if held to the same standards.<sup>220</sup> However, the actions of industry leaders may move the needle subtly toward increased responsibility for user safety in the context of sexual harassment and assault, thereby nudging the bar a bit higher for smaller players.

An adjusted industry benchmark would help guide courts in deciphering whether an ICSP has acted reasonably to protect its users from known harms in the event of an allegation of deficient safety measures. Of course, this prong of the analysis would only require online services to protect users to a minimum standard prescribed by industry competitors; users would still assume responsibility for much of their own conduct and remain incentivized to exercise caution online, in accordance with courts’ concerns regarding personal accountability.

Acknowledging industry standards in this way does not mean that online services would collectively choose to decelerate their efforts to curb sexual misconduct on their platforms in an attempt to lower the bar for accountability. Because MeToo is a grassroots social movement with huge consumer implications,<sup>221</sup> online social networking and dating services will

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rma.cc/TJ7J-8N4E]; David McCabe, *Match Group Moves to Protect Users from Sexual Assault*, AXIOS (July 19, 2018), <https://www.axios.com/match-groups-new-moves-to-protect-users-from-sexual-assault-90cbad73-3f0e-4f3f-ac7d-2cec5910c4a4.html> [<https://perma.cc/W58A-KRAD>].

217. Locker, *supra* note 216; McCabe, *supra* note 216.

218. Murray, *supra* note 212; Tait, *supra* note 215 (“The dating industry needs to be finally able to offer some type of post-dating service: we can’t be a simple online messaging system anymore. We have to take responsibility for what actually happens during the date.”).

219. Match Group reported \$2 billion in LTM Revenue as of September 30, 2019 and had 9.6 million average subscribers. *Investor Relations*, MATCH GROUP, <https://ir.mtch.com/overview/default.aspx> [<https://perma.cc/8SNQ-MX3R>].

220. See, e.g., EFF Amicus Brief, *supra* note 140, at 8–9.

221. See, e.g., Chavie Lieber, *Topshop Billionaire Philip Green Is at the Center of a #MeToo Scandal*, VOX (Oct. 25, 2018, 4:40 PM), <https://www.vox.com/the-goods/2018/10/25/18024504/philip-green-topshop-sexual-harassment-claims-metoo> [<https://perma.cc/2TT9-BWA8>]; Mark Edward Nero, *Boycott of Terranea Resort Launched Over Sexual Harassment, Misconduct Allegations*, DAILY BREEZE

likely continue to focus on these issues in order to gain or maintain competitive advantage. This claim is bolstered by the example of social networking sites like MySpace putting forth great effort to increase safety precautions for minor users in response to societal pressures around Internet predators,<sup>222</sup> despite the promise of nearly unfettered section 230 immunity. The presence of market incentives for interactive online services to eliminate harassment on their platforms will help ensure that industry standards remain high enough to meaningfully protect members of online communities from the threat of sexual harassment and sexual assault.<sup>223</sup>

### CONCLUSION

Section 230 of the Communications Decency Act has played a pivotal role in promoting the development of the Internet and protecting interactive computer service providers from liability based on the speech of their users. However, ambiguous interpretations of the provision have led to uncertainty in the courts as to the proper scope of section 230 immunity. While ICSPs have historically been afforded ultrabroad protection under the Act's safe harbor, immunity most often prevails where free speech concerns, issues of personal user accountability, and a lack of explicit wrongdoing by the ICSP are implicated. Because of these factors, lawsuits brought against social networking and online dating services for allegedly enabling acts of sexual misconduct have frequently been rejected by the courts, leaving little recourse for plaintiffs who have suffered these harms as a result of insufficient online safety features and policies.

The MeToo movement against sexual harassment and sexual assault suggests that some modification of the section 230 immunity doctrine is needed to hold ICSPs accountable for curbing sexual misconduct online. While this may be achieved by courts adopting a narrower interpretation of "publisher" within the meaning of the CDA or an elevated focus on the "Good Samaritan" language of the statute, the most effective solution would be a combination of the two approaches. This reinterpretation of the doctrine would allow plaintiffs to bring claims against ICSPs for maintaining deficient user safety protocols, using applicable industry standards as a benchmark for "Good Samaritan" conduct. Allowing online services that facilitate personal human interactions to face potential liability for failing to take reasonable measures to protect their users from the threat of sexual

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(Oct. 18, 2018, 9:55 PM), <https://www.dailybreeze.com/2018/10/18/boycott-of-terranea-resort-launched-over-sexual-harassment-misconduct-allegations> [<https://perma.cc/AU9U-VDJH>] (discussing consumer boycotts of companies embroiled in MeToo-related scandals).

222. See *supra* Section III.C.2.

223. See Waldman, *supra* note 146, at 1007.

harassment and assault is necessary to bring section 230 in line with modern societal understandings and will not threaten the continued growth of expression and innovation online.

