

**MENTAL HEALTH AND SOCIAL MEDIA: ANALYZING THE SHIFT IN
FUTURE LIABILITY FOR SOCIAL MEDIA PLATFORMS**

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In recent years, mental health trends have been extremely concerning, especially amongst teenagers and young adults. The COVID-19 pandemic exacerbated mental health issues and caused scholars to consider the role social media companies play in the relationship between social media and mental health. A recent Ninth Circuit decision reveals holes in a federal statute that has historically protected social media platforms from liability. This case solidifies that this statutory protection is not absolute. Accordingly, Congress must hold social media companies accountable for aspects they control in designing their platforms to create a safer environment online. Legislation aimed at policing algorithms would save lives by forcing companies to redesign addictive algorithms to avoid features of social media that companies know negatively affect mental health.

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I. INTRODUCTION

A woman constantly checked her personal social media accounts during the COVID-19 pandemic, criticizing the number of likes and comments on her posts.¹ She recalled feeling depressed and overly anxious every time she opened a social media app, prioritizing her image on social media over her personal well-being.²

A highschooler who found herself on social media starting at age thirteen attributed low feelings of self-worth and self-confidence to her social media use.³ Feeling as if she would miss out on something if she didn't download the apps, she developed a toxic relationship

¹ Alyssa Young, *Pressures and Dangers of Social Media: A Personal Story*, LEE HEALTH, <https://www.leehealth.org/health-and-wellness/healthy-news-blog/mental-health/pressures-and-dangers-of-social-media-a-personal-story> [https://perma.cc/HT38-P3V2] (last visited Oct. 16, 2022).

² *Id.* (“I got to the point where I started feeling depressed and my anxiety would spike every time I got on social media . . . I started prioritizing social media and getting that perfect photo instead of enjoying the moment.”).

³ Nicole DiAntonio, ‘*I Want to Know That I’m Making An Impact*’ | *Students Help Shine a Light on Social Media’s Impact on Mental Health, Body Image*, WUSA9, <https://www.wusa9.com/article/features/producers-picks/social-media-mental-health-and-body-image-concerns/65-4913c27a-6345-4feb-8194-7cbe8872b4a0> [https://perma.cc/82VZ-B2JY] (last updated Sept. 15, 2022, 3:19 AM) (“Social media has contributed to my low feelings of self-worth and self-confidence.”).

with social media that led her to severe depression and feelings of self-harm.⁴

A teenager found themselves bingeing social media, spending more time on the apps than doing their schoolwork or spending time with friends and family.⁵ They found that their social media use “exacerbated depression and brought [them] to the brink of suicide, and more pervasively it trapped [them] in a kind of ‘living death.’”⁶ Their inability to refrain from scrolling on the apps left them feeling powerless and trapped.⁷

A 14-year-old girl’s social media feeds were filled with posts relating to suicide ideations.⁸ Exposure to this content “pushed her into a rabbit hole of depressive content” that eventually led her to take her own life.⁹ These are only a handful of stories that demonstrate the negative relationship between mental health and social media. Although social media platforms have historically enjoyed statutory protections from liability, “social media companies [add] fuel to the fire by allowing machine learning algorithms to go on ‘learning’ its users and foist harmful content on vulnerable [users].”¹⁰ A recent decision from the Ninth Circuit could

⁴ *Id.* (“I really struggled with feelings of self-harm because I didn’t feel worthy and I was just really battling depression badly. From the moment I woke up to the moment I went to sleep, it was really hard to think about anything else.”).

⁵ *Recovery Stories*, INTERNET & TECH. ADDICTS ANONYMOUS, <https://internetaddictsanonymous.org/recovery-stories/> [https://perma.cc/P78C-KCDC] (last visited Oct. 16, 2022).

⁶ *Id.*

⁷ *Id.* (“I felt trapped behind my eyes, wishing that I could stop but totally powerless to not keep clicking on the next video.”).

⁸ Ian Russell, *My Daughter Was Driven to Suicide by Social Media. It’s Time for Facebook to Stop Monetizing Misery*, WASH. POST (Oct. 25, 2021, 12:45 PM), <https://www.washingtonpost.com/opinions/2021/10/25/facebook-frances-haugen-molly-russell-teen-suicide-social-media-uk/> [https://perma.cc/7NDD-8GPX].

⁹ *Id.*

¹⁰ *Social Media Company Meta Target of Mental Illness Lawsuit*, TOP CLASS ACTIONS (Sept. 29, 2022), <https://topclassactions.com/lawsuit-settlements/investigations/social-media-company-meta-target-of-mental-illness-lawsuit/> [https://perma.cc/UFU5-42JR].

lead Congress to reevaluate this statutory protection that was originally enacted to safeguard internet advancement.¹¹

The development of the internet, a once-uncharted territory, presented numerous opportunities for new developments that undoubtedly changed the way individuals communicate, learn, do business, and function as a society.¹² As experts learned more about the internet's capabilities, they also realized protections were necessary to ensure the internet would advance without hindrance.¹³

Section 230 of the Communications Decency Act of 1996 ("CDA") protects internet platforms from liability they might otherwise incur as a result of action by a third party.¹⁴ The CDA, including Section 230, was a component of the broader Telecommunications Act of 1996, which purported to promote the development of new technologies and competition amongst companies by minimizing internet regulation.¹⁵ Today, Section 230's protections shield internet platforms from liability and "[have] allowed innovation and free speech to flourish" online.¹⁶

Since their creation, the internet and broad social media have been increasingly relied upon by Americans. For instance, the Pew

¹¹ See generally *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); 47 U.S.C. § 230(b)(1).

¹² See Zaryn Dentzel, *How the Internet Has Changed Everyday Life*, BBVA OPEN MIND (2013), <https://www.bbvaopenmind.com/en/articles/internet-changed-everyday-life/> [<https://perma.cc/L3BB-5MHJ>] (noting the various ways the internet has revolutionized our lifestyle).

¹³ See generally 47 U.S.C. § 230(b)(1).

¹⁴ See *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/7UCJ-ZMF6>] (last visited Sept. 17, 2022) ("[O]nline intermediaries that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do.").

¹⁵ Sara L. Ziegler, *Communications Decency Act of 1996*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1070/communications-decency-act-of-1996> [<https://perma.cc/QU95-H6CJ>] ("[The Telecommunications Act's] purpose was to encourage new technologies and reduce regulation of the relevant industries in order to promote competition among service providers.").

¹⁶ See *id.* (noting the CDA was added as an amendment after congressional hearings on the Telecommunications Act); *Section 230 of the Communications Decency Act*, *supra* note 14.

Research Center found that in 1995—the year Section 230 was drafted—only 21 percent of Americans were using the internet.¹⁷ In less than thirty years, this number has skyrocketed to 93 percent.¹⁸ Even Section 230’s authors anticipated the large impact social media would have on society.¹⁹ However, with all of the new positive opportunities these technologies introduced, no one could have anticipated the toll social media has on mental health today.

As research reveals the effects of social media on mental health, many critics argue that Section 230 should not protect social media companies from liability in all circumstances.²⁰ In fact, a recent lawsuit whereby the parents of three teenagers sued Snap, Inc. for its design of the Snapchat Speed Filter used by teenagers just before they died in a car accident has uncovered potential cracks in Section 230’s protections.²¹ This Article analyzes the relationship between growing concerns of mental health associated with social media use and the future of liability for social media companies. As discussed below, social media companies should be held liable for mental health-related accidents, and, at least for now, legislation aimed at policing platforms’ algorithms is the most feasible way to achieve this.

¹⁷ Quinta Jurecic, *The Politics of Section 230 Reform: Learning from FOSTA’s Mistakes*, BROOKINGS (Mar. 1, 2022), <https://www.brookings.edu/research/the-politics-of-section-230-reform-learning-from-fostas-mistakes/> [<https://perma.cc/KGM7-YYSF>].

¹⁸ *Id.*

¹⁹ 47 U.S.C. § 230(a)(5) (“Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.”).

²⁰ See VALERIE C. BANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 31–32 (2021), <https://crsreports.congress.gov/product/pdf/R/R46751> [<https://perma.cc/T95S-JK3G>] (“Other proposals would have more broadly exposed providers to liability for hosting unlawful content, if the provider is aware of that content.”).

²¹ See generally *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); Beth Findley, *State AG’s TikTok Investigation Part of Growing Concern for Social Media’s Adverse Effects on Youth*, JOLT DIG. (Apr. 21, 2022), <https://jolt.law.harvard.edu/digest/state-ags-tiktok-investigation-part-of-growing-concern-for-social-medias-adverse-effects-on-youth> [<https://perma.cc/6R96-PXU4>].

This Article will proceed in five parts. Part II outlines the various concerns around the relationship between social media and mental health. Part III explores the history of Section 230. Part IV examines *Lemmon v. Snap, Inc.* and extracts the framework necessary for future liability. Part V discusses the uncertainties amongst legislation imposing liability for social media platforms. Part VI proffers that legislation aimed at policing algorithms is the most feasible option at this juncture.

II. SOCIAL MEDIA'S TOLL ON MENTAL HEALTH

Although mental health has not historically been given adequate attention in the United States,²² more recently, concerns surrounding mental health have been growing, especially in the wake of the COVID-19 pandemic. Generally, “[m]ental health is defined as a state of well-being in which people understand their abilities, solve everyday life problems, work well, and make a significant contribution to the lives of their communities.”²³ Therefore, in assessing the status of one’s mental health, it is important to examine both the nature and number of social relationships.²⁴ However, concerns regarding mental health are not new. In fact, studies show that 13 percent of 12- to 17-year-olds report depression, 32 percent of 12- to 17-year-olds report anxiety, and 25 percent of 18- to 25-year-olds report having some form of mental illness.²⁵ Consequently, given that so many adolescents and young adults are active on social media, it is vital to assess the effects of social media on mental health. These statistics, coupled with the effects of

²² See Emma E. McGinty et al., *Trends in News Media Coverage of Mental Illness in the United States: 1995–2014*, HEALTH AFFS. (June 2016), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2016.0011> [https://perma.cc/T74U-VXHG] (discussing how mental illness was rarely discussed in the media).

²³ Fazida Karim et al., *Social Media Use and its Connection to Mental Health*, NAT’L INST. OF HEALTH (June 15, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7364393/> [https://perma.cc/LKN5-BTZ6].

²⁴ See *id.* (“Both the quantity and quality of social relationships affect mental health, health behavior, physical health, and mortality risk.”).

²⁵ Elina Mir et al., *Social Media and Adolescents’ and Young Adults’ Mental Health*, NAT’L CTR. FOR HEALTH RSCH., <https://www.center4research.org/social-media-affects-mental-health/> [https://perma.cc/3KR3-TA3J] (last visited Sept. 17, 2022).

COVID-19, reveal that the relationship between social media and mental health is only going to worsen over time.

A. Relationship Between Mental Health and Social Media

Research indicates the connection between social media use and mental health is strong.²⁶ Almost all social media platforms are designed to be addictive, which validates many concerns about social media-related mental health issues.²⁷ Addiction to social media is commonly characterized as “an uncontrollable urge to log on to or use social media and devoting so much time and effort to social media that it impairs other important life areas.”²⁸ Common risk factors affecting users of social media include time spent, type of activity, and the number of daily interactions with platforms.²⁹ Overall, experts estimate that roughly “5 to 10 [percent] of Americans meet the criteria for social media addiction today.”³⁰

Social media addiction can be attributed to the pressure of conveying perfected images of one’s self online.³¹ Social media creates an environment where individuals compare their realistic selves to filtered versions of other users, which detrimentally affects self-esteem and self-perception.³² Additionally, the amount of time children spend on social media engaged in these comparisons is alarming, with 45 percent of children admitting they are online almost constantly and 44 percent checking social media multiple

²⁶ Karim et al., *supra* note 23.

²⁷ Meg Walters, *Social Media and Youth Mental Health: How to Find Balance After Pandemic Spikes in Use*, HEALTHLINE (Apr. 26, 2022), <https://www.healthline.com/health/mental-health/social-media-and-youth-mental-health-how-to-find-balance-after-pandemic-spikes> [https://perma.cc/9HZT-JNQV].

²⁸ *Social Media Addiction*, ADDICTION CTR., <https://www.addictioncenter.com/drugs/social-media-addiction/> [https://perma.cc/RM2P-4Y33] (last visited Sept. 17, 2022).

²⁹ Karim et al., *supra* note 23.

³⁰ *Social Media Addiction*, *supra* note 28.

³¹ *Id.*

³² *Id.* (“Social media facilitates an environment in which people are comparing their realistic offline selves to the flawless, filtered, and edited online versions of others, which can be detrimental to mental well-being and perception of self.”).

times per day.³³ These high statistics and the nature of unhealthy engagement seen on social media can lead to various mental health-related issues.

Social media causes a multitude of concerns ranging from depression and anxiety to suicidal ideation. In other cases, time spent scrolling on social media correlates with anxiety, depression, and self-harm.³⁴ Other influences, such as cyberbullying and body image issues, can exacerbate these problems.³⁵ Cyberbullying affects a majority of teenagers, with “[a]s many as 72 [percent] of teens [saying] that they have been cyberbullied at some point.”³⁶ Similarly, “[r]esearch on adolescents has found that body image, for girls and boys, is harmed by social media use.”³⁷ The most extreme cases involve suicide attempts, which experts are beginning to label as a “second pandemic.”³⁸ “[S]uicide attempts among U.S. adolescents increased by 31 percent from 2019 to 2020, and emergency department visits for suspected suicide attempts in 2021 were 51 percent higher among girls ages 12 to 17 than during the same period in 2019.”³⁹ Thus, it is very likely that these alarming numbers of mental health issues correlate with increased social media use and social media addiction.

These trends are particularly high on Instagram, where users primarily share brief videos and pictures. Instagram has been flagged numerous times for “increasing suicidal ideation, depression, and body image concerns in children.”⁴⁰ Additionally, “[Facebook’s] internal research showed that . . . 13 [percent] of

³³ Mir et al., *supra* note 25.

³⁴ *The Social Dilemma: Social Media and Your Mental Health*, MCLEAN HOSP. (Jan. 21, 2022), <https://www.mcleanhospital.org/essential/it-or-not-social-medias-affecting-your-mental-health> [<https://perma.cc/2A4F-GTRS>].

³⁵ Mir et al., *supra* note 25.

³⁶ *Id.* See also Press Release, Off. of Att’y Gen. Maura Healey, AG Healey Co-Leads Bipartisan Coalition of 44 Attorneys General Urging Facebook to Abandon Launch of Instagram Kids (May 10, 2021), <https://www.mass.gov/news/ag-healey-co-leads-bipartisan-coalition-of-44-attorneys-general-urging-facebook-to-abandon-launch-of-instagram-kids> [<https://perma.cc/RA6X-EUZZ>].

³⁷ Mir et al., *supra* note 25.

³⁸ Walters, *supra* note 27.

³⁹ *Id.*

⁴⁰ Press Release, Off. of Att’y Gen. Maura Healey, *supra* note 36.

British and 6 [percent] of American users with suicidal thoughts traced those thoughts to Instagram, and that teens often attribute increased anxiety and depression to Instagram.”⁴¹ And while many technology executives deny that social media harms childrens’ mental health, investigations into TikTok confirm that technology companies are aware of, but turn a blind eye to, these harmful effects.⁴²

B. The COVID-19 Pandemic’s Detrimental Impact on Mental Health and Social Media

COVID-19 brought life to a halt by requiring everyone to quarantine for months, escalating preexisting mental health issues.⁴³ Long-term isolation during COVID-19 forced many social relationships to a virtual format, causing an increased reliance on social media.⁴⁴ One survey concluded that 63 percent of parents saw an increase in teen social media use during the pandemic.⁴⁵ Because social media provided a primary means of communication, it became “the only way to stay in touch with friends and maintain a social circle.”⁴⁶ Despite this alternative form of socialization, the pandemic disrupted education, socialization, routines, and daily interactions, which in turn affected mental health.⁴⁷

COVID-19-related mental health concerns are most apparent among teens. Studies show that 37 percent of high schoolers

⁴¹ Findley, *supra* note 21.

⁴² *Id.*

⁴³ Walters, *supra* note 27.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Katharine Schaeffer, *In CDC Survey, 37% of U.S. High School Students Report Regular Mental Health Struggles During COVID-19*, PEW RSCH. CTR. (Apr. 25, 2022), <https://www.pewresearch.org/fact-tank/2022/04/25/in-cdc-survey-37-of-u-s-high-school-students-report-regular-mental-health-struggles-during-covid-19/> [<https://perma.cc/R2XD-JBC8>]; Press Release, White House Briefing Room, Biden-Harris Administration Announces Two New Actions to Address Youth Mental Health Crisis (July 29, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/29/fact-sheet-biden-harris-administration-announces-two-new-actions-to-address-youth-mental-health-crisis/> [<https://perma.cc/LC44-ZK7Q>].

experienced poor mental health during the pandemic and 44 percent said they felt persistently sad during the past year.⁴⁸ Further, the pandemic especially affected teenage girls, with approximately 49 percent of high school girls reporting poor mental health most of the time or always during the COVID-19 outbreak—roughly double the percentage of boys reporting poor mental health always or most of the time.⁴⁹ Similarly, individuals identifying as LGBTQ+ reported levels of mental stress that outnumbered that of their heterosexual peers.⁵⁰ Thus, the pandemic heightened the risk of social media-related concerns for teenagers, with higher statistics observed in certain groups.

Likewise, the mental health of various racial and ethnic minority groups was disproportionately affected compared to white communities.⁵¹ In fact, in a symptom-tracking study promoted on social media, “Black participants in the United States were 1.16 times more likely to screen positive for depression than White participants. Hispanic participants were also 1.23 times more likely to screen positive for depression and 1.23 times more likely to show signs of anxiety compared to White participants.”⁵² Additionally, studies have shown that different ethnicities faced different risk factors that correlated with and heightened the risk of developing depression, anxiety, and increased stress levels.⁵³ For example, for “African Americans, it was having family and/or community

⁴⁸ Tony Hicks, *How Covid-19 Pandemic Has Affected the Mental Health of Teens*, HEALTHLINE (Apr. 6, 2022), <https://www.healthline.com/health-news/how-covid-19-has-affected-the-mental-health-of-teens> [https://perma.cc/W7WM-KSER].

⁴⁹ Schaeffer, *supra* note 47.

⁵⁰ *Id.*

⁵¹ Aislinn Antrim, *Study: COVID-19 Pandemic Disproportionately Impacted the Mental Health of Minority Populations*, CONTEMP. CLINIC (Aug. 18, 2022), <https://www.contemporaryclinic.com/view/study-covid-19-pandemic-disproportionately-impacted-the-mental-health-of-minority-populations> [https://perma.cc/YY9L-X32B] (“[R]acial and ethnic minorities in the US and UK were more likely to screen positive for depression and anxiety.”).

⁵² *Id.*

⁵³ Jordan M. Brooks et al., *The Differential Impact of COVID-19 on Mental Health: Implications of Ethnicity, Sexual Orientation, and Disability Status in the United States*, FRONTIERS PSYCH. (Sept. 13, 2022), <https://www.frontiersin.org/articles/10.3389/fpsyg.2022.902094/full> [https://perma.cc/Y9NJ-ACZW].

members vulnerable to COVID-19 ... [and] among Asian Americans, it was being in a home or work [setting] with greater environmental COVID-19 risk.”⁵⁴ Therefore, the pandemic disproportionately affected the mental health of various demographic groups.

As concerns about the negative effects of social media on mental health continue to grow, even as society continues to transition out of the COVID-19 pandemic, scholars must assess the role that social media executives play regarding these issues. While social media platforms have historically avoided liability for actions of social media users, a recent lawsuit might be foreshadowing a drastic change in liability—one that could prove to be important for mental health-related accidents.

III. THE HISTORY OF CDA SECTION 230

The Telecommunications Act of 1996 (“Telecommunications Act”) brought economic and consumer benefits to internet development.⁵⁵ Its goal was to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new technologies.”⁵⁶ Essentially, the Telecommunications Act promoted continuing development to

⁵⁴ *Id.*

⁵⁵ Stuart N. Brotman, *Was the 1996 Telecommunications Act Successful in Promoting Competition?*, BROOKINGS INST. (Feb. 8, 2016), <https://www.brookings.edu/blog/techtank/2016/02/08/was-the-1996-telecommunications-act-successful-in-promoting-competition/> [<https://perma.cc/5YYW-22K2>].

⁵⁶ Telecommunications Act of 1996, S. 652, 104th Cong. (1996) <https://www.congress.gov/104/plaws/publ104/PLAW-104publ104.pdf> [<https://perma.cc/96QP-8WW7>]; *Telecommunications Act of 1996*, Fed. Comm’n Comm’n, <https://www.fcc.gov/general/telecommunications-act-1996> [<https://perma.cc/596U-V654>] (last updated June 20, 2013) (“The goal of [the Telecommunications Act of 1996] is to let anyone enter any communications business—to let any communications business compete in any market against any other.”).

ensure that subscribers had access to information in all forms—voice, data, graphics, videos, and pictures—in real time.⁵⁷

However, wide-ranging access to various information on the internet led to growing concerns that minors would have unfettered access to sexually explicit content.⁵⁸ Consequently, legislators proposed the CDA.⁵⁹ The CDA purported to protect children by “[imposing] criminal sanctions on anyone who knowingly transmits messages or materials that are obscene or indecent [to minors] over the [i]nternet.”⁶⁰ Legislators tacked the CDA onto the Telecommunications Act as an amendment to address “threats of pornography and children’s safety.”⁶¹

Around the time that the CDA and Telecommunications Act were moving through Congress, two court decisions—*Cubby, Inc. v. CompuServe, Inc.*⁶² and *Stratton Oakmont v. Prodigy Services, Co.*⁶³—produced differing opinions on internet liability that aroused concerns over the First Amendment’s right to free speech.⁶⁴ Legislators viewed the different outcomes of these decisions as a potential roadblock to internet development, so they added Section 230 to the CDA to ensure that internet companies would not be subject to liability for attempting to moderate their own sites.⁶⁵ Thus, Section 230’s goals were two-fold: “the first was to ‘encourage the

⁵⁷ Brotman, *supra* note 55 (“The act’s legislative history reflects the goal of Congress to ‘accelerate the deployment of an advanced capability that will enable subscribers in all parts of the United States to send and receive information in all its forms—voice, data, graphics, and video—over a high-speed switched, interactive, broadband, transmission capability.’”).

⁵⁸ *Section 230 of the Communications Decency Act*, *supra* note 14; *CDA 230: Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> [<https://perma.cc/7H9J-9HUQ>] (last visited Oct. 16, 2022).

⁵⁹ *CDA 230: Legislative History*, *supra* note 58.

⁶⁰ *Communications Decency Act of 1996 (CDA)*, THOMSON REUTERS PRAC. L., [https://uk.practicallaw.thomsonreuters.com/9-502-8947?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-502-8947?transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/8B58-XRRH>] (last visited Oct. 16, 2022).

⁶¹ *CDA 230: Legislative History*, *supra* note 58.

⁶² *See generally* 776 F. Supp. 135 (S.D.N.Y. 1991).

⁶³ *See generally* No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁶⁴ *CDA 230: Legislative History*, *supra* note 58.

⁶⁵ *Id.*

unfettered and unregulated development of free speech on the [i]nternet’ . . . [and] the other was to allow online services to implement their own standards for policing content.”⁶⁶ Ultimately, the CDA, including Section 230, and the Telecommunications Act were passed simultaneously but met instant backlash from proponents of free speech.⁶⁷

Free speech activists litigated the anti-indecency provisions of the CDA in *Reno v. ACLU*.⁶⁸ The case reached the U.S. Supreme Court, which unanimously invalidated the anti-indecency provisions in favor of the First Amendment, reasoning that the CDA failed to define “indecent,” and therefore was applied over-broadly to the entire cyberspace rather than well-defined areas.⁶⁹ However, since Section 230 was a provision of the CDA that promoted free speech, it survived this litigious period.⁷⁰ Today, Section 230 “shields websites from being held legally responsible for content that others post.”⁷¹ However, now that there is more research on the effects of the digital world, there is a growing movement to increase liability for digital companies—particularly social media platforms.

⁶⁶ *Id.* See also Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/> [<https://perma.cc/7RBC-958X>] (“Section 230 acts as a shield, by protecting online services when they overlook potentially objectionable content, and as a sword, by also protecting them when they remove potentially objectionable content.”).

⁶⁷ See *CDA 230: Legislative History*, *supra* note 58; *Reno v. ACLU* (1997), INFOPLEASE, <https://www.infoplease.com/us/government/judicial-branch/reno-v-aclu-1997> [<https://perma.cc/6C8C-3QGW>] (last updated Feb. 28, 2017); *Section 230 of the Communications Decency Act of 1996*, BALLOTPEdia, https://ballotpedia.org/Section_230_of_the_Communications_Decency_Act_of_1996 [<https://perma.cc/2LEF-BAQY>] (last visited Oct. 16, 2022).

⁶⁸ See generally 521 U.S. 844 (1997).

⁶⁹ *Id.*; INFOPLEASE, *supra* note 67.

⁷⁰ See *Section 230 of the Communications Decency Act*, *supra* note 14.

⁷¹ Jurecic, *supra* note 17.

IV. AN OPPORTUNITY FOR LIABILITY: *LEMMON V. SNAP, INC.*

Section 230 has provided broad-sweeping protections for internet sites as well as social media platforms.⁷² Specifically, Section 230 protects social media companies from liability for actions of its third-party users.⁷³ The statutory provision protecting social media platforms reads “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁷⁴ Additionally, the statute defines interactive computer service to mean “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server,” which by definition, applies to social media platforms.⁷⁵ However, despite this broad statutory protection, *Lemmon v. Snap, Inc.*⁷⁶ provides a framework that could allow for social media liability.

A. *An Overview of Lemmon v. Snap, Inc.*

The issue in *Lemmon* was whether Section 230 immunity applied to a claim arising from use of the Snapchat Speed Filter prior to a deadly automobile accident.⁷⁷ The parents of three teenagers who died in the car accident brought suit against Snap, Inc. (“Snap”), the company that created Snapchat.⁷⁸ The teenagers were driving down a road at dangerously high speeds—as high as 123 miles per hour—and were documenting their real-life speed with the Snapchat Speed Filter.⁷⁹ Shortly after opening and using the Speed Filter, the teenagers ran off the road and crashed into a tree, killing everyone in the car.⁸⁰ Although the families conceded that Snap warned against using the Speed Filter while driving, they argued that the warnings were largely ignored, and Snap failed by not

⁷² 47 U.S.C. § 230(c)(1).

⁷³ Jurecic, *supra* note 17.

⁷⁴ 47 U.S.C. § 230(c)(1).

⁷⁵ § 230(f)(2).

⁷⁶ *See generally* 995 F.3d 1085 (9th Cir. 2021).

⁷⁷ *Id.* at 1087.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1088.

⁸⁰ *Id.*

implementing further restrictions or removing the filter altogether to prevent dangerous situations.⁸¹ Applying a three-prong test, the Ninth Circuit Court of Appeals declined to dismiss the parents' claim, holding Section 230 did not protect Snap in this instance.⁸² The court reasoned that, because the claim sought to hold Snap liable for its own design of the Snapchat Speed Filter, and not for the content posted by the teenagers, Snap could not rely on Section 230 immunity.⁸³ While the court's holding in this case is groundbreaking for liability in this sector of technology, the framework of the legal claim alleged by the plaintiffs is equally important.

The court provided a viable framework for future cases by focusing on Snapchat's negligent design instead of a third party's use of the Speed Filter. Through their negligent design framework, the plaintiffs alleged that "Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards."⁸⁴ Therefore, the claim purported to hold Snap liable for functions that Snap itself created, rather than a third party, exposing a landscape for future liability.⁸⁵ In other words, the negligent design argument attacked "Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds."⁸⁶ Ultimately, the court debunked Section 230 immunity in this case by finding that the statute does not protect platforms against encouraging dangerous activities that the platform itself creates.⁸⁷

⁸¹ Lemmon v. Snap, Inc., 995 F.3d 1085, 1089–90 (9th Cir. 2021).

⁸² *Id.* at 1087.

⁸³ *See id.* ("[T]he Parents' claim neither treats Snap as a 'publisher or speaker' nor relies on 'information provided by another information content provider.'").

⁸⁴ *Id.* at 1091.

⁸⁵ *See id.* at 1093 ("Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely 'seek[s] to hold [Snap] liable for its own conduct, principally for the creation of the Speed Filter,' immunity is unavailable.").

⁸⁶ *Id.*

⁸⁷ Lemmon v. Snap, Inc., 995 F.3d 1085, 1094 (9th Cir. 2021). *But see* Cathy Gellis, *Why the Ninth Circuit's Decision in Lemmon v. Snap is Wrong on Section 230 and Bad for Online Speech*, TECHDIRT (June 8, 2021, 3:37 PM),

This conclusion likely opens the door for a plethora of other claims related to platforms' negligent designs, which could include claims related to social media addiction and mental health-related accidents.

B. Frameworks for Future Lawsuits

Future claims attacking social media platforms are inevitable, and the negligent design framework will be essential to surviving Section 230 defenses.⁸⁸ Victims will rely on litigation to hold social media companies accountable until Congress reevaluates Section 230 and decides to expressly impose liability on social media companies. As the *Lemmon* court noted, negligent design claims can be framed through the encouragement of dangerous activities.⁸⁹ And while *Lemmon* is not the only lawsuit to be brought under negligent design by encouraging dangerous activities, the court's conclusion is the first of its kind.

Another example of this type of negligent design lawsuit alleged that an eleven-year-old girl “was addicted to Snapchat and Instagram for two years and pulled into sending sexually exploitative messages . . . [which led to] depression, eating disorders, and self-harm that ended in suicide.”⁹⁰ Specifically, this claim alleges that Meta Platforms, the company owning both Instagram and Facebook, as well as Snapchat, “knowingly and purposefully designed, manufactured, marketed, and sold social media products that were unreasonably dangerous because they

<https://www.techdirt.com/2021/06/08/why-ninth-circuits-decision-lemmon-v-snap-is-wrong-section-230-bad-online-speech/> [https://perma.cc/4X8W-2PKW] (“[T]he entire theory of the case is predicated on the idea that Snapchat let people talk about something they were doing. This expressive conduct is at the heart of what Section 230 was intended to protect, and denying the statute’s protection here invites exactly the sort of harm to expression that the law was passed to prevent.”).

⁸⁸ See *Lemmon*, 995 F.3d at 1089 (noting various movements, petitions, and lawsuits concerning similar accidents to address the Speed Filter).

⁸⁹ *Id.* at 1093.

⁹⁰ Susannah Luthi, *A Legal Shield for Social Media is Showing Cracks*, POLITICO, <https://www.politico.com/news/2022/07/14/legal-shield-social-media-facebook-00045226> [https://perma.cc/3NHR-CTZW] (last updated July 14, 2022, 3:42 PM).

were designed to be addictive to minor users despite knowledge that the foreseeable use of these social media products causes mental and physical harm to minor users.”⁹¹ This lawsuit is currently pending in a California district court, and a judge is set to hear and rule on the defendant’s motion to dismiss, which argues for Section 230 to bar the claim against the social media platforms.⁹² While the *Lemmon* decision provides a similar fact pattern to this California case, the success of that claim will likely depend on the degree of particularity in which the facts are plead. The *Lemmon* pleadings and analysis were extremely fact-specific. Therefore, if the facts of the California claim allege specific aspects of the social media products that were unreasonably dangerous, the plaintiffs will be more likely to succeed under this framework. In contrast, if the facts allege social media platforms generally are at fault, then Section 230 will likely protect the platforms, especially because courts have historically protected social media platforms through Section 230 immunity.

Alternatively, lawsuits attacking social media companies could be framed through the negligent design of algorithms. Social media algorithms operate similarly to the Snapchat Speed Filter and Snapchat rewards system, in that both encourage users to spend more time on the apps. Since research has revealed that social media algorithms feed off common risk factors associated with mental health issues, this could provide a basis for claims arguing that social media companies design algorithms to encourage activities related to mental health issues and even social media addiction.⁹³

⁹¹ Jason Ysais, *Social Media Victims Law Center Files Wrongful Death Lawsuit Against Meta Platforms, Inc. and Snap, Inc. for Causing the Suicide of 11-year-old Selena Rodriguez*, BUS. WIRE (Jan. 21, 2022, 1:17 PM), <https://www.businesswire.com/news/home/20220120005868/en/Social-Media-Victims-Law-Center-Files-Wrongful-Death-Lawsuit-Against-Meta-Platforms-Inc.-and-Snap-Inc.-for-Causing-the-Suicide-of-11-year-old-Selena-Rodriguez> [<https://perma.cc/C5PY-WC8W>].

⁹² See *Rodriguez v. Meta Platforms, Inc.*, No. 3:22-CV-00401-JD, 2022 WL 4592835 (N.D. Cal. July 25, 2022).

⁹³ See Clodagh O’Brien, *How Do Social Media Algorithms Work?*, DIGIT. MKTG. INST. (Jan. 19, 2022), <https://digitalmarketinginstitute.com/blog/how-do-social-media-algorithms-work> [<https://perma.cc/V9W2-YSVT>] (“[Facebook’s algorithm is] made up of four ranking signals: popularity, content type, relationship, and recency.”).

Moreover, because the *Lemmon* case demonstrates that companies can be held liable for aspects of platforms which they control,⁹⁴ social media companies could face liability for exclusively designing algorithms that learn and feed harmful content to users to turn a profit. Lawsuits under this framework will “[focus] on the algorithms the companies use to curate and deliver content rather than the content itself.”⁹⁵ Further, these lawsuits will echo the realization that companies are aware of—but turn a blind eye towards—the harm their platforms inflict on young users, especially teens.⁹⁶

The reason that companies turn a blind eye is likely because algorithms play a vital role in the success of social media platforms. Put simply, social media algorithms are data mechanisms that sort through and prioritize content for individualized feeds based largely on “the likelihood that [users] will actually want to see it.”⁹⁷ In practice, this means that the algorithms will individualize users’ content by “leveraging individual users’ data to push highly-personalized content in order to maximize scroll time.”⁹⁸ Thus, algorithms feed off risk factors associated with social media addiction and contribute to the negative relationship between social

⁹⁴ See *Lemmon*, 995 F.3d at 1094 (“[T]he Parents’ claim does not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends.”).

⁹⁵ Joel Rosenblatt, *In Dozens of Lawsuits Parents Blame Meta, TikTok for Hooking Kids*, BLOOMBERG (Sept. 22, 2022, 7:00 AM), <https://www.bloomberg.com/news/articles/2022-09-22/social-media-addiction-brings-lawsuits-against-youtube-facebook> [<https://perma.cc/6JWD-XP9F>].

⁹⁶ TOP CLASS ACTIONS, *supra* note 10.

⁹⁷ Brent Barnhart, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOC. (Mar. 26, 2021), <https://sproutsocial.com/insights/social-media-algorithms/> [<https://perma.cc/LAA8-VZ4F>].

⁹⁸ Dipayan Ghosh, *Are We Entering a New Era of Social Media Regulation?*, HARV. BUS. REV. (Jan. 14, 2021), <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation> [<https://perma.cc/B24S-UVSW>]. See also Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & JUST SOC’Y (Apr. 24, 2021), <https://www.internetjustsociety.org/algorithms-in-social-media-platforms> [<https://perma.cc/6W3M-3XGD>] (“[Many] controversies often concern privacy issues: algorithms work with personal data of the social media user, in order to ‘know’ how to display the content on the social media platform.”).

media and mental health.⁹⁹ While platforms craft these algorithms to maximize profits,¹⁰⁰ this economic-centric business model could lead social media platforms into a liability trap later down the road.

From a policy perspective, social media companies must be held accountable for these negligent actions that have resulted in far too many accidents. If no action is taken, then stories documenting mental health concerns on social media, including the teenager with uncontrollable social media addiction, the woman who suffered from severe depression and anxiety, and the 14-year-old girl who took her own life because of what she saw on her social media feeds, will multiply.¹⁰¹ As many scholars have noted, social media companies must “acknowledge the growing concerns around the impact of social media on mental health and well-being . . . and alter the algorithms and business objectives that have caused so much damage.”¹⁰²

While the *Lemmon* decision signals to social media companies that failure to address problematic features of their platforms will leave them vulnerable in litigation, reforming Section 230 to address platforms’ knowingly dangerous features could prevent litigation in the first place and potentially save lives. The *Lemmon* decision shows that social media companies cannot always rely on Section 230’s protection in certain situations. However, legislation could create a preventative measure by permitting proactive intervention

⁹⁹ See *The Social Dilemma*, *supra* note 34 (“[P]latforms are designed to be addictive and are associated with anxiety, depression, and even physical ailments.”). See generally Christopher Cocchiarella, *Manipulative Algorithms and Addictive Design: Summing Up What’s Wrong with Social Media*, MINDFUL TECHNICS (Nov. 30, 2021), <https://mindfultechinics.com/manipulative-algorithms-and-addictive-design-summing-up-whats-wrong-with-social-media/> [https://perma.cc/93PS-HDGV].

¹⁰⁰ Ghosh, *supra* note 98.

¹⁰¹ Rosenblatt, *supra* note 95; *Facebook Faces Federal Lawsuit Over Youth Mental Health Crisis*, BEASLEY ALLEN L. FIRM (June 8, 2022), <https://www.beasleyallen.com/article/facebook-faces-federal-lawsuits-over-youth-mental-health-crisis/> [https://perma.cc/CC98-7GLL]; Young, *supra* note 1; DiAntonio, *supra* note 3; *Recovery Stories*, *supra* note 5; Russell, *supra* note 8.

¹⁰² *Facebook Faces Federal Lawsuit Over Youth Mental Health Crisis*, *supra* note 101; Young, *supra* note 1; DiAntonio, *supra* note 3; *Recovery Stories*, *supra* note 5; Russell, *supra* note 8.

that would impose liability against social media platforms before private claims are litigated.¹⁰³ Additionally, legislation addressing social media liability would not force social media users to wait until an accident occurs to hold social media companies accountable for their algorithms.

Nevertheless, the *Lemmon* decision pioneered a string of cases filed against social media platforms that dodge, rather than confront, Section 230.¹⁰⁴ In fact, “[m]ore than 70 lawsuits have been filed [as of August, 2022] against Meta, Snap, ByteDance’s TikTok, and Google centering on claims from adolescents and young adults who say they’ve suffered anxiety, depression, eating disorders, and sleeplessness as a result of their addiction to social media.”¹⁰⁵ These plaintiffs assert that the apps are defective products under a product liability framework to avoid having their claims dismissed due to the apps’ Section 230 immunity.¹⁰⁶ Therefore, these cases demonstrate further that legislative action addressing Section 230’s over-breadth will call for earlier intervention to prevent social media-related mental health accidents and will eliminate the need for lawyers to seek claims that avoid frameworks crossing paths with Section 230.

V. UNCERTAINTIES SURROUNDING FUTURE LIABILITY FOLLOWING *LEMMON V. SNAP, INC.*

As suggested earlier, social media companies should be held liable for their actions to rebuild platforms as positive environments that advance many aspects of everyday life. Those suffering from social media addiction and other mental health issues are often unaware of their diagnosis and incapable of counteracting their

¹⁰³ See generally *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021); *Facebook Faces Federal Lawsuit Over Youth Mental Health Crisis*, *supra* note 101.

¹⁰⁴ Rosenblatt, *supra* note 95; Winston Cho, *Instagram, Snapchat, TikTok Cause Mental Health Problems in Teens, Lawsuits Claim*, HOLLYWOOD REP. (Aug. 18, 2022, 3:18 PM), <https://www.hollywoodreporter.com/business/business-news/instagram-snapchat-tiktok-teens-mental-health-lawsuit-1235201941/> [https://perma.cc/77NX-UAJT].

¹⁰⁵ Rosenblatt, *supra* note 95.

¹⁰⁶ Cho, *supra* note 104.

symptoms.¹⁰⁷ Therefore, social media companies must be called upon to change their platforms' designs.¹⁰⁸ Specifically, social media companies should be held responsible for conscious decisions they make in designing their platforms because research reveals that social media companies' algorithms are designed to be addictive.¹⁰⁹ Social media companies are the exclusive controllers of their algorithms that affect hundreds of millions of users every day, and it is time to call them out for placing social media users in dangerous situations.¹¹⁰

The *Lemmon* decision and recent empirical studies have not only promoted awareness about mental health issues related to social media use and addiction, but they have also paved the way for defining future liability standards for social media platforms. While uncertainties over the best form of liability exist, experts agree the effects of social media are strikingly similar to the effects of the tobacco industry.¹¹¹ In that industry, the realization of tobacco's serious addictive effects led to strict regulation.¹¹² With social media, experts have attempted to advocate for similar legislative reform that "would make companies liable for addicting children," using strategies comparable to the ones used against the tobacco industry.¹¹³ While the *Lemmon* decision seems to have solidified a recognition of the negative and addictive effects of social media platforms, lawmakers must now decide the best way to address this issue.

¹⁰⁷ *Social Media Addiction*, *supra* note 28.

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g.*, Ghosh, *supra* note 98.

¹¹⁰ Cocchiarella, *supra* note 99 ("[I]f something is addictive by design, it's unreasonable to put the onus of overcoming addiction [sic] solely on the addict. The professionals responsible for that addictive design also bear the responsibility to redesign it in the best interest of the user.").

¹¹¹ Alexandra S. Levine et al., *Whistleblower to Senate: Don't Trust Facebook*, POLITICO, <https://www.politico.com/news/2021/10/05/facebook-whistleblower-testifies-congress-515083> [<https://perma.cc/3QAL-YHEY>] (last updated Oct. 5, 2021, 3:24 PM).

¹¹² Luthi, *supra* note 90.

¹¹³ *Id.*

A. *Who Should Monitor Social Media Platforms and Enforce Liability?*

The consensus that social media causes adverse mental health effects is stalemated by the uncertainty around who should monitor and enforce liability against social media platforms. On the one hand, some scholars suggest that the *Lemmon* decision stretches and misapplies Section 230 by arguing that “[t]he prevailing and uniform interpretation of Section 230 is squarely on the side of platforms.”¹¹⁴ Accordingly, these experts would likely argue that under a broad interpretation of Section 230, the best form of accountability is self-monitoring social media use and seeking help for mental health issues and social media addiction as it arises.¹¹⁵

Conversely, other scholars argue that either amending or repealing Section 230 is the most viable option.¹¹⁶ Scholars on this side of the debate would argue that the legislature is responsible for detailing the standard of liability that can guide courts in settling alleged violations as they arise.¹¹⁷ While these viewpoints outline vastly different approaches, it’s worth noting that this is not a two-sided debate. Other reform proposals involve strategies that fit somewhere between the two approaches.¹¹⁸ Nevertheless, legislative action has been the most frequented mode of Section 230 reform.

B. *Potential Roadblocks to Legislative Action*

Although legislative action is the most popular method of reform, polarization in Congress provides a tough hurdle to achieve lasting change. Congress has attempted to reevaluate Section 230

¹¹⁴ *Id.*

¹¹⁵ *The Social Dilemma*, *supra* note 34.

¹¹⁶ See e.g., BANNON & HOLMES, *supra* note 20, at 31–32 (“Removing Section 230 immunity for certain types of content does not necessarily mean that a provider or user will be liable for hosting that content; it merely means that such liability will not be barred by Section 230.”).

¹¹⁷ Peter J. Pizzi, *Social Media Immunity in 2021 and Beyond: Will Platforms Continue to Avoid Litigation Exposure Faced by Offline Counterparts*, DEF. COUNS. J. (Oct. 20, 2021), <https://www.iadclaw.org/defensecounseljournal/social-media-immunity-in-2021-and-beyond-will-platforms-continue-to-avoid-litigation-exposure-faced-by-offline-counterparts/> [https://perma.cc/EQ9Z-87NA].

¹¹⁸ See generally BANNON & HOLMES, *supra* note 20.

for some time, with more than twenty-five bills addressing Section 230 formally introduced in the 116th Congress, and over twenty proposals formally introduced thus far in the 117th Congress.¹¹⁹ However, given the large ideological gaps between political parties, Congress likely will not achieve permanent legislation in this space any time soon.¹²⁰ For example, “Democrats generally argue that platforms use Section 230 to get off the hook for the proliferation of misinformation on their apps, while many Republicans argue that platforms lean on the legal shield as a tool for censoring conservative content.”¹²¹ Therefore, long-term legislative reform will involve debates over policies, such as freedom of speech, as well as the legislative purpose and history of Section 230.¹²²

Additionally, even where policymakers can overcome ideological differences, legislative efforts must be specific and narrow enough to achieve enactment. For instance, this year the California state legislature attempted to pass legislation aimed at liability for social media companies.¹²³ Entitled the Social Media Duty to Children Act, it intended to impose “civil penalties against social networks whose designs caused a ‘child user . . . to become addicted to the platform,’ either by design or in a way the operators should have known was harmful.”¹²⁴ Although the Act failed to pass through the committee stages, it revealed that lawmakers can find common ground over the universal need to address the negative effects of social media.¹²⁵ Further, the Act’s failure can be attributed

¹¹⁹ Jurecic, *supra* note 17.

¹²⁰ Levine et al., *supra* note 111.

¹²¹ *Id.*

¹²² Bradley A. Smith, *Big Tech’s Court Wins Risk a Big Backlash Against Section 230*, HILL (Aug. 8, 2022, 9:00 AM), <https://thehill.com/opinion/technology/3592309-big-techs-court-wins-risk-a-big-backlash-against-section-230/> [<https://perma.cc/H55P-DRHN>].

¹²³ Adi Robertson, *California Ban on ‘Addictive’ Social Media Fails*, VERGE (Aug. 12, 2022, 12:49 PM), <https://www.theverge.com/2022/8/12/23302990/california-ab2408-social-media-children-addiction-bill> [<https://perma.cc/6JW7-GRFN>]; AB 2408, OPEN STATES, <https://openstates.org/ca/bills/20212022/AB2408/> [<https://perma.cc/HG4K-NPX2>] (last visited Oct. 16, 2022).

¹²⁴ Robertson, *supra* note 123.

¹²⁵ *Id.*

to its vagueness rather than ideological differences. There is no indication in the drafts of this proposal to show that ideological differences caused the Act's failure.¹²⁶ Instead, the Act was ambiguous, with nothing in the Act's text specifying how regulators would determine if apps were addictive, nor identifying what aspects of the apps would be measured in evaluating a platform's addictiveness.¹²⁷ While this unsuccessful legislation marks progress for politicians on both sides of the aisle, it demonstrates that legislation must address specific elements of social media platforms.

Small-scale legislative reform targeting algorithms provides a way for legislatures to hold social media companies accountable. This type of reform could avoid larger ideological controversies and offer a narrow and specific mechanism for enforcing liability. While it is uncertain whether policing algorithms would be the most effective way to enforce liability long-term, this strategy would buy legislatures time to enact broader legislation that does not conflict with other laws or policies.¹²⁸

VI. LEGISLATION AIMED AT POLICING ALGORITHMS

Legislation aimed at policing algorithms is the most feasible way to hold social media companies accountable because it addresses a specific aspect that social media companies control. As mentioned above, algorithms are programming tools that sort through and personalize content on social media platforms to maximize the amount of time users spend on the platform.¹²⁹ Legislation tailored to monitoring platforms' algorithms would provide a way for the legislature to convey to social media platforms that Section 230's protective shield is not absolute, and it would secure a judicial vehicle for viable negligent design claims aimed at addictive features of social media platforms.

¹²⁶ *AB-2408 Bill Text*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB2408 [<https://perma.cc/4NBZ-N7ZB>] (last visited Oct. 16, 2022).

¹²⁷ *Id.*

¹²⁸ See generally BANNON & HOLMES, *supra* note 20.

¹²⁹ Barnhart, *supra* note 97.

The purpose behind this type of reform centers around the level of control social media platforms have over their algorithms.¹³⁰ While many aspects of social media are uncontrollable, algorithms directly impact a platform's design and how content is presented to users, which in turn affects the number and nature of social media interactions.¹³¹ At a minimum, Congress should require that social media platforms be transparent about their algorithms and outline the legal consequences for failing to do so. Then, regulators could periodically evaluate platforms' algorithms, to ensure that social media companies are not taking advantage of harmfully addictive algorithms.

A. Why Legislation Aimed at Policing Algorithms is Necessary

Because social media companies historically conceal internal research findings from the public, a large knowledge gap exists between social media companies and consumers.¹³² In fact, legislators highlighted this lack of transparency between social media platforms and the general population at a 2021 hearing entitled "Protecting Kids Online: Facebook, Instagram, and Mental Health Harms."¹³³ Here, lawmakers exposed social media executives for refusing to disclose complete findings from internal research on algorithms, which is necessary for further research on the relationship between mental health and social media.¹³⁴ Consequently, this lack of disclosure and limited research on the relationship between social media algorithms and mental health provide "no means by which governments or independent regulators can review company policies and data to ensure its product isn't

¹³⁰ Levine et al., *supra* note 111.

¹³¹ See e.g., Cocchiarella, *supra* note 99 ("[S]ocial media algorithms manipulate what people see online in order to keep them addicted to 'liking' and scrolling through nonstop ads and content.").

¹³² Cristiano Lima, *Lawmakers Hammer Facebook for Hiding How Its Products May Hurt Kids*, WASH. POST (Sept. 30, 2021, 1:45 PM), <https://www.washingtonpost.com/technology/2021/09/30/facebook-instagram-congress-hearing-antigone-davis/> [https://perma.cc/4BU3-Q7E8].

¹³³ *Social Media and Mental Health*, SENATE RPC (Oct. 5, 2021), <https://www.rpc.senate.gov/policy-papers/social-media-and-mental-health> [https://perma.cc/JU4Q-ENF4].

¹³⁴ *Id.*; Lima, *supra* note 132.

leading to harm or even death.”¹³⁵ Since different platforms employ different algorithms, it is vital that social media companies are transparent about their internal research to combat the negative relationship between social media and mental health.¹³⁶

Similarly, while many social media executives have pledged to value user health and safety following publicized accidents caused by social media, their words have often been followed by inaction. For example, the chief of Instagram, Adam Mosseri, released a statement pledging “to do everything [Instagram] can to keep the most vulnerable people who use [the] platforms safe” following the news of the 14-year-old girl who took her own life after spending excessive time viewing depressive content on social media.¹³⁷ However, as Facebook’s whistleblower revealed to the Senate, social media companies consistently make false pledges to the public while concealing internal research about the toxic effects of their platforms.¹³⁸ Since social media platforms have failed to voluntarily meet the public’s concerns by honestly conveying their internal research, legislative action requiring the release of internal information and policing platforms’ algorithms is necessary.¹³⁹

However, the success of legislation aimed at policing algorithms depends on social media companies’ internal information about their respective algorithms, thus required disclosures must be balanced against the companies’ rights to privacy.¹⁴⁰ Social media platforms have already invoked, and will continue to invoke, their right to privacy when asked to reveal internal research to the public. In fact, Facebook revoked access to its platforms from researchers at New York University last year due to privacy concerns.¹⁴¹ Regulators should have access to internal information that is necessary to

¹³⁵ Russell, *supra* note 8.

¹³⁶ José Ramón Saura et al., *Ethical Design in Social Media: Assessing the Main Performance Measurements of User Online Behavior Modification*, J. BUS. RSCH. (May 2021), <https://www.sciencedirect.com/science/article/abs/pii/S0148296321001545> [<https://perma.cc/44UT-55ZE>].

¹³⁷ Russell, *supra* note 8.

¹³⁸ Lima, *supra* note 132.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Social Media and Mental Health*, *supra* note 133.

evaluate platforms' algorithms for addictive features. One suggestion is to "mandate the release of auditable data about algorithms . . . which would give independent researchers the ability to analyze this data and understand information networks."¹⁴² Internal data that is unrelated to algorithms could be kept private to preserve companies' rights to privacy. Nevertheless, information about the innerworkings of social media algorithms will help regulators to understand both how algorithms work and how to balance social media's business interests with health and safety.

Given the language and legislative history of Section 230, it makes the most sense for platforms to self-monitor and report internal research relating to their algorithms to an outside regulatory agency. This regulatory agency would be established to oversee the required disclosures and enforce liability on social media platforms when necessary.¹⁴³ Since the Commerce Committee's Subcommittee on Consumer Protection, Product Safety, and Data Security has already initiated investigations into Facebook, it has the public exposure best suited to spearhead the establishment of an agency to oversee this legislation in action.¹⁴⁴

Moreover, policing algorithms this way would reflect a modern understanding of a goal that Section 230 sought to achieve: the idea that companies would self-regulate their sites to avoid unnecessary setbacks caused by third-party users' actions.¹⁴⁵ The intentions were "not to create an entirely unregulated [i]nternet, but rather an [i]nternet that could regulate itself."¹⁴⁶ In other words, Section 230 served as a "Good Samaritan" protection incentivizing companies to exercise some control over their sites without fear of liability.¹⁴⁷ Ironically, today it seems as though social media platforms live in an entirely unregulated market, where profit potentials dictate the

¹⁴² Veronica Combs, *4 Ideas for Understanding and Managing the Power of Algorithms on Social Media*, TECHREPUBLIC (Apr. 1, 2022, 3:38 PM), <https://www.techrepublic.com/article/4-ideas-for-understanding-and-managing-the-power-of-algorithms-on-social-media/> [<https://perma.cc/4FYJ-WH75>].

¹⁴³ 47 U.S.C. § 230(c)(1); Jurecic, *supra* note 17.

¹⁴⁴ *Social Media and Mental Health*, *supra* note 133.

¹⁴⁵ Jurecic, *supra* note 17; Pizzi, *supra* note 117.

¹⁴⁶ Jurecic, *supra* note 17.

¹⁴⁷ Pizzi, *supra* note 117.

design of addictive algorithms.¹⁴⁸ To counteract this abuse of freedom, legislation aimed at policing algorithms would achieve a two-fold result: (1) it would allow platforms to maintain self-regulation, as intended by the enactment of Section 230, by periodically assessing and reporting information about their own algorithms;¹⁴⁹ and (2) it would create a system of checks and balances by providing a way for the outside regulating agency to hold companies accountable for failing to address addictive algorithms.¹⁵⁰ However, for this type of legislation to achieve any change, researchers and regulators must understand the mechanics of different platforms' algorithms.

B. Inside Social Media Algorithms

Algorithms require some human oversight in their early developmental stages before they learn to operate independently.¹⁵¹ Through “machine learning,” coders teach social media algorithms “to ‘learn’ how to carry out tasks under various levels of human oversight.”¹⁵² As a result, algorithms become more advanced on their own.¹⁵³ Once they are created, algorithms work around the clock “by monitoring people’s online behavior, harvesting their private data, and manipulating what they see online” to ensure users continuously open the apps and spend time on the platform.¹⁵⁴ Therefore, regular monitoring is necessary for legislation aimed at policing algorithms because algorithms continuously learn and become more efficient over time.

Additionally, algorithms of various social media platforms utilize different data points as signals in their learning and operating processes, and internal personnel understand how algorithms of their specific platforms operate.¹⁵⁵ For example, while Facebook has changed its algorithm many times over the years, its current

¹⁴⁸ Ghosh, *supra* note 98.

¹⁴⁹ Cocchiarella, *supra* note 99.

¹⁵⁰ Pizzi, *supra* note 117.

¹⁵¹ Golino, *supra* note 98.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Cocchiarella, *supra* note 99.

¹⁵⁵ *Id.*; Saura et al., *supra* note 136.

algorithm consists of four primary ranking signals: popularity, content type, relationship, and recency.¹⁵⁶ These “engagement-based rankings . . . tailor content to each user, often showing them more and more extreme content based on what they engage with.”¹⁵⁷

Twitter’s algorithm places a higher emphasis on relevance.¹⁵⁸ Its algorithms’ primary signals include engagement, activity, recency, and media type.¹⁵⁹ Additionally, Twitter categorizes posts into three main groups: “In Case You Missed It” posts, algorithm-based posts, and posts presented in reverse chronological order.¹⁶⁰ Thus, Twitter mixes engagement-based strategies with simpler mechanisms like reverse chronological order.

Instagram’s algorithmic strategy is particularly complex because it employs not one but “a variety of algorithms, classifiers, and processes, each with its own purpose.”¹⁶¹ The key factors that guide these algorithms are interest, relationship with the user, following, session time, and time the post was posted.¹⁶² Because Instagram employs multiple algorithms simultaneously, ranking signals for Instagram’s Feed and Stories page, Explore page, and Reels page all slightly vary to ensure users engage with individualized content on each of the app’s respective pages.¹⁶³

Similarly, TikTok’s personalizing algorithm is extremely successful in attracting users to its “For You” page, which “presents a stream of videos curated to each user’s interests.”¹⁶⁴ TikTok’s algorithm assigns videos to a user’s “For You” page by analyzing factors like whether the video is similar to ones the user has liked or shared, relates to comments the user has posted, contains information with which the user frequently engages, and matches

¹⁵⁶ O’Brien, *supra* note 93.

¹⁵⁷ Russell, *supra* note 8.

¹⁵⁸ O’Brien, *supra* note 93.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Greg Jarboe, *A Guide to Social Media Algorithms & How They Work*, SEARCH ENGINE J. (July 2, 2022), <https://www.searchenginejournal.com/how-social-media-algorithms-work/380642/#close> [<https://perma.cc/MMH8-5SRC>].

¹⁶² O’Brien, *supra* note 93.

¹⁶³ Jarboe, *supra* note 161.

¹⁶⁴ *Id.*; O’Brien, *supra* note 93.

the user's device and account settings like language and location.¹⁶⁵ This results in "For You" pages that are highly personalized for each user.¹⁶⁶

Given the complexity and specificity of each platform's respective algorithms, periodic regulatory checks of these engagement-based, machine-learning algorithms will not only help researchers understand the behaviors of complex algorithms, but will also contribute to the development of the best long-term solutions to counteract addictive features of algorithms.

Algorithms, like artificial intelligence ("AI") systems, are far faster and more effective than human coders.¹⁶⁷ Nevertheless, research has revealed that algorithms repeatedly feed off addictive features; thus, policymakers and social media platforms cannot rely on algorithms to unlearn harmful habits acquired through "machine learning."¹⁶⁸ Determining the frequency and thoroughness of these algorithm checks requires social media platforms to release internal information about the mechanics of their specific algorithms to counteract machine learning and to avoid addictive designs that companies knowingly use to turn a profit.¹⁶⁹

This is not to say that policing platforms should steer companies away from business incentives that maximize profits, but rather that algorithms should learn from aspects that are not high-risk factors for mental health concerns and social media addiction. For example, some algorithms currently feed off the addictive design of the "like"

¹⁶⁵ Jarboe, *supra* note 161. See also Nils Aoun et al., *Social Media Algorithms: The Code Behind Your Life*, MONTREAL AI ETHICS INST. (Mar. 11, 2022), <https://montrealaiethics.ai/social-media-algorithms-the-code-behind-your-life/> [<https://perma.cc/7Q5W-R2C8>] ("If a user watches a video fully, they will see more like it, whereas if a video is swiped away or not finished, the algorithm notes not to show similar content to that user often or block it off entirely.").

¹⁶⁶ Jarboe, *supra* note 161.

¹⁶⁷ Ben Green & Amba Kak, *The False Comfort of Human Oversight as an Antidote to A.I. Harm*, SLATE (June 15, 2021, 5:45 AM), <https://slate.com/technology/2021/06/human-oversight-artificial-intelligence-laws.html> [<https://perma.cc/VF4Y-EAQM>] (noting that A.I. technologies are superior in terms of "accuracy, efficiency, and objectivity").

¹⁶⁸ Cocchiarella, *supra* note 99.

¹⁶⁹ Combs, *supra* note 142; Lima, *supra* note 132.

button and infinite scrolling.¹⁷⁰ Since research has shown that many mental health issues stem from time spent on social media and perceptions of oneself online, redesigning algorithms to avoid these features could lead to a decrease in mental health-related incidents caused by social media.¹⁷¹ Similarly, social media companies who proactively reroute their algorithms away from high-risk, addictive features protect themselves from liability stemming from negligent design claims. In comparison, if a company fails to monitor and adjust its algorithms, social media users are equipped with a mode for recovery against negligent social media companies.

However, asking companies to avoid these features entirely is both unrealistic and unfeasible, because these features are common profit sources for social media platforms.¹⁷² Nevertheless, companies must at a minimum mitigate the harmful, addictive effects. Coders could strike a balance between addictive and non-addictive features by changing the way platforms display content and by moving away from engagement-based rankings and towards chronological displays.¹⁷³ While this transition will most likely temporarily stunt companies' growth, it would be necessary to ensure that platforms promote healthy lifestyles in the long run.¹⁷⁴ These efforts would help transition social media use from a harmful experience to one that actively promotes user health and safety.¹⁷⁵

Overall, even though legislation aimed at policing algorithms is a feasible way to hold social media companies accountable for the design of their platforms, it is probably not a permanent solution.

¹⁷⁰ Cocchiarella, *supra* note 99.

¹⁷¹ Megan McCluskey, *How Addictive Social Media Algorithms Could Finally Face a Reckoning in 2022*, TIME (Jan. 4, 2022, 12:36 PM), <https://time.com/6127981/addictive-algorithms-2022-facebook-instagram/> [<https://perma.cc/3R2J-MPWQ>].

¹⁷² Ghosh, *supra* note 98.

¹⁷³ *Social Media and Mental Health*, *supra* note 133.

¹⁷⁴ Tammy Qiu, *A Psychiatrist's Perspective on Social Media Algorithms and Mental Health*, STAN. UNIV. HUMAN-CENTERED A.I. (Sept. 14, 2021), <https://hai.stanford.edu/news/psychiatrists-perspective-social-media-algorithms-and-mental-health> [<https://perma.cc/UQ55-4259>] (“[I]t’s the ethical thing to do, because we have a responsibility to help these young minds develop in a healthy way.”).

¹⁷⁵ *Id.*

Algorithms are likely not the lone source of addictive features leading to mental health issues, and in extreme cases, mental health-related accidents. Nevertheless, this legislation buys Congress time to address ideological differences between political parties, and provides courts with interim guidance to deal with these cases.¹⁷⁶ For now, scaled-down legislative reform requiring platforms to disclose internal information about the addictiveness of their algorithms and to police and redesign their algorithms that become knowingly addictive is minimally invasive for platforms, provides immediate relief for victims and their families, and allows for more research about the factors contributing to social media addiction to develop.

VII. CONCLUSION

The alarming presence of social media-related mental health issues and accidents must be addressed, especially as research reveals more information about the consequences of the COVID-19 pandemic. Recent empirical studies have confirmed that users' interactions with social media cause and worsen a variety of mental health issues.¹⁷⁷ Social media platforms have long enjoyed broad immunity from Section 230 of the CDA, but tolerance of this broad protection is dwindling.¹⁷⁸ The *Lemmon* decision highlighted a turning point for social media platforms that will likely warrant liability for negligent and addictive platforms in the future.¹⁷⁹ What this liability will precisely look like is one of many questions that remains on this issue. Nevertheless, if Congress addresses Section 230 and passes legislation aimed at policing algorithms, it can prevent future accidents caused by the negative relationship between social media and mental health, as well as hold companies accountable for their addictive algorithms.

¹⁷⁶ Levine et al., *supra* note 111; Pizzi, *supra* note 117.

¹⁷⁷ *Social Media Addiction*, *supra* note 28.

¹⁷⁸ See e.g., BANNON & HOLMES, *supra* note 20 (“While the law does have a number of defenders, others have argued that courts have interpreted Section 230 immunity too broadly.”).

¹⁷⁹ See *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021) (discussing how the CDA does not protect against “predictable consequences” of encouraging dangerous behaviors through design).

Legislation aimed at policing algorithms not only requires companies to create a safer environment online, but also allows companies to maintain a largely self-regulated market. Since social media executives have refused to willingly combat addictive algorithms, which they continue to employ to maximize profits, it is time for regulators to compel platforms to address these harmful features.¹⁸⁰ This strategy would be consistent with the goals of Section 230 by allowing companies to employ internal personnel to monitor and address algorithms for addictive features, and by empowering an outside agency to ensure that social media companies are not negligently implementing addictive algorithms.¹⁸¹ Moreover, platforms that redesign and redirect their algorithms away from addictive features likely will have enough of a defense to deny a negligent design claim alleged against the platform.

All in all, knowledge of the addictive effects of social media platforms will most likely be met by some legislative reform of Section 230 following the *Lemmon* decision. More permanent proposals will require the legislature to reevaluate and decide whether to amend or do away with Section 230 altogether. However, this action will likely not occur for some time, given the large bipartisan divide plaguing Congress.¹⁸² In the interim, a narrow legislative proposal aimed at monitoring and recoding addictive algorithms hopefully will bypass these ideological differences to address such large concerns over mental health and social media use. As more reform proposals are discussed, lawmakers must remember that the solution cannot rest on individual users because the problem stems from social media companies' conscious decisions.¹⁸³ At the end of the day, policymakers must decide where the priority lies: with internet development or with the health and safety of internet users. Any reform of Section 230 addressing the addictiveness of social media will surely hinge on this distinction.

¹⁸⁰ Lima, *supra* note 132.

¹⁸¹ Jurecic, *supra* note 17; Cocchiarella, *supra* note 99.

¹⁸² Levine et al., *supra* note 111.

¹⁸³ Cocchiarella, *supra* note 99.