

BLAME IT ON THE A-A-A-A-A-AL-GORITHM? INAPPLICABILITY OF DESIGN DEFECT DOCTRINE TO ALLEGED MENTAL HEALTH HARMS OF SOCIAL MEDIA

Abstract: Social media may be the most important invention of the twenty-first century; it is undoubtedly the most controversial. This Note explores the intersection of strict products liability law and social media, to opine on whether social media platform providers (providers) should be liable to their consumers for purported design defects within their platforms that allegedly contribute to negative mental, physical, and emotional health consequences for adolescent users. This requires determining the proper standard for how direct the harm that the defect causes must be for liability to attach. Because internet companies are currently rendered immune from claims related to third-party content on their platforms by Section 230 of the Communications Decency Act of 1996 (CDA), this Note scrutinizes claims that could survive summary judgment against a Section 230 immunity defense. It compares the ongoing multidistrict litigation in *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, in which a number of design defect claims survived summary judgment despite defendants' Section 230 defenses, with litigation against e-cigarette companies, opioid companies, and slot machine manufacturers. This Note argues that product defect claims against social media platforms alleging general harm fall outside the contours of strict products liability doctrine and are better served to be addressed by legislatures. Products liability law is not designed to parse whether a product is optimal for every user, but to deter and punish purveyors of defective products. This Note does not address the potential reformation or replacement of Section 230 of the CDA and only briefly considers the First Amendment issues raised by proposed legislation. The Note outlines how the indirect and attenuated nature of the harms allegedly caused, along with the positive utilities of social media, should shift the onus to the legislature to define parameters for providers.

INTRODUCTION

The average American teenager spends nearly five hours per day on social media.¹ Researchers differ considerably about the correlation between adolescent social media use and instances of depression.² Even studies finding

¹ Jonathan Rothwell, *Teens Spend Average of 4.8 Hours on Social Media Per Day*, GALLUP (Oct. 13, 2023), <https://news.gallup.com/poll/512576/teens-spend-average-hours-social-media-per-day.aspx> [<https://perma.cc/XY63-FRTK>].

² Compare Mingli Liu et al., *Time Spent on Social Media and Risk of Depression in Adolescents: A Dose-Response Meta-Analysis*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH, Apr. 2022, at 1, 2 (finding

correlation concede that determining whether the relationship is causal is difficult and, at this point, largely speculative.³ Regardless of correlation, social media use and adolescent depression rates have both skyrocketed over the last fifteen years.⁴ Now, parents who believe their children's mental, physical, and emotional health has been negatively affected by social media use are seeking to hold the providers responsible.⁵ Over 140 school districts and more than half of the states' Attorneys General have joined in, asserting design defect and failure to warn claims against these social media companies.⁶ A finding in favor of plaintiffs could open the floodgates to design defect litigation whenever a minor aspect of a social media platform could be reasonably improved, and wrongful death claims against platforms when adolescents purportedly addicted to those platforms die by suicide or other risky behavior.⁷

that the risk of depression increased by thirteen percent with each additional hour per day spent on social media), with Elroy Boers, Mohammad H. Afzali, Nicola Newton & Patricia Conrod, *Association of Screen Time and Depression in Adolescence*, 173 J. AM. MED. ASS'N PEDIATRICS 853, 854–56 (2020) (finding that increasing the amount of time on social media by one hour per day was associated with an increase in the severity of depression symptoms), and Amy Orben & Andrew K. Przybylski, *The Association Between Adolescent Well-Being and Digital Technology Use*, 3 NATURE HUM. BEHAV. 173, 178–79 (2019) (finding only circumstantial correlations between social media use and rates of depression in adolescents).

³ See Liu et al., *supra* note 2, at 3 (noting that no causal links can be drawn from this study).

⁴ See Michael Daley, *Prevalence of Depression Among Adolescents in the U.S. from 2009 to 2019: Analysis of Trends by Sex, Race/Ethnicity, and Income*, 70 J. ADOLESCENT HEALTH 496, 496–97 (2022) (indicating that the rate of adolescent depression in the United States increased from 8.1% to 15.8% from 2009–2019); *Prevalence of Major Depressive Episode Among Adolescents*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/major-depression#part_2565 [https://perma.cc/U4LK-H76S] (July 2023) (finding that in 2021, over twenty percent of adolescents in the United States suffered at least one major depressive episode).

⁵ *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 817 (N.D. Cal. 2023). This suit is a multidistrict litigation featuring hundreds of plaintiffs' consolidated complaints against providers including Meta's Facebook and Instagram, YouTube, TikTok, and Snapchat, alleging more than eighteen causes of action including strict products liability design defect and strict products liability failure to warn. *Id.* Judge Yvonne Gonzalez Rogers identified each of the plaintiffs' products liability design defect claims that survived summary judgment, which are:

Not providing effective parental controls; not implementing effective parental notifications; not employing robust age verification process; not providing options to users to self-restrict time spent on platform; not providing default protective limits on the length and frequency of use; making it needlessly challenging for users to choose to delete their account; making it challenging for users to report predator accounts and content; offering appearance-altering filters; not labelling filtered content; making some filters available that "blur imperfections" and others that allow users to overlay content on top of existing content; not implementing reporting protocols that allow a person to report Child Sexual Abuse Material without requiring them to first log into the product.

Id. at 829. The court held that these nine defects do not concern the publishing or monitoring of third-party content, and that therefore they were not barred by Section 230 of the CDA. *Id.*

⁶ *Id.* at 817.

⁷ See, e.g., *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021) (litigating a wrongful death claim on a negligent design theory when Snapchat provided a filter that allowed users to post

The ongoing litigation has been consolidated via multidistrict litigation under 28 U.S.C. § 1407 in the U.S. District Court for the Northern District of California and is assigned to Judge Yvonne Gonzalez Rogers.⁸ That court's decisions will provide an indication as to whether strict products liability is a proper legal mechanism for holding social media platforms accountable for alleged harms done.⁹ This litigation has the potential to usher products liability law into the digital age.¹⁰

Products liability claims traditionally apply exclusively to tangible products, but the Restatement (Third) of Torts: Products Liability and various courts have provided for exceptions to that rule.¹¹ Though only electricity and real property are enumerated as examples of exceptions in the Restatement Third, some courts have found that other intangible items such as computer software—including social media applications—may be considered products.¹²

the speed at which their phone was traveling, which allegedly encouraged decedents to drive at an unsafe speed), *rev'g* 440 F. Supp. 3d 1103 (C.D. Cal. 2020). In 2021, the Ninth Circuit Court of Appeals in *Lemmon v. Snap, Inc.*, implicated the risk-utility test, but only for a narrow application, whereas the multidistrict litigation could provide a laundry list of defects that could become actionable. *Id.* at 1092; *see In re Soc. Media*, 702 F. Supp. 3d at 829, 849–53 (considering at least nine different categories of defects). There was at least one other similar suit brought against Snapchat for the defective nature of the speed filter. *See Maynard v. Snapchat, Inc.*, 870 S.E.2d 739, 743 (Ga. 2022) (vacating summary judgment ruling in favor of Snapchat because plaintiff plausibly alleged that car accident was a reasonably foreseeable outcome). Similarly, South Carolina state representative Brandon Guffey brought a wrongful death suit against Meta, asserting, among other claims, that the platform does not sufficiently protect children from online predators. Faith Karimi, *A South Carolina Lawmaker Is Suing Instagram After His Son Died by Suicide*, CNN, <https://www.cnn.com/2024/01/30/us/rep-brandon-guffey-instagram-lawsuit-ccc/index.html> [https://perma.cc/D2X8-68XM] (Jan. 30, 2024).

⁸ *See In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 637 F. Supp. 3d 1377 (J.P.M.L. 2022) (centralizing dozens of actions against the same defendants in Northern District of California in a transfer order from the U.S. Judicial Panel on Multidistrict Litigation). In multidistrict litigation, the court applies the law of its own circuit to federal law questions and applies the law of the state under which a claim would have been heard had it not been transferred to the multidistrict litigation. *Id.*

⁹ *See In re Soc. Media*, 702 F. Supp. 3d at 819 (stating that plaintiffs allege that defendants are aware that their platforms harm young users).

¹⁰ *See* Matthew P. Bergman, *Assaulting the Citadel of Section 230 Immunity: Products Liability, Social Media, and the Youth Mental Health Crisis*, 26 LEWIS & CLARK L. REV. 1159, 1201–02 (2023) (explaining how Justice Cardozo brought tort law into the automotive age by rejecting the privity doctrine then dominating products liability law and suggesting a similar doctrinal shift could be impending due to the youth mental health crisis).

¹¹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. D (AM. L. INST. 1998); *see, e.g., Ransome v. Wis. Elec. Power Co.*, 275 N.W.2d 641, 648 (Wis. 1979) (holding that electricity can be considered a product for products liability purposes when it is distributed in the stream of commerce).

¹² RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a); *see Lemmon*, 995 F.3d at 1093 (holding that Snapchat, and its speed filter in particular, were products); *In re Fort Totten Metro-rail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 88 (D.D.C. 2012) (recognizing that defendant's Advanced Information Management software could be considered a product for the purposes of a products liability claim); *Brookes v. Lyft Inc.*, No. 50-2019-CA-004782, 2022 WL

Courts have been consistent in holding that thoughts and ideas, such as the words in a physical book, are not products.¹³

The U.S. District Court for the Northern District of California is not the only institution taking a long look at adolescent online safety: members of U.S. Congress have identified this issue as an area of concern and have proposed and debated related legislation.¹⁴ This legislation includes the Senate's Kids Online Safety and Privacy Act, which would require platforms to integrate many of the safeguards categorized as defects by plaintiffs in the multidistrict litigation, and the Protecting Kids on Social Media Act, which would require platforms to verify the ages of their users and mandate parental consent for minors to sign up for these platforms.¹⁵ In January 2024, Snap, Inc. became the first social media company to endorse the Kids Online Safety Act.¹⁶ Congress

19799628, at *3 (Fla. Cir. Ct. Sept. 30, 2022) (trial order) (finding that the Lyft app could be considered a product).

¹³ See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1035–36 (9th Cir. 1991) (holding that the plaintiffs did not state a product liability claim when they became sick after eating mushrooms in reliance on a book, *The Encyclopedia of Mushrooms*); *James v. Meow Media, Inc.*, 300 F.3d 683, 695 (6th Cir. 2002) (holding that the ideas conveyed by violent video games and movies are not products and therefore could not form basis for products liability suit after school shooting).

¹⁴ Kids Online Safety & Privacy Act, S. 2073, 118th Cong. (2023) (passing the Senate, 91-3, in 2024, but failed to advance out of House of Representatives); Protecting Kids on Social Media Act, S. 1291, 118th Cong. (2023).

¹⁵ Protecting Kids on Social Media Act, S.1291 § 3; Kids Online Safety & Privacy Act, S. 2073 § 103. The Kids Online Safety & Privacy Act was originally introduced in the Senate in 2022 as the Kids Online Safety Act and passed the Senate in 2024 as the Kids Online Safety & Privacy Act after being combined with parts of the Children & Teens' Online Privacy Protection Act, S. 1418, 118th Cong. (2023) and the Filter Bubble Transparency Act, S. 2024, 116th Cong. (2021). Joe Duball, *Kids Online Safety and Privacy Act Clears US Senate*, IAPP, <https://iapp.org/news/a/kids-online-safety-and-privacy-act-clears-us-senate> [<https://perma.cc/P2ZX-YZB2>]; *What Is the Kids Online Safety Act (KOSA)?*, SEN. RICHARD BLUMENTHAL, <https://www.blumenthal.senate.gov/about/issues/kids-online-safety-act> [<https://perma.cc/LK27-3UYU>]. For ease of clarity, this Note refers to this bill solely as the Kids Online Safety & Privacy Act.

¹⁶ Rebecca Kern, *First Tech Platform Breaks Ranks to Support Kids Online Safety Bill*, POLITICO (Jan. 25, 2024), <https://www.politico.com/news/2024/01/25/snapchat-kids-safety-bill-00137853> [<https://perma.cc/Q7CB-4ZZ5>]. Microsoft and X pledged to support the bill in the following months. Barbara Ortutay, *What to Know About the Kids Online Safety Act That Just Passed the Senate*, AP NEWS (July 31, 2024), <https://apnews.com/article/congress-social-media-kosa-kids-online-safety-act-parents-ead646422cf84cef0d0573c3c841eb6d> [<https://perma.cc/P8BR-GL4W>]. NetChoice, a lobbying group for technology companies, asked the Senate to reject this bill, citing data privacy concerns. Krista Chavez, *NetChoice Asks Senate to Reject Bills That Would Harm Children's Privacy*, NETCHOICE (July 27, 2023), <https://netchoice.org/netchoice-asks-senate-to-reject-bills-that-would-harm-childrens-privacy/> [<https://perma.cc/AP2E-N3RQ>]. Another relevant piece of legislation is the Stop CSAM Act of 2023, a bill that would hold social media platforms liable for intentionally or knowingly hosting, storing, or distributing Child Sexual Abuse Material. S. 1199, 118th Cong. (2023). X CEO Linda Yaccarino confirmed that X supports the Stop CSAM Act during a 2024 Congressional hearing, becoming the first major social media company to support the bill. *Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. On the Judiciary*, 118th Cong. (2024) (statement of X CEO Linda Yaccarino).

has also held hearings with social media CEOs regarding what it has deemed “online child sexual exploitation.”¹⁷

Additionally, state legislatures are beginning to act: Utah passed the Utah Social Media Regulation Act, which had been set to fully take effect on October 1, 2024, in an attempt to alleviate some of the perceived harms associated with adolescent social media use.¹⁸ That law would have required social media platforms to obtain express consent from the parents of minors who create accounts and to provide consenting parents with a means to access that account, including the content of messages to and from the profile.¹⁹ The law also would have prohibited any minor with a social media account in Utah from using the account between 10:30 PM and 6:30 AM, unless a parent opted out of this restriction via their parental oversight account.²⁰ Parents also would have retained the ability to limit the number of hours per day during which their minor child user could access the account.²¹ The law sought to ban social media platforms from displaying ads on a minor’s account and prohibit employing any practice that they know, or should reasonably know, could cause minors to become addicted to the social media platform.²² The provisions of this act were to be enforceable either by private right of action or by the Utah Department of Commerce’s Consumer Protection Division.²³ NetChoice, a

¹⁷ *Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. On the Judiciary*, *supra* note 16.

¹⁸ See UTAH CODE ANN. § 13-63-102 (LexisNexis 2023) (repealed 2024) (substantive aspects of legislation were to take effect on October 1, 2024).

¹⁹ *Id.* §§ 13-63-102, -104.

²⁰ *Id.* § 13-63-105.

²¹ *Id.*

²² *Id.* § 13-63-401. Of course, proving a cause of action against a social media platform for causing an addiction to the product will be difficult to prove if research continues to indicate that social media addiction is not a diagnosable condition. See Cecilia Cheng, Omid V. Ebrahimi & Jeremy W. Luk, *Heterogeneity of Prevalence of Social Media Addiction Across Multiple Classification Schemes: Latent Profile Analysis*, 24 J. MED. INTERNET RSCH. 674, 675 (2022) (acknowledging that social media addiction is not currently a diagnosable condition).

²³ UTAH CODE ANN. §§ 13-63-201, -301. There remain open questions as to whether enforcement of this legislation would have been constitutional under the First Amendment. See Shoshana Weissmann, Canyon Brimhall & Josh Withrow, *R Street Institute Concerns About the Kids Online Safety Act*, RSTREET INST. (July 27, 2023), <https://www.rstreet.org/commentary/r-street-institute-concerns-about-the-kids-online-safety-act/> [<https://perma.cc/L8AA-FAVF>] (expressing First Amendment concerns with similar legislation on the federal level); Krista Chavez, *NetChoice Disappointed to See Unconstitutional Utah Bills Endangering Online Privacy Signed into Law*, NETCHOICE (Mar. 23, 2023), <https://netchoice.org/netchoice-disappointed-to-see-unconstitutional-utah-bills-endangering-online-privacy-signed-into-law/> [<https://perma.cc/25AC-AWKZ>] (claiming that bills infringe on “rights to share and access speech online”). Under *Brown v. Entertainment Merchants Association*, Arkansas would likely struggle to defeat strict scrutiny without showing a “direct causal link” between social media and harm to minors. See 564 U.S. 786, 799 (2011) (holding that restrictions on selling violent video games violated the First Amendment in part because California had not shown an “actual problem,” when it only presented research based on correlation between exposure to violent video games and increased aggressive behavior).

lobbying group for technology companies, challenged the Utah Social Media Regulation Act's constitutionality in the U.S. District Court for the District of Utah.²⁴ As a result of the constitutional challenge by NetChoice, the Utah legislature repealed and replaced the Utah Social Media Act with two new bills,²⁵ which were once again challenged and at the time of this Note's publication, are stayed under a preliminary injunction.²⁶

Arkansas Governor, Sarah Huckabee Sanders, signed the Arkansas Social Media Safety Act (ASMSA) in April 2023 and it was set to become effective on September 1, 2023.²⁷ Then, in August 2023, in *NetChoice, LLC v. Griffin*, the U.S. District Court for the Western District of Arkansas granted plaintiffs a temporary injunction, with Judge Timothy Brooks determining that plaintiffs were likely to succeed on the merits of claims that the ASMSA violates the First Amendment.²⁸ The ASMSA sought to require social media platforms to verify all Arkansas account holders' ages through a third-party vendor.²⁹ Minors would be denied accounts absent parental consent.³⁰ A similar law in Ohio that would have required certain website operators to obtain parental consent before allowing children under sixteen to register suffered a parallel fate, being

²⁴ Complaint for Declaratory and Injunctive Relief, *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105 (D. Utah 2024).

²⁵ David Stauss & Shelby Dolen, *Utah Legislature Repeals and Replaces Utah Social Media Regulation Act*, HUSCH BLACKWELL (Mar. 11, 2024), <https://www.bytebacklaw.com/2024/03/utah-legislature-repeals-and-replaces-utah-social-media-regulation-act/> [<https://perma.cc/L33Q-9BEM>]; S.B. 194, 65th Leg., Gen. Sess. (Utah 2024), *codified at* UTAH CODE ANN. §§ 13-71-101 to -401. S.B. 194 creates a private right of action for minor social media account holders or their parents to sue the providers for "an adverse mental health outcome arising, in whole or in part, from the minor's excessive use of the social media company's algorithmically curated social media service." S.B. 194. An "adverse mental health outcome" includes "depression, anxiety, suicidal thoughts or behaviors, and self-harm thoughts or behaviors." *Id.* The plaintiff must show that a "licensed mental health care provider" has diagnosed the minor account holder with an adverse mental health outcome, and then must also show causation—proof that the minor's excessive use of the social media platform led to the adverse mental health outcome. *Id.*

²⁶ *Reyes*, 748 F. Supp. 3d at 1130 (holding that the plaintiff was likely to succeed on merits of its claim that the Act violated the First Amendment).

²⁷ 2023 Ark. Acts 689.

²⁸ No. 23-CV-05105, 2023 WL 5660155, at *2 (W.D. Ark. Aug. 31, 2023).

²⁹ 2023 Ark. Acts 689.

³⁰ *Id.* The American Civil Liberties Union (ACLU) filed an Amicus Brief in support of the temporary restraining order, arguing that the ASMSA impermissibly burdens the free speech of both adults and children. Brief of ACLU et al. as Amici Curiae in Support of Plaintiff's Motion for Preliminary Injunction at 16, 18–20, *NetChoice, LLC v. Griffin*, 2023 WL 566015 (No. 5:23-CV-05105). The ACLU characterized social media as the next up in a long line of emerging technologies regarding which the courts will strike down legislation aimed at protecting kids from purported danger. *Id.* at 19. The ACLU referenced *Brown v. Entertainment Merchants Association* as being particularly persuasive. *Id.*; *Brown*, 564 U.S. 786 (2011). In *Brown*, the Supreme Court preemptively struck down a California law that would have made it illegal to sell or rent "violent video games" to minors. 564 U.S. at 805. The Court did so by determining that the law violated the First Amendment and did not pass the strict scrutiny required to overcome its restrictions on the content of protected speech. *Id.* at 799.

enjoined in 2024 by the U.S. District Court for the Southern District of Ohio in *NetChoice, LLC v. Yost*.³¹ Similarly, a Texas law that took effect on September 1, 2024, sought to create a duty for digital service providers to prevent minors from being exposed to harmful material, but these provisions were enjoined.³²

Part I of this Note examines the origins and the current state of strict products liability litigation and ponders whether addictiveness alone is a defect.³³ Part II analyzes analogs to the active social media litigation and evaluates the steps legislators are taking in attempts to alleviate the perceived negative side effects of social media use.³⁴ Part III of this Note argues that although social media platforms are products, they are predominantly not defective as a matter of law; regulation of their sphere of influence should emanate from the legislature rather than from the courts.³⁵

I. SOCIAL MEDIA PLATFORMS' FIT WITHIN THE PRODUCTS LIABILITY REALM

Section A of this Part explores products liability doctrine at common law and tracks its evolution in the United States, tracing seminal cases like *Greenman v. Yuba Power Products* and exploring the influence of various Restatement provisions.³⁶ Section B of this part explores how courts deciding products liability cases have dealt with addiction, specifically examining when addiction becomes a defect.³⁷ Section C considers issues related to proving proximate cause.³⁸ Finally, Section D discusses the crucial distinction between products and services.³⁹

A. The Emergence of Modern Products Liability Doctrine

The concept of strict tort liability for defective products began to take hold in 1963, after the California Supreme Court's decision in *Greenman v.*

³¹ See 716 F. Supp. 3d 539, 546 (S.D. Ohio 2024) (granting preliminary injunction against Ohio Attorney General David Yost and enjoining him from implementing and enforcing the Parental Notification by Social Media Operators Act because it is unconstitutional).

³² 2023 TEX. BUS. & COM. CODE ANN. § 509.001 (West 2023); Comput. & Comm'n Indus. Ass'n v. Paxton, 747 F. Supp. 3d 1011, 1036–37 (W.D. Tex. 2024) (granting preliminary injunction because “monitoring-and-filtering requirements” violate the First Amendment, are unconstitutionally vague, and are preempted by Section 230); see also *Yost*, 716 F. Supp. 3d at 561–62 (enjoining Ohio Attorney General from implementing social media age verification requirements); *Griffin*, 2023 WL 566015 (same in Arkansas); *NetChoice, LLC v. Fitch*, 738 F. Supp. 3d 753, 780 (S.D. Miss. 2024) (same in Mississippi).

³³ See *infra* notes 40–109 and accompanying text.

³⁴ See *infra* notes 138–162 and accompanying text.

³⁵ See *infra* notes 163–203 and accompanying text.

³⁶ See *infra* notes 40–72 and accompanying text.

³⁷ See *infra* notes 73–87 and accompanying text.

³⁸ See *infra* notes 88–97 and accompanying text.

³⁹ See *infra* notes 99–109 and accompanying text.

Yuba Power Products.⁴⁰ The public policy goals driving strict products liability include providing recourse for consumers who rely on manufacturers' products to their detriment, deterring companies from selling unsafe products, and allowing manufacturers to spread losses by increasing prices of goods and obtaining liability insurance.⁴¹ *Greenman* extended the logic of earlier laws imposing strict liability in tort to the production and distribution of unsafe food products.⁴² These medieval British laws were created for the public good under the premise that there is no consumer utility provided by food "[un]fit for human consumption."⁴³

The products liability landscape began to come into focus in its current form in 1998, when the American Law Institute published the Restatement (Third) of Torts: Products Liability.⁴⁴ The approach detailed in the Restatement (Third) focuses on whether a product is defective, and provides three avenues by which to proceed with a claim: defective design, defective manufacture, or defective warning.⁴⁵ A prima facie claim for strict products liability involves a showing that a product is defective, that the defect existed when the product left the hands of the defendant, and that the defect was the actual and proximate cause of plaintiff's injury.⁴⁶ Under the modern construction of products liability, two tests for defectiveness are most popular: the consumer expectations test, which has carried over since the Restatement Second of Torts, and

⁴⁰ DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION—PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 802 (9th ed. 2022); *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1963).

⁴¹ DOBBS ET AL., *supra* note 40, at 781–83. Strict products liability encourages consumers to reasonably rely on products they purchase and provides them with a remedy when the products do not perform as advertised, without the burden of proving negligence. *Id.* It shifts the consumer's loss to the manufacturer, who can build liability costs into its budget and spread losses by increasing prices as necessary. *Id.*; see *Greenman*, 377 P.2d at 901 ("The purpose of such [strict products] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.").

⁴² 377 P.2d at 900; see HARRY C.W. MELICK, SALE OF FOOD AND DRINK AT COMMON LAW AND UNDER THE UNIFORM SALES ACT 6–7 (1936) (noting that in the mid-thirteenth century, England began imposing criminal liability upon those who sold "corrupt" food for immediate consumption); William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103 (1960) (indicating that corrupt food statutes served as the first recognized application in English law of what has grown into strict products liability law).

⁴³ See MELICK, *supra* note 42, at 7–8 (describing the development of an implied warranty that food sold was fit for human consumption; this legal concept lacked a scienter requirement).

⁴⁴ DOBBS ET AL., *supra* note 40, at 781.

⁴⁵ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. L. INST. 1998) (setting forth separate proposed standards for each of the three different types of claims).

⁴⁶ See *Barrett v. Tri-Coast Pharm., Inc.*, 518 F. Supp. 3d 810, 825 (D.N.J. 2021) (stating the elements of a prima facie products liability claim under New Jersey law); *Winters v. Country Home Prods.*, 654 F. Supp. 2d 1173, 1180 (D. Mont. 2009) (same under Montana law).

the risk-utility test, the test preferred by the Restatement Third.⁴⁷ The consumer expectations test is more often applied to manufacturing defects, whereas the risk-utility test is frequently applied to design defect claims.⁴⁸ The consumer expectations test asks whether a product is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it.”⁴⁹ The risk-utility test weighs a number of factors to determine “whether the omission of a reasonable alternative design renders a product not reasonably safe.”⁵⁰ In addition to proving the defect, to succeed on any strict products liability claim, a plaintiff must prove that the defect was the actual and proximate cause of an injury.⁵¹

Though referred to as “strict” liability, two of the three recognized classes of strict products liability claims—design defect claims and information defect claims—typically adopt standards closer to negligence.⁵² This Note focuses on design defects and information defects because they are most likely to be implicated by dangers associated with social media platforms.⁵³

To state a claim for design defect, a plaintiff must assert that the foreseeable risks of harm posed by the product could have been reduced or avoided, and must present the existence of a commercially feasible alternative; whether the alternative option is feasible is subject to a risk-utility analysis.⁵⁴ That risk-utility analysis considers whether the alternative design could have been implemented without impairing the product’s usefulness, with a positive finding

⁴⁷ DOBBS ET AL., *supra* note 40, at 802. The consumer expectations test is closer to true strict liability, whereas the risk-utility test essentially implies a negligence standard because if a company makes the proper risk-utility calculation, and there is no reasonable alternative it should be producing instead, a court will not hold it strictly liable. *Id.* Some scholars write that although a reasonable alternative design is only required by the risk-utility test, and not by the consumer expectations test, the reality is that the plaintiff will always introduce a reasonable alternative design. Aaron D. Twerski, *An Essay on the Quieting of Products Liability*, 105 CORNELL L. REV. 1211, 1216–17 (2020) (noting that it is extremely rare to find a products liability case governed by either test in which the plaintiff does not introduce a reasonable alternative design).

⁴⁸ DOBBS ET AL., *supra* note 40, at 810.

⁴⁹ RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

⁵⁰ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. f. One of these factors can be consumer expectations. *Id.*

⁵¹ *Id.* § 15 cmt. a.

⁵² See *id.* § 1 cmt. a (stating that design defect claims and failure to warn claims rely on reasonableness tests and are “strict liability” in moniker only). A product that fails to meet the manufacturer’s own standards is defective, and courts typically hold the manufacturers strictly liable for the harms these manufacturing defects cause. *Id.*

⁵³ See *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 819–22 (N.D. Cal. 2023) (explaining the defects alleged). The plaintiffs are not alleging a manufacturing defect, which would require a showing that defendant manufactured the product in a way that did not meet their internal expectations. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (defining manufacturing defects). Instead, the complaints allege that the way the providers chose to build their product resulted in defects. *In re Soc. Media*, 702 F. Supp. 3d at 819–20.

⁵⁴ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b).

potentially rendering the product as currently constituted unreasonably dangerous.⁵⁵ To state a claim for information defect, or failure to warn, a claimant must typically show that the defendant failed to warn about a foreseeable risk that could have been reduced if the defendant provided a warning, and that the failure to warn rendered the product not reasonably safe, causing plaintiff's injury.⁵⁶

Among the bedrock principles of strict products liability is that it only applies to distributors of products and not to purveyors of services.⁵⁷ Though this aspect of a case often goes uncontested, it was at issue in *In Re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation* because there were questions of law regarding whether the social media platforms were products, as well as if the different design choices of the platforms represented distinct products.⁵⁸ The products liability laws of at least one state relevant to the litigation specifically requires that products be tangible, precluding it from applying to social media applications.⁵⁹ Both parties in the suit argued an "all-or-nothing" approach as to whether the platforms and their alleged defects constituted products.⁶⁰ The court specifically noted that the application of strict products liability to the digital world implicates novel questions of law.⁶¹

⁵⁵ DOBBS ET AL., *supra* note 40, at 802; *Roberts v. Rich Foods*, 654 A.2d 1365, 1372–73 (N.J. 1995) (noting that a defendant is normally not required to implement the change if it would require "eliminating an inherent characteristic" of the product).

⁵⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c); *see Conner v. Marriott Hotel Servs.*, 559 F. Supp. 3d 1305, 1309 (M.D. Fla. 2022) (stating the elements of a strict liability failure to warn claim under Florida law and asserting that a *prima facie* claim does not require a showing of negligence).

⁵⁷ DOBBS ET AL., *supra* note 40, at 792.

⁵⁸ 702 F. Supp. 3d at 837–39. Judge Yvonne Gonzalez Rogers first analyzed whether the platforms are products. *Id.* She considered five factors: (1) Whether the platforms are services; (2) Whether the platforms are tangible; (3) Whether the platforms are analogous to tangible personal property; (4) Whether the platforms are akin to ideas, content, or free expression; (5) Whether the platforms, are software, and are therefore products. *Id.* at 842–48. Judge Gonzalez Rogers then went one by one and analyzed whether each defect had the properties of a product. *Id.* at 848–50.

⁵⁹ *Id.* at 844 n. 38. This state was Ohio, and because Judge Gonzalez Rogers found that the social media platforms were not tangible, she dismissed all claims brought under Ohio tort law. *Id.* The Restatement Third also limits its definition of products to tangible items, but with an important exception provided if the item's distribution and use functions as if it were a tangible product. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a). Judge Gonzalez Rogers essentially applied the framework from the Restatement Third when she considered whether the platforms are analogous to tangible personal property. *See id.* (noting an exception to the tangibility requirement where the intangible product functions as if it were a tangible product); *In re Soc. Media*, 702 F. Supp. 3d at 842–44 (applying Restatement (Third) approach to tangibility requirement). The Sixth Circuit has held that video game cartridges, cassette tapes, and internet transmissions are not sufficiently tangible to qualify as products when they are introduced for their ideas and images. *James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002).

⁶⁰ *In re Soc. Media*, 702 F. Supp. 3d at 837–39. Judge Gonzalez Rogers rejected this approach and found much of the caselaw referenced by the parties to be unpersuasive because those courts had not done a meaningful analysis, either. *Id.* For example, *Jacobs v. Meta Platforms, Inc.* held that Facebook was more akin to a service than to a product, but the court made this finding without providing

Though these claims arise from a novel context, there have been examples of consumers attempting to hold manufacturers of digital products responsible under a products liability theory going back decades.⁶² In 2002, in *Wilson v. Midway Games*, the U.S. District Court for the District of Connecticut granted summary judgment to the defendants, in part because it deemed that the video game “Mortal Kombat” was not a product for the purposes of products liability.⁶³ Plaintiffs unsuccessfully advanced strict products liability failure to warn and design defect theories against the video game creator when an adolescent became addicted to the video game, believed he was a character from the game, and killed his friend.⁶⁴ The *Wilson* court used the Restatement Third as a persuasive resource, but quoted only the portion of the definition of product that mentions, “tangible personal property distributed commercially for use or consumption.”⁶⁵ The *Wilson* court did not draw attention to where the same section of the Restatement recognizes that “other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property”⁶⁶

On the other hand, in 2012, in *In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, the U.S. District Court for the District of Columbia held that defendants were not entitled to summary judgment on a design defect claim against the manufacturer of software systems for operators of mass transit.⁶⁷ In that case, the court found the intangible software to be a product that plaintiffs plausibly alleged had caused a train crash.⁶⁸

The basis for a failure to warn claim accrues when the “foreseeable risk . . . could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller . . . and the omission . . . renders the product not reasonably safe.”⁶⁹ Sellers are generally not required to warn about obvious risks or

any rationale as to how it reached that conclusion. No. 22CV005233, 2023 WL 2655586, at *4 (Cal. Sup. Ct. Mar. 10, 2023).

⁶¹ *In re Soc. Media*, 702 F. Supp. 3d at 838.

⁶² See, e.g., *Wilson v. Midway Games*, 198 F. Supp. 2d 167, 169 (D. Conn. 2002) (unsuccessfully asserting products liability claims against video game manufacturer).

⁶³ *Id.* at 173–74.

⁶⁴ *Id.* at 169.

⁶⁵ *Id.* at 173 (quoting RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (AM. L. INST. 1998)).

⁶⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19(a); *Wilson*, 198 F. Supp. 2d at 173; see *In re Fort Totten Metrorail Cases Arising Out of Events of June 22, 2009*, 895 F. Supp. 2d 48, 88 (D.D.C. 2012) (holding that defendants were not entitled to summary judgment on design defect claim against manufacturer of software systems for operators of mass transit). The U.S. District Court for the District of Columbia considered the intangible software a product, or else it would have been required to grant the defendant’s motion for summary judgment on this claim. *In re Fort Totten*, 895 F. Supp. 2d at 88.

⁶⁷ 895 F. Supp. 2d at 88.

⁶⁸ *Id.* at 87–88.

⁶⁹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c).

the risks of unreasonable uses of a product.⁷⁰ Whether a seller has a duty to warn the consumer is another risk-utility analysis.⁷¹ In some jurisdictions, an adequate warning about a product's defect can serve to defeat a design defect claim.⁷²

B. The Defect of Addictiveness?

Two of the main theories of liability the plaintiffs advance in *In re Social Media* are that the providers designed their products to be addictive and that they subsequently failed to warn their users about the dangers of social media addiction.⁷³ Among the questions that could be raised are whether an addictive product is per se defective, or whether a manufacturer of an addictive product has a duty to warn the consumer of the product's addictive qualities.⁷⁴ One consideration in suits against social media companies is whether promoting addiction to, or at least frequent use of, a product that has positive utility and is not deleterious to the health of all users distinguishes manufacturer liability from that of cigarette or e-cigarette companies.⁷⁵ In the context of cigarette products liability claims, some courts have held that injury occurs at the time a smoker recognizes he or she is addicted.⁷⁶ Failure to warn consumers about the

⁷⁰ *Id.* § 2(c) cmt. j. For example, in 1991 in *Joseph E. Seagram & Sons v. McGuire*, the Texas Supreme Court held that the dangers associated with alcoholism have been well-known for centuries and fell within the common knowledge of the community, and that therefore the alcohol producer had no duty to warn consumers about those potential effects. 814 S.W.2d 385, 388 (Tex. 1991). Similarly, in 2007, in *Mills v. Giant of Maryland, LLC*, in a decision authored by now-Supreme Court Justice Brett Kavanaugh, the U.S. Court of Appeals for the District of Columbia held that it was widely known that people could be subject to flatulence or bloating after consuming milk. 508 F.3d 11, 12 (D.C. Cir. 2007).

⁷¹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c).

⁷² See *Hickerson v. Yamaha Motor Corp., U.S.A.*, 882 F.3d 476, 484 (4th Cir. 2018) (holding that under South Carolina law, which follows the Restatement Second approach, a seller may either make a safe product or provide a warning that renders the otherwise defectively designed product safe).

⁷³ *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 828–30 (N.D. Cal. 2023).

⁷⁴ See *id.* (alleging design defect and failure to warn claims); *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 576 (N.D. Cal. 2022) (alleging all three categories of strict products liability violations). Another major focus of the lawsuit against Juul centered around the company's marketing materials misleading its customers about the nicotine contents of its product. *In re Juul*, 497 F. Supp. 3d at 576.

⁷⁵ See *Engle v. Liggett Grp.*, 945 So. 2d 1246, 1276–77 (Fla. 2006) (holding tobacco companies liable for compensatory and punitive damages, in large part based on their creation of a defective product and concealment of its negative health effects from its consumers).

⁷⁶ See, e.g., *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 115 (Ala. 2003); *Simpson v. Phillip Morris, Inc.*, No. CV03-4717, 2003 WL 23341207, at *6 (C.D. Cal. Nov. 6, 2003). The dissent in the 2003 Supreme Court of Alabama case, *Spain v. Brown & Williamson Tobacco Corp.*, expressed several concerns with this premise, including that addiction is unverifiable, and that holding addiction alone is a compensable injury could open the floodgates to any litigious member of the smoking public. *Spain*, 872 So. 2d at 120 (Johnstone, J., dissenting in part). Judge Johnstone mentioned that he believes the Supreme Court of Alabama is making bad law that people will take ad-

addictive nature of a harmful product, and specifically targeting that product at adolescents, served as the basis of many of the claims that resulted in large settlements in recent litigation against e-cigarette company, Juul Labs.⁷⁷ Cases against e-cigarette companies have the benefit of referencing decades of data documenting the addictive nature of nicotine and the negative health consequences associated with its consumption, especially for children.⁷⁸

Social media addiction is not currently a diagnosable condition according to the American Psychiatric Association (APA), but the term has nonetheless become a part of common parlance.⁷⁹ The APA's May 2023 health advisory on the topic of social media use in adolescence, based on up-to-date research, states that "using social media is not inherently beneficial or harmful to young people."⁸⁰ The advisory does, however, suggest that adolescents be routinely screened for symptoms associated with "problematic social media use."⁸¹

This area of research will continue to play a major role in future litigation against providers, with "battles of the experts" likely to factor into trials.⁸² The results of these studies will weigh heavily on the actual causation portion of the plaintiff's burden of proof in a products liability case.⁸³ For now, studies do not support the conclusion that the amount of time spent using digital media is

vantage of and expressed concern that this holding "will create a disincentive for willpower and self-control in a society already wracked with blame-shifting." *Id.*

⁷⁷ See *In re Juul*, 497 F. Supp. 3d at 576 (alleging strict liability design defect, manufacturing defect, and failure to warn, among other causes of action).

⁷⁸ See *City of Chicago v. Equite LLC*, 693 F. Supp. 3d 879, 886–87 (N.D. Ill. 2023) (stating that the basis for city restrictions on the ability to sell e-cigarettes to minors is clearly grounded in proven, scientific rationale regarding health issues caused by nicotine).

⁷⁹ See Cheng et al., *supra* note 22, at 675 (noting that although social media disorder is not recognized by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, 5th Edition, the condition involves compulsive engagement with social media platforms that disrupts other aspects of life). Other experts prefer the term "problematic internet media use" because addiction is typically associated with products that have very little positive utility, whereas the internet is a valuable tool when used appropriately that is "essential to everyday life." Matt Richtel, *Is Social Media Addictive? Here's What the Science Says*, N.Y. TIMES (Oct. 25, 2023), <https://www.nytimes.com/2023/10/25/health/social-media-addiction.html> [<https://perma.cc/XS2U-UQW5>] (quoting Dr. Michael Rich, director of the Digital Wellness Lab at Boston Children's Hospital).

⁸⁰ *Advisory on Social Media Use in Adolescence*, AM. PSYCH. ASS'N 1, 2 (2023), <https://www.apa.org/topics/social-media-internet/health-advisory-adolescent-social-media-use.pdf> [<https://perma.cc/4F4R-QXEG>].

⁸¹ *Id.* at 7. The behaviors associated with problematic social media use include an inability to control when to stop using social media, intense cravings to check social media, and neglect of other important life responsibilities because of a perceived need to focus on social media. *Id.* at 7–8.

⁸² See *Deluxe Bldg. Sys. v. Constructamax, Inc.*, No. 06-02996, 2013 WL 5179077, at *3 (D.N.J. Sept. 13, 2013) (stating that a jury typically decides methodological disputes between dueling experts).

⁸³ See *Calhoun v. Honda Motor Co.*, 738 F.2d 126, 130 (6th Cir. 1984) (describing methods of proving causation element of products liability claim).

causally associated with increased risks for mental disorders or maladaptive behavior.⁸⁴

The Restatement Third has adopted a version of the “substantial factor test,” that comes into play mainly when there are multiple sufficient causes of harm: it states that if a defect is a substantial factor in increasing the level of harm beyond what would have resulted from only the other causes, then the seller is liable for that increase in harm.⁸⁵ The calculation for how much liability the seller then faces depends on whether the court can make a determination of the amount of harm that would have occurred as a result of only the other causes.⁸⁶ If the court can make this determination, the seller is responsible only for the harm added, but if it is not able to make such a finding, the seller is held liable for all of the harm attributable to the multiple causes.⁸⁷

C. Proximate Causation Analysis in Context

Proximate cause refers to the scope of liability and, in the context of strict products liability, it has been primarily construed to limit the seller’s liability to damages that resulted from “reasonably foreseeable” product uses, just as it does in negligence cases.⁸⁸ Though this typically extends to reasonably foreseeable misuses of a product, if a plaintiff was aware of the defect and used the product anyway, some courts have declined to find proximate cause.⁸⁹

It is unlikely that social media providers are required to make special accommodations for underage users: in 1999 in *Jennings v. BIC Corp.*, the Eleventh Circuit Court of Appeals held that defectiveness was not to be judged from the perspective of the young child who accidentally lit a lighter, but from the perspective of an “ordinary consumer” or the “normal public expectation.”⁹⁰ This represents a popular application of the consumer expectations test, where courts evaluate the product’s defectiveness from an objective

⁸⁴ Mitchell J. Prinstein, Jacqueline Nesi & Eva H. Telzer, *Commentary: An Updated Agenda for the Study of Digital Media Use and Adolescent Development—Future Directions Following Odgers & Jensen (2020)*, 61 J. CHILD PSYCH. & PSYCHIATRY 349, 349 (2020).

⁸⁵ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 (AM. L. INST. 1998).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Michael P. Penick, *Products Liability: Proof That Defect Was Not Cause of Injury*, in 49 AM. JURIS. PROOF FACTS 2D 93 (2024). The question asked is essentially whether this was the kind of accident that normally occurs from a product defect. *Id.*

⁸⁹ *Id.*; see *Duncan v. Monark Boat Co.*, 330 So. 2d 843, 844 (Fla. Dist. Ct. App. 1976) (holding that plaintiff’s decision to take the boat out on the water despite his knowledge that it was overloaded is a superseding cause that allowed defendant summary judgment on the issue of proximate causation). The Florida First District Court of Appeal 1976 decision in *Duncan v. Monark Boat Co.*, aligns with the policy in *Hickerson v. Yamaha Motor Corp., U.S.A.*, where the conveyance of an adequate warning brought any damages outside the scope of the defendant’s liability. *Hickerson*, 882 F.3d 476, 484 (4th Cir. 2018); *Duncan*, 330 So. 2d at 844.

⁹⁰ 181 F.3d 1250, 1260 (11th Cir. 1999) (affirming summary judgment for defendant).

standpoint, rather than from the subjective standpoint of a single victim.⁹¹ The court in *Jennings* went on to state that even though this type of misuse of the product—a child playing with it—was foreseeable, it still did not fall within the scope of BIC’s liability.⁹²

Taking a different approach from that in *Jennings*, *Lemmon v. Snap, Inc.* is an example of a court extending the proximate cause doctrine to include reasonably foreseeable misuses of a social media product defect.⁹³ In 2021, in *Lemmon*, the U.S. Court of Appeals for the Ninth Circuit considered whether Snap could be held accountable for designing a “speed filter” that purportedly encouraged users to drive at high speeds.⁹⁴ Two Wisconsin teenagers and a twenty-year-old were using the filter and driving well over one hundred miles per hour when they lost control of their vehicle and died in the ensuing crash.⁹⁵ In *Lemmon*, the Ninth Circuit reversed the district court’s summary judgment ruling in favor of the defendants, and determined that Snap should be treated as the manufacturer of the specific filter, rather than as a publisher with immunity under Section 230 of the CDA.⁹⁶ On remand, the district court determined that whether the teenagers’ conduct was a reasonably foreseeable misuse of the “interplay between Snapchat’s reward system and the speed filter” was a question for a jury.⁹⁷

D. Distinguishing Products from Services

It is the court’s job to determine, as a matter of law, whether something is a “product” or a “service.”⁹⁸ If the court determines it is a service rather than a product, products liability law does not apply.⁹⁹ Many courts turn to a “primary purpose” or “primary objective” test to make this decision.¹⁰⁰ This analysis

⁹¹ *Id.*; see also *LaBarre v. Bristol-Myers Squibb Co.*, 544 Fed. App’x 120, 126 (3d Cir. 2013) (reiterating the *Jennings* objective standard).

⁹² 181 F.3d at 1260.

⁹³ See 995 F.3d 1085, 1092 (9th Cir. 2021) (holding that Snapchat speed filter user driving over 100 MPH while using the product could be considered a reasonable misuse of the product that presented a foreseeable danger), *rev’g* 440 F. Supp. 3d 1103 (C.D. Cal. 2020).

⁹⁴ *Id.* at 1088.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1092; 47 U.S.C. § 230(c). The Ninth Circuit in *Lemmon* did not make any findings as to whether Snapchat should be liable for its conduct, but instead only expressed that Section 230 did not bar Snapchat from being liable as a matter of law and remanded the case to the District Court. 995 F.3d at 1092, 1095.

⁹⁷ *Lemmon v. Snap, Inc.*, No. 19-4504, 2022 WL 1407936, at *12 (C.D. Cal. Mar. 31, 2022). One potential issue regarding the interplay between Snapchat’s reward system and the speed filter was that Snapchat did not tell users what types of filter usage would allow them to obtain certain trophies; some users believed that increasing speed would increase the likelihood of receiving a trophy for using the speed filter. *Id.* at *10.

⁹⁸ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 cmt. a (AM L. INST. 1998).

⁹⁹ DOBBS ET AL., *supra* note 40, at 792.

¹⁰⁰ See *McKenna v. Harrison Mem. Hosp.*, 960 P.2d 486, 488–89 (Wash. Ct. App. 1998) (holding that hospital is a provider of services because people go to hospital to receive a course of treatment,

asks whether the primary reason for a transaction or contractual relationship is to deliver the use of a product or of a service.¹⁰¹ Still, this can prove to be a difficult distinction for courts because in many instances the business is providing access to both products and services.¹⁰² These types of transactions are known as hybrid transactions.¹⁰³ The Restatement Third mentions that courts tend to distinguish between two types of sale-service hybrid transactions: in one, a product is consumed in the course of providing a service and the transaction is treated as a sale of the material consumed.¹⁰⁴ In the other, the product is not permanently transferred to the customer, and it is interpreted as not involving a sale of the product to the customer.¹⁰⁵ The Restatement goes on to note that even when products are consumed during a hospital stay, hospitals are nonetheless found to be service providers in most jurisdictions.¹⁰⁶

Some courts have consulted the Uniform Commercial Code (UCC) in their attempts to clarify the product versus service question.¹⁰⁷ Under this analysis, if a court deems a transaction to be for goods, it likely involves a product.¹⁰⁸ Many courts have classified the sale of software packages as transactions involving goods for the purposes of the UCC.¹⁰⁹

II: THE COURTS, THE LEGISLATURE, OR THE STATUS QUO: THE PATHS FORWARD

Section A of this Part analogizes the active products liability litigation against social media platforms to prior litigation against manufacturers of pur-

not to buy pills or screws); *Anderson Hay & Grain Co. v. United Dominion Indus.*, 76 P.3d 1205, 1210 (Wash. Ct. App. 2003) (noting that many courts ask whether the primary purpose of a contractual relationship is to provide a service or a product, and holding that the construction company provided services, not products); *Sharufa v. Festival Fun Parks, LLC*, 49 Cal. App. 5th 493, 502–03 (Ct. App. 2020) (stating that products liability law only applies when the primary objective is to acquire use or ownership of a product, and finding it unclear based on the record whether the waterpark was a provider of products or services).

¹⁰¹ *Sharufa*, 49 Cal. App. 5th at 502.

¹⁰² *See id.* (requiring the factual record to be developed further before determining whether customers primarily went to the waterpark to ride the waterslides or to receive service involving the use of the waterslides).

¹⁰³ RICHARD E. KAYE, *AMERICAN LAW OF PRODUCTS LIABILITY* 3D § 37.4 (2023).

¹⁰⁴ *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 20 cmt. d (AM. L. INST. 1998).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See Legal Tender Servs. PLLC v. Bank of Am. Fork*, 506 P.3d 1211, 1219–20 (Utah Ct. App. 2022) (stating that because Utah's Product Liability Act does not define a product, the state's courts look to the Uniform Commercial Code (UCC) for guidance on whether something is a product or not).

¹⁰⁸ *Id.* at 1220. The UCC defines goods as "all things which are movable at the time of identification to the contract for sale." *Id.*

¹⁰⁹ *See Rottner v. AVG Techs. U.S., Inc.*, 943 F. Supp. 2d 222, 230 (D. Mass. 2013) (stating that courts across the country have consistently held that the sale of a software package constitutes the sale of a good for UCC purposes).

portedly addictive products, such as slot machines, cigarettes, and hamburgers.¹¹⁰ Section B of this Part discusses the overlap between the goals of proposed social media legislation and the policy driving the allegations in *In re Social Media*.¹¹¹

A. Identifying Analogs

In attempting to situate litigation against social media platform providers within the contours of past products liability litigation, it can be helpful to consider how courts have treated claims against addictive, but not inherently harmful, products.¹¹² One such example arose in 2016, in the Supreme Court of Appeals of West Virginia: in *Stevens v. MTR Gaming Group*, when that court considered a products liability case against the manufacturers of a slot machine.¹¹³ The plaintiff's husband, Scott Stevens, had developed an extreme gambling habit and embezzled millions of dollars from his company, spending it all at casinos, before he eventually committed suicide.¹¹⁴ Two of the claims brought in the U.S. District Court for the Northern District of West Virginia were products liability claims: plaintiff alleged the machine was defective because it was not programmed with technology to allow the player to lock himself out, and argued a failure to warn claim because the machines were inherently dangerous.¹¹⁵ The District Court certified three questions to the West Virginia Supreme Court of Appeals, one of which was whether the slot machine was a "product" for the purpose of a products liability claim.¹¹⁶ The court did not end up answering whether the machine was a product, instead holding that the slot machines were not defective, rendering their status as a product moot.¹¹⁷ The court emphasized that it is the job of the legislature, and not the courts, to regulate gambling in the state of West Virginia.¹¹⁸ This serves as an instance in which a court found that a machine that likely contributed to a harmful addiction was not defective as a matter of law because it was part of a key source of revenue for the state and was regulated as such.¹¹⁹ Importantly,

¹¹⁰ See *infra* notes 112–137 and accompanying text.

¹¹¹ See *infra* notes 138–162 and accompanying text.

¹¹² AM. PSYCH. ASS'N, *supra* note 80, at 1–2 (stating that adolescent social media use is neither inherently harmful nor inherently beneficial).

¹¹³ *Stevens v. MTR Gaming Grp.*, 788 S.E.2d 59, 63 (W. Va. 2016).

¹¹⁴ *Id.* at 61.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 62.

¹¹⁷ *Id.* at 65–66.

¹¹⁸ *Id.* at 66.

¹¹⁹ See *id.* (emphasizing the amount of attention to detail the legislature had already focused on the installation of these types of slot machines).

unlike social media addiction, gambling addiction is recognized as an official disorder by the APA.¹²⁰

A more recent case featuring a digital product also presents an interesting comparison: in early 2024, Robinhood, an investment app, paid a \$7.5 million settlement to the Commonwealth of Massachusetts and agreed to change elements of its platform after the Massachusetts Securities Division accused the app of “gamification to encourage and entice continuous and repetitive use.”¹²¹ Though the goal of this claim seems similar to those in *In re Social Media*—to discourage a digital platform from engaging in tactics that may foster addictive behavior—the enforcement mechanisms are entirely different because Robinhood is subject to securities laws that do not apply to social media platforms.¹²² Sports betting apps are perhaps more likely to face the sort of products liability claims alleged against social media platforms, but these claims would likely fail for the reasons expressed in *Stevens*.¹²³

What if a potentially unhealthy product is so tasty that you just keep eating it? In 2003, in *Pelman v. McDonald’s Corp.*, plaintiffs brought suit against McDonald’s, advancing products liability claims, including failure to warn and design defects, against the fast-food chain for serving addictive food that contributed to obesity.¹²⁴ The products liability claim was dismissed in part because the plaintiffs failed to allege that McDonald’s had information its consumers did not have about the potentially deleterious effects of its products.¹²⁵

¹²⁰ *What Is Gambling Disorder?*, AM. PSYCHIATRIC ASS’N (Aug. 2021), <https://www.psychiatry.org/patients-families/gambling-disorder/what-is-gambling-disorder> [<https://perma.cc/Q5MZ-6DSP>].

¹²¹ Melanie Waddell, *Robinhood to Pay \$7.5M Over ‘Gamification’ Practices*, THINKADVISOR (Jan. 18, 2024), <https://www.thinkadvisor.com/2024/01/18/robinhood-to-pay-7-5m-over-gamification-practices/> [<https://perma.cc/95AU-3PP8>]; Nate Raymond, *Robinhood Settles Massachusetts Regulators’ Trading Case for \$7.5 Million*, REUTERS (Jan. 18, 2024), <https://www.reuters.com/legal/transactional/robinhood-settles-massachusetts-regulators-trading-case-75-million-2024-01-18/> [<https://perma.cc/VWY6-S9US>]. Robinhood is a stock trading app that does not charge commissions and has no minimum funding requirement; it has become popular with retail investors, with over twenty-three million funded accounts and approximately twelve million active monthly users. News Release, Robinhood, Robinhood Markets, Inc. Reports January 2024 Operating Data (Feb. 15, 2024), <https://investors.robinhood.com/news/news-details/2024/Robinhood-Markets-Inc.-Reports-January-2024-Operating-Data/default.aspx> [<https://web.archive.org/web/20240417125622/https://investors.robinhood.com/news/news-details/2024/Robinhood-Markets-Inc.-Reports-January-2024-Operating-Data/default.aspx>].

¹²² See *Robinhood Fin. LLC v. Sec’y of Commonwealth*, 214 N.E.3d 1058, 1062–63 (Mass. 2023) (upholding the validity of the “fiduciary duty rule” under the Massachusetts Uniform Securities Act).

¹²³ See *Stevens*, 788 S.E.2d at 537 (holding that it would be inappropriate for the court to undermine the legislature, which had already put in place substantial regulations regarding the gambling industry).

¹²⁴ *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 540–41 (S.D.N.Y. 2003) (granting defendant’s motion to dismiss but granting plaintiff leave to amend pleadings), *vacated in part*, 396 F.3d 508, 511–12 (2d Cir. 2005).

¹²⁵ *Id.* at 522.

The plaintiffs also failed to make any showing that McDonald's had been a substantial factor toward causing their obesity and other health problems.¹²⁶ Though the facts supporting the claim in *Pelman* were weak, the court did suggest that plaintiffs may have been able to state a claim to survive summary judgment had they alleged with specificity the defects in the products that were particularly addictive or that McDonald's had a duty to warn about.¹²⁷

Other litigation worth exploring includes products liability claims against opioid companies.¹²⁸ Litigation against opioid companies reached a crescendo with multi-district litigation including thousands of plaintiffs in *In re National Prescription Opiate Litigation*.¹²⁹ This litigation culminated in a \$26 billion settlement by four of the largest drug companies in the world.¹³⁰ Prescription opioids represent another product that presumably has positive utility but that nonetheless sparked one of the most significant public health crises in American history because of the way they were marketed, prescribed, and misused.¹³¹ Although a significant portion of the claims dealt with misleading marketing and sales practices, which fall outside the confines of products liability law, the opioid companies were also sued under a strict products liability theory for failure to warn consumers of the addictive nature of their products.¹³²

Another product with widespread, unregulated use and acceptance which poses questions of addiction is coffee, which contains substantial levels of caffeine.¹³³ Coffee, like social media, has been determined to have significant

¹²⁶ *Id.* at 537–38. On appeal, the U.S. Court of Appeals for the Second Circuit vacated the finding as to causation, holding that it was a jury question. *Pelman v. McDonald's Corp.*, 396 F.3d 508, 511–12 (2d Cir. 2005).

¹²⁷ *See Pelman*, 237 F. Supp. 2d at 542 (noting the weaknesses of the complaint but speculating about whether McDonald's' unique combination of fats and sugars or additives used could contribute to the defects alleged).

¹²⁸ *See* Ileana Thompson, Note, *Influenced into Addiction: Using the Multi-District Litigation Against Opioid Companies as a Framework for Social Media Companies*, 76 FED. COMM. L. J. 37, 49 (2023) (advocating for treating social media companies similarly to how opioid companies were treated in multi-district litigation based on unknown addictive properties of products).

¹²⁹ 290 F. Supp. 3d 1375, 1378–79 (J.D.M.L. 2017).

¹³⁰ Jan Hoffman, *Companies Finalize \$26 Billion Deal with States and Cities to End Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/health/opioids-settlement-distributors-johnson.html> [<https://perma.cc/A5DA-67GM>].

¹³¹ *Opioid Use Disorder*, AM. PSYCHIATRIC ASS'N (Dec. 2022), <https://www.psychiatry.org/patients-families/opioid-use-disorder> [<https://perma.cc/Z9PJ-7LMC>]; Maya Salam, *The Opioid Epidemic: A Crisis Years in the Making*, N.Y. TIMES (Oct. 26, 2017), <https://www.nytimes.com/2017/10/26/us/opioid-crisis-public-health-emergency.html> [<https://perma.cc/G8TW-8A3P>].

¹³² Thompson, *supra* note 128, at 54–55.

¹³³ *See* Erikka Loftfield et al., *Coffee Drinking Is Widespread in the United States, but Usual Intake Varies by Key Demographics and Lifestyle Factors*, 146 J. NUTRITION 1762, 1765 (2016) (finding that approximately seventy-five percent of adult Americans drink coffee, with about five percent of Americans adults consuming five or more cups of coffee per day). The levels of caffeine that can be present in “cola-type” beverages are regulated, in part because of the prevalence of adolescents in soda's target market, but caffeine content is not regulated in other contexts. Caffeine, 21 C.F.R. § 182.1180 (2025).

positive utility, but it is also associated with a number of caffeine use disorders.¹³⁴ Caffeine has not always been so universally accepted in the United States, either: in the early twentieth century, the U.S. government sued to force the Coca-Cola Company to eliminate caffeine from its recipe.¹³⁵ The suit attempted to label caffeine as an “added poisonous or added deleterious ingredient” which would render Coca-Cola “adulterated” and injurious to health.¹³⁶ The American Psychiatry Association’s latest Diagnostic and Statistical Manual (DSM-5) added caffeine-related disorders, including caffeine withdrawal and caffeine intoxication.¹³⁷

B. Interplay Between Litigation and Potential Legislation

The proposed Kids Online Safety & Privacy Act addresses most of the design defects that survived summary judgment in *In re Social Media*, but it also attempts to provide increased protection.¹³⁸ For instance, the bill would restrict the sharing of the geolocation of minors to other users on the platforms.¹³⁹ The issue of social media safety has been the subject of Congressional hearings featuring social media executives, hosted by the Senate Judiciary Committee, whose leaders champion the Kids Online Safety & Privacy Act.¹⁴⁰ During these hearings, U.S. senators have alleged that the social media companies are responsible for causing the deaths of adolescents who committed

¹³⁴ Meredith A. Addicott, *Caffeine Use Disorder: A Review of the Evidence and Future Implications*, 1 CURRENT ADDICTION REPS. 186, 188 (2014). Of course, there is an alternative context in which courts have held coffee to be a defective product, but only because of its physical attributes, which are not relevant in the present analysis. See, e.g., *Liebeck v. McDonald’s Rests.*, No. 93-02419, 1995 WL 360309, at *1 (N.M. Dist. Ct. Aug. 18, 1994) (showing that a trial court jury found McDonald’s liable when scalding hot coffee caused severe burns on elderly woman after she spilled on herself; the case settled prior to appeal).

¹³⁵ See *United States v. Coca Cola Co. of Atlanta*, 241 U.S. 265, 270–72 (1916) (alleging a violation of the Food and Drugs Act because adding caffeine made Coca-Cola an adulterated product under the law); see also L.F. Kebler, *Habit-Forming Agents: Their Indiscriminate Sale and Use a Menace to the Public Welfare*, FARMERS’ BULL., Apr. 29, 1910, at 1, 6 (“[S]oft drinks containing caffeine . . . on account of insufficient information, were formerly looked upon as harmless, but they are now known to be an impending evil.”).

¹³⁶ *Coca-Cola*, 241 U.S. at 277. This finding would have required Coca-Cola to remove caffeine from its recipe. *Id.* The Supreme Court held that caffeine was an additive, reversing the decision of the Sixth Circuit, which had granted a directed verdict to Coca-Cola, and remanded the case for consideration of whether that additive was poisonous or deleterious, at which point Coca-Cola voluntarily cut its caffeine contents in half. *Id.* at 289–90; Deborah Blum, *How a Lawsuit Against Coca-Cola Convinced Americans to Love Caffeine*, TIME (Sept. 25, 2018), <https://time.com/5405132/coca-cola-trial-caffeine-history/> [<https://perma.cc/6TRL-AMDE>].

¹³⁷ See Addicott, *supra* note 134, at 188 (listing caffeine-related diagnoses present in DSM-5).

¹³⁸ Kids Online Safety & Privacy Act § 103, S. 2073, 118th Cong. (2023).

¹³⁹ *Id.* The bill defines minors as individuals aged sixteen or younger. *Id.* § 101(9).

¹⁴⁰ 170 CONG. REC. NO. 18, at D97.

suicide after using the platforms.¹⁴¹ Senator Lindsey Graham went as far as to address Meta CEO Mark Zuckerberg, telling him, “You have blood on your hands . . . You have a product that’s killing people.”¹⁴²

Though no social media company will admit to a causal link between their platform design choices and negative mental health consequences, at least some platforms have started providing some of the safety features that litigants and legislators alike have been demanding.¹⁴³ Meta’s 2022 introduction of Family Center is not as intrusive as the measures originally taken in the now-repealed Utah Social Media Regulation Act, but it does address core concerns expressed in *In re Social Media* and the Kids Online Safety & Privacy Act by providing tools for parents to supervise their children’s platform usage.¹⁴⁴ Under Federal Rule of Evidence 407, platform updates cannot be used as evidence tending to prove that the product contained a defect prior to the change.¹⁴⁵ TikTok has recently gone on the offensive, using its “TikTok Sparks Change” television commercial campaign in an attempt to refocus the narrative surrounding the app around its positive societal effects.¹⁴⁶

Later in his testimony, after he had suggested repealing Section 230, Senator Graham made his most salient observation, posing the question: “What do you do with dangerous products? You either allow lawsuits, you have statutory protections to protect consumers, or you have a commission of sorts to regulate

¹⁴¹ *Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. on the Judiciary*, *supra* note 16.

¹⁴² *Id.* (statement of Senator Lindsey Graham); *see also* Senate Judiciary Committee (@Judiciary Dems), X (Jan. 31, 2024, 12:26 PM) [<https://perma.cc/T63W-PFBC>] (mischaracterizing the statements by Mark Zuckerberg as apologizing for Meta’s behavior, and asserting that parents have “lost kids to social media”).

¹⁴³ *See* Adam Mosseri, *Introducing Family Center and Parental Supervision Tools on Instagram and in VR*, META (Mar. 16, 2022), [<https://about.fb.com/news/2022/03/parental-supervision-tools-instagram-vr/>] [<https://perma.cc/J3G2-DTCJ>] (introducing Family Center, where parents and guardians are able to access supervision tools for their children’s accounts on Instagram and can find other resources recommended by industry experts); *Family Center*, SNAPCHAT [<https://perma.cc/F45U-6KWJ>] (outlining parental control mechanisms put in place in 2022).

¹⁴⁴ *See* Mosseri, *supra* note 143 (introducing Instagram’s parental supervision tools); UTAH CODE ANN. § 13-63-102 (LexisNexis 2023) (repealed 2024) (seeking to ban providers from any practices that could cause minors to become addicted to their platforms); Kids Online Safety & Privacy Act, S. 2073, 118th Cong. § 103(b) (2023) (seeking to protect children from harm by requiring mandatory parental controls).

¹⁴⁵ *See* FED. R. EVID. 407 (prohibiting the introduction of subsequent remedial measures as evidence tending to prove a defect in a product or its design). It remains possible that the evidence could be admitted to prove the feasibility of this feature or to impeach the claims of platforms that they were already doing everything they could to keep children safe on their platforms. *Id.*

¹⁴⁶ *TikTok Sparks Good* (television commercials airing in 2024), [<https://impact.tiktok.com/stories>] [<https://perma.cc/4Q6X-MP2C>]; *see also* Garth Graham, *Safer Internet Day: Empowering Teens and Parents with Tools to Support Wellbeing*, YOUTUBE (Feb. 11, 2025), [<https://blog.youtube/inside-youtube/teen-mental-health-tools-2025/>] [<https://perma.cc/85VK-2TG7>] (promoting YouTube’s mental health content for teens, including a voluntary supervised experience for teens, default private uploads for users ages thirteen to seventeen, and “Bedtime & Take a Break Reminders”).

the industry in question.”¹⁴⁷ As Senator Graham insinuates, the path ahead boils down to three potentially viable options: an internet commission could be formed, the Federal Communications Commission (FCC) could be given jurisdiction, or statutory protections can be enacted that reflect the preferences of voters.¹⁴⁸

Though federal legislation on point is still a work in progress in the United States, recent regulation by other nations can provide a useful reference point.¹⁴⁹ For example, the United Kingdom (UK) passed legislation geared toward protecting youth online in 2023, in the form of the Online Safety Act.¹⁵⁰ This legislation enumerates duties of care for website platforms including age verification standards and duties to design services in a way that limits the number of interactions that children will have with harmful content—including otherwise legal but harmful content.¹⁵¹ This UK legislation is, of course, not subject to the limitations of Section 230 of the CDA and so it may hold companies responsible in their roles as publishers.¹⁵² The Online Safety Act regulates online speech to an extent that would likely violate the First Amendment, so any U.S. regulation is unlikely to impose the same level of sweeping duties.¹⁵³

¹⁴⁷ *Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. On the Judiciary*, *supra* note 16 (statement of Senator Lindsey Graham). Senator Graham then expressed his astonishment that the United States has “no regulatory body dealing with the most profitable, biggest companies in the history of the world.” *Id.* In Senator Graham’s opinion, none of the three methods of dealing with a potentially dangerous product are supported by viable infrastructure at this point. *Id.* He also pointed out the positive utility of the products in question, differentiating them from cigarettes. *Id.*

¹⁴⁸ *See, e.g.*, Kids Online Safety & Privacy Act, S. 2073, 118th Cong. (2023).

¹⁴⁹ Online Safety Act 2023, c. 50 (U.K.).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 12(2). Ofcom, the communications regulatory agency in the United Kingdom akin to the United States’s FCC, oversees the United Kingdom’s Online Safety Act. *Ofcom’s Approach to Implementing the Online Safety Act*, OFCOM (Oct. 26, 2023), <https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation> [<https://perma.cc/3YJ9-LQZB>]. Ofcom will have the power to levy fines against companies that violate the Online Safety Act, even if those companies are not based in the UK. *Id.*

¹⁵² *Compare* Online Safety Act 2023 at 12(2) (imposing an affirmative duty on publishers to prevent harmful content even if posted by third parties), *with* 47 U.S.C. § 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.”).

¹⁵³ Online Safety Act 2023 at 12(2)(b) (imposing a duty on publishers to “mitigate the impact of harm to children in different age groups presented by content that is harmful to children present on the service”); *see* *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 800 (2011) (declaring unconstitutional a California statute that would have limited youth access to violent video games); *Comput. & Comm’n Indus. Ass’n v. Paxton*, 747 F. Supp. 3d 1011, 1036–37 (W.D. Tex. 2024) (explaining Texas statute employing language very similar to United Kingdom’s Online Safety Act and imposing affirmative duties on website operators to prevent minors from encountering harmful material deemed a violation of the First Amendment and preliminarily enjoined). The Cato Institute wrote an Amicus Brief in *Brown* that Justice Scalia relied on in his opinion. *See generally* Brief of Cato Institute as Amicus Curiae Supporting Respondents, *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448). That brief delves into the history of new communication methods in the United States, and how the

Prominent medical professionals have made suggestions, too: in 2023, the U.S. Surgeon General released an advisory titled “Social Media and Youth Mental Health.”¹⁵⁴ The advisory enumerated a set of forward-looking recommendations for policymakers aimed at safeguarding the well-being of adolescents and children.¹⁵⁵ Among these recommendations are enacting policies strengthening minimum age enforcement and supporting the development of media literacy curricula in schools.¹⁵⁶

Congress has allowed cigarettes—product for which the harm is scientifically proven and clearly outweighs any utility—to be marketed and sold with designated warning labels.¹⁵⁷ In 1964, an advisory committee to the U.S. Surgeon General published a report about the health hazards associated with cigarette smoking.¹⁵⁸ A year later, Congress responded with the Federal Cigarette Labeling and Advertising Act (FCLAA).¹⁵⁹ The purpose of the FCLAA is to provide a comprehensive program to instruct sellers on how they can market and sell cigarettes.¹⁶⁰ Because there is a comprehensive program in place, most products liability failure to warn claims under state law are preempted.¹⁶¹ Over the years, Congress has amended the FCLAA on a number of occasions to provide more stringent requirements for tobacco companies, including banning television advertisements.¹⁶²

public has feared many developments. *Id.* at 3, 6. Claims that comic books were dangerous were prevalent in the 1940s and 1950s, movie violence was associated with juvenile crime in the early twenty-first century, and the public has scrutinized television for its impacts on juveniles. *Id.* at 8, 11, 13. Many researchers concluded that there was a correlation between watching violent television and aggressive behavior. *Id.* at 14. In the Telecommunications Act of 1996, Congress required that the television industry create a voluntary rating system so that viewers have an improved idea of whether the program they are watching contains violence or other sensitive content. *Id.* The TV Parental Guidelines have been in effect since 1997. *Id.* This serves as an example of Congress regulating a media industry with the aim to make it safer for children but stopping short of anything resembling censorship. *Id.*

¹⁵⁴ U.S. SURGEON GEN., SOCIAL MEDIA AND YOUTH MENTAL HEALTH, DEP’T OF HEALTH & HUM. SERVS. (2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> [<https://perma.cc/M9H3-UJAM>].

¹⁵⁵ *Id.* at 13–15.

¹⁵⁶ *Id.* at 15.

¹⁵⁷ Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341.

¹⁵⁸ U.S. DEP’T OF HEALTH, EDUC., & WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 33 (1964).

¹⁵⁹ 15 U.S.C. §§ 1331–1341.

¹⁶⁰ *Id.* § 1331.

¹⁶¹ *Id.* § 1334.

¹⁶² *Id.* § 1335.

III: LEGISLATURES ARE APPROPRIATELY SITUATED TO REGULATE SOCIAL MEDIA PLATFORMS

Because social media platforms—and even the defects alleged in *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*—provide positive consumer utility, the platforms are more like slot machines, prescription drugs, or Big Macs than they are cigarettes.¹⁶³ Penalties that may attach to the creation and widespread availability of these platforms should be determined by Congress or state legislatures.¹⁶⁴ The platforms largely operate as designed and expected, even though negative externalities may attach, as is the case with many products.¹⁶⁵ Legislatures may ultimately decide they wish to regulate social media platforms, but the indirect nature of the harms currently alleged do not bring them within the ambit of products liability law.¹⁶⁶ Products liability law did not originate and has not developed to excuse individuals from personal responsibility, but instead to protect unsuspecting victims from products unsafe for their intended uses.¹⁶⁷ Courts are not the proper mechanism through which to determine whether one of the most pervasively used products in the world, operating as intended, without any proven negative health consequences, is defective.¹⁶⁸ The design defect analysis asks

¹⁶³ See *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2393 (2024) (“The novel services [social media platforms] offer make our lives better, and make them worse—create unparalleled opportunities and unprecedented dangers.”); *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 520 (S.D.N.Y. 2003) (noting a lack of substantive allegations of causation, as well as the application of “open and obvious risk” doctrine), *vacated in part*, 396 F.3d 508, 511–12 (2d Cir. 2005); *Stevens v. MTR Gaming Grp.*, 788 S.E.2d 59, 63 (W. Va. 2016) (holding that slot machines cannot be defective products when the state legislature extensively regulates them); *In re Juul Labs, Inc. Mktg., Sales Pracs. & Prods. Liab. Litig.*, 497 F. Supp. 3d 552, 576 (N.D. Cal. 2022) (“[T]he need for prevention of youth vaping is unquestionable . . .”).

¹⁶⁴ See *Moody*, 144 S. Ct. at 2393 (“[G]overnment actors will generally be better positioned than courts to respond to the emerging challenges social-media entities pose.”).

¹⁶⁵ See *Pelman*, 237 F. Supp. 2d at 520 (featuring unproven causation and misuse of products); *Stevens*, 788 S.E.2d at 63 (holding that regulated product could not be defective despite potential negative externalities).

¹⁶⁶ See Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965) (stating that though a bottling company would be liable for a dead animal found in a bottle, it cannot be held liable for customers’ cavities from consuming the sugar in its beverage). Even if conceded, a court may consider these harms to be “open and obvious” risks. *Stevens*, 788 S.E.2d at 63.

¹⁶⁷ See *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) (holding that the dangers associated with alcoholism are part of the common knowledge of the community and therefore could not form the basis of a products liability claim); *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1963) (describing policy rationale behind strict products liability in tort law); David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 475 (1993) (stating that products liability law encourages manufacturers to achieve an optimal level, rather than a maximum level, of safety, and that personal choice to engage in risks is always part of the equation).

¹⁶⁸ See *Greenman*, 377 P.2d at 901 (stating that a product must be unsafe for its intended use to implicate strict products liability).

whether a reasonable person would determine that a product's utility does not outweigh the risk of selling a product designed in that particular manner.¹⁶⁹ Because this is an objective standard, the positive utility associated with social media platforms sets a high bar to clear to prove a strict products liability claim.¹⁷⁰ The consideration of the utility of a product to its user and to the public at large is the most important factor in the risk-utility analysis.¹⁷¹

Social media platforms have largely made reasonable decisions based on the information available to them with respect to many of the alleged defects.¹⁷² There would be tradeoffs associated with significant regulation of platforms' interactions with its adolescent users, including with "repairing" many of the alleged defects that survived summary judgment—including lack of effective parental controls and notifications, lack of a robust age verification process, and the availability of appearance-altering filters.¹⁷³ This Note addresses counter-considerations and motives for these choices.¹⁷⁴

Not providing parental controls is a choice that platforms have made to allow all users the opportunity to shape their own experiences on the sites.¹⁷⁵ Parental controls eliminate much of the autonomy an adolescent user has over his or her social media identity.¹⁷⁶ Social media platforms provide adolescents opportunities to connect with peers whom they never could have reached before social media's advent.¹⁷⁷ Even when social media companies have offered parental control capabilities, very few parents have chosen to employ the tools.¹⁷⁸

¹⁶⁹ See *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. Ct. App. 1983) (iterating the reasonable person standard for determining whether a plaintiff states a claim for defective design). The objective nature of the standard indicates that it does not matter whether specific plaintiffs would have used the product had they known of potential side effects. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997) (listing the factors in the risk-utility analysis, with the utility of the product listed first).

¹⁷² See *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 702 F. Supp. 3d 809, 829–30 (N.D. Cal. 2023) (analyzing each defect individually).

¹⁷³ See *supra* note 5 and accompanying text.

¹⁷⁴ See *supra* note 5 and accompanying text; *infra* notes 175–187 and accompanying text.

¹⁷⁵ See Chloe Berryman, Christopher J. Ferguson & Charles Negy, *Social Media Use and Mental Health Among Young Adults*, 89 PSYCHIATRIC Q. 307, 307 (arguing that social media use helps youth and young adults form their identities by interacting with peers online).

¹⁷⁶ See *id.* at 312–13 (finding that social media use is a poor predictor of mental health problems and that perceived conflict between a parent and a child is a stronger predictor of mental health problems).

¹⁷⁷ See Prinstein et al., *supra* note 84, at 350 (indicating the potential benefits that may be conferred and competencies that may be built by using social media).

¹⁷⁸ See Naomi Nix, *Meta Says Its Parental Controls Protect Kids. But Hardly Anyone Uses Them.*, WASH. POST (Jan. 30, 2024), <https://www.washingtonpost.com/technology/2024/01/30/parental-controls-tiktok-instagram-use/> [https://perma.cc/38NV-YA8A] (stating that at the end of 2022, fewer than ten percent of teenagers' Instagram accounts had activated parental controls, and that among that subgroup, fewer than ten percent of parents adjusted their child's settings). Instagram, Snapchat, Discord, and TikTok are among the social media platforms that currently offer parental control settings. *Id.*

Age verification procedures engender negative externalities of their own: part of the case against robust age verification is that it makes data about minors vulnerable to being stolen by bad actors online; the decision not to require such disclosure is a choice that prioritizes user privacy.¹⁷⁹ It also prioritizes providing American youth with increased access to information and community.¹⁸⁰ Further, government restrictions limiting minors' access to social media platforms may be unconstitutional under the First Amendment.¹⁸¹

Privacy concerns and promoting opportunity for free expression are throughlines of many of the platforms' design choices and the decision to not label filtered content is consistent with decades, if not centuries of societal norms: edited physical photos are constantly displayed sans demarcation, and digital photographs are posted across the internet in the same manner.¹⁸² In many cases, the presence of a filter is obvious, and when it is not obvious, the label is presumably unwelcome.¹⁸³ Requiring filtered content to be labeled as such would be akin to requiring people who have had cosmetic surgery to display an indication of their appearance alteration at all times.¹⁸⁴ Watching ten minutes of the TV program *Friends* has been found to significantly detrimentally affect women's appearance satisfaction, but certainly no steps are being taken to remove attractive actresses wearing makeup and subject to significant pre-release editing from television.¹⁸⁵

¹⁷⁹ See Weissmann et al., *supra* note 23 (expressing concerns about data breaches and hacking of the sensitive user data that would be disclosed in order to access social media sites under proposed legislation); Chavez, *supra* note 16 (mentioning privacy concerns as a primary reason for opposing Kids Online Safety & Privacy Act); Samantha Chapman, *Age Verification Bill Will Not Keep Your Kids Safer, Will Risk Privacy*, ACLU S.D. (Mar. 3, 2024), <https://www.aclusd.org/en/news/age-verification-bill-will-not-keep-your-kids-safer-will-risk-privacy> [<https://perma.cc/H7NM-NR5C>] (advocating for ACLU of South Dakota against bill that would make age verification a requirement for creating a social media account in South Dakota).

¹⁸⁰ See Berryman et al., *supra* note 175, at 307 (finding that social media helps many youths with process of forming an identity).

¹⁸¹ See *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539, 546 (S.D. Ohio 2024) (enjoining Ohio Attorney General from implementing social media age verification requirements because proposed law is unconstitutional); *NetChoice, LLC v. Griffin*, No. 23-CV-05105, 2023 WL 5660155 (enjoining Arkansas Attorney General from implementing similar law).

¹⁸² Cf. Phillip Ozimek, Semina Lainas, Hans-Werner Bierhoff & Elke Rohmann, *How Photo Editing in Social Media Shapes Self-Perceived Attractiveness and Self-Esteem Via Self-Objectification and Physical Appearance Comparisons*, BMC PSYCH., Apr. 6, 2023, at 1, 2 ("Compared to past decades, people are nowadays constantly confronted with highly edited beauty pictures . . .").

¹⁸³ See generally Ashna Habib, Tooba Ali, Zainab Nazir & Arisha Mahfooz, *Snapchat Filters Changing Young Women's Attitudes*, 82 ANNALS MED. & SURGERY 104668 (2022).

¹⁸⁴ Cf. NATHANIEL HAWTHORNE, *THE SCARLET LETTER: A ROMANCE* 52–53 (N.Y. Modern Libr. 1950) (1850) (depicting a fictional nineteenth century Puritan Boston in which a woman was required to wear a scarlet "A" because she gave birth to a child out of wedlock).

¹⁸⁵ Stephen C. Want, Kristin Vickers & Jennifer Amos, *The Influence of Television Programs on Appearance Satisfaction: Making and Mitigating Social Comparisons to "Friends,"* 60 SEX ROLES 642, 650 (2009).

Proposed alternative designs that are based merely on the preferences of a certain group of users cannot, as a matter of law, render a product defective when a reasonable person would choose the status quo.¹⁸⁶ In fact, if the government required some of the product design changes that plaintiffs in *In Re Social Media* push for, those government actions would toe the line of constitutionality.¹⁸⁷

The relationship between social media and negative mental health consequences in adolescents is a “socially constructed reality” without scientific proof of causation.¹⁸⁸ It is this conflation of correlation and causation that may pose a Federal Rule of Evidence Rule 702 or *Daubert* problem for plaintiffs attempting to introduce expert testimony to establish causation of harm by social media platforms.¹⁸⁹ Under Federal Rule of Evidence Rule 702, testimony is only admissible if it will assist the trier of fact; the presentation of research that only draws correlative conclusions while asserting or implying the presence of legal causation could be more confusing than helpful.¹⁹⁰ Not only must the plaintiffs prove that the platform itself was a substantial factor in causing negative mental health consequences, but they are also required to show that the injuries were caused by the specific defects alleged.¹⁹¹

Regardless of its merits, the Kids Online Safety & Privacy Act or similar legislation would provide a semblance of regulation in a heretofore unregulated space, and it would presumably reflect the priorities of the majority of Congress.¹⁹² As Snap, Inc. CEO, Evan Spiegel, told Congress, “[n]o legislation is

¹⁸⁶ See *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. Ct. App. 1983) (laying out the reasonable person standard for determining whether a plaintiff states a claim for defective design).

¹⁸⁷ See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 800 (2011) (holding that limitation on accessibility of violent video games for minors violated First Amendment).

¹⁸⁸ See Betul Keles, Niall McCrae & Annmarie Grealish, *A Systematic Review: The Influence of Social Media on Depression, Anxiety and Psychological Distress in Adolescents*, 25 INT’L J. ADOLESCENCE & YOUTH 79, 89–90 (2019) (“Looking evidence [sic] emerged from cross-sectional studies, it is not possible to decide whether social media use causes depression, anxiety and psychological distress, or whether those with depression, anxiety and psychological distress are more likely to spend more time on social media.”).

¹⁸⁹ See FED. R. EVID. 702 (setting forth standard which expert witnesses must meet to be allowed to testify); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (establishing a test for admitting expert testimony for which “general acceptance” is not a requirement); Keles et al., *supra* note 188, at 90 (emphasizing that many studies have found a correlative relationship between social media use and negative mental health effects, but that causation has not been established).

¹⁹⁰ FED. R. EVID. 702; see *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir. 2010) (“Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence, because it does not adequately account for other contributory variables.”); *Brown*, 564 U.S. at 800 (stating that studies purporting to show correlative relationships between violent video games and aggressive behavior had been “rejected by every court to consider them, and with good reason”).

¹⁹¹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 16 (AM. L. INST. 1998).

¹⁹² Kids Online Safety & Privacy Act, S. 2073, 118th Cong. (2023).

perfect, but some rules of the road are better than none.”¹⁹³ The decision in *Stevens v. MTR Gaming Group, Inc.*, in which the Supreme Court of Appeals for West Virginia held that a slot machine was not defective despite its potential to cause addiction, was straightforward because of the presence of extensive state government regulation over the product at issue.¹⁹⁴ In 2010, in *Caesars Riverboat Casino, LLC v. Kephart*, the Supreme Court of Indiana held that the legislature’s choice to sanction gambling and its overarching statutory scheme abrogated any common law claim a compulsive gambler might have against a casino.¹⁹⁵ Similarly, statutory guidance here would aid in eliminating much of the ambiguity regarding platforms’ duties.¹⁹⁶

Elementary school education provides another mechanism by which social media habit-forming behavior can be addressed, likely through social media literacy classes.¹⁹⁷ Curriculum decisions are typically addressed by state and local legislatures¹⁹⁸ and social media literacy courses could be mandated, just as sexual education classes have been.¹⁹⁹ The APA’s 2023 Health Advisory on Social Media Use in Adolescence specifically recommends formal social media literacy training to better inform young users of how to maximize opportunities for “balanced, safe, and meaningful social media use.”²⁰⁰ The U.S. Surgeon General’s advisory on Social Media and Youth Mental Health similarly recognizes the importance of supporting the implementation of “digital and media literacy curricula in schools.”²⁰¹ Equipping American youth with the requisite tools to reap the

¹⁹³ *Big Tech and the Online Child Sexual Exploitation Crisis: Hearing Before the S. Comm. on the Judiciary*, *supra* note 16 (statement of Snap, Inc. CEO, Evan Spiegel).

¹⁹⁴ 788 S.E.2d 59, 63 (W. Va. 2016).

¹⁹⁵ 934 N.E.2d 1120, 1124 (Ind. 2010).

¹⁹⁶ *See id.* (holding that intentionality of statutory scheme provides clarity as to the legislature’s desired outcome).

¹⁹⁷ *See* Peter Suci, *Teaching Social Media—Adding to K-12 Curriculum*, FORBES (June 18, 2023), <https://www.forbes.com/sites/petersuci/2023/06/18/teaching-social-media-adding-to-k-12-curriculum/?sh=36d20bb92bc9> [<https://perma.cc/73HK-9T2M>] (quoting multiple industry experts advocating for social media education in primary schools); *Social Media for Students*, NAT’L FED’N OF STATE HIGH SCH. ASS’NS, <https://nfhslearn.com/courses/social-media-for-students> [<https://perma.cc/4737-HCS4>] (offering a “Social Media for Students” online course that helps to inform high schoolers about building responsible social media tendencies).

¹⁹⁸ *See* 20 U.S.C. § 1232(a) (barring the federal government from exercising any control over the curriculum decisions made by schools or school systems).

¹⁹⁹ *See* *Parker v. Hurley*, 474 F. Supp. 2d 261, 270–71 (D. Mass. 2007) (holding that there is not a fundamental right for every parent to dictate to public schools what topics to teach or not teach); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) (refusing to exempt a student from participating in health education class based on parents’ requests). A mandatory social media safety class would likely only need to meet a “rational basis” standard, which requires only that it serves a legitimate state interest and is reasonably related to that interest. *See* *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996) (holding that rational basis review is appropriate when parents attempt to exempt their child from an educational requirement for “secular reasons”).

²⁰⁰ AM. PSYCH. ASS’N, *supra* note 80, at 8.

²⁰¹ *See* U.S. SURGEON GEN., *supra* note 154, at 15 (emphasizing the importance of media literacy classes).

benefits associated with social media is preferable to sending the message that the platforms are responsible for causing all of their problems.²⁰² This approach applies the instincts of Justice Johnstone of the Alabama Supreme Court in his 2003 dissent in *Spain v. Brown & Williamson Tobacco Corp.* to a modern problem: it is the way to avoid creating a “disincentive for willpower and self-control in a society already wracked with blame-shifting.”²⁰³

CONCLUSION

Social media platforms are products. They are designed to provide the user with an experience rather than only a service. Despite this conclusion, lawsuits against social media platforms alleging general harms to adolescent users do not fit under a defective products theory. The relevant research does not illustrate a causal relationship between social media use and negative mental health consequences. Even if it did, in a risk-utility product analysis, the test preferred by the Restatement Third of Products Liability, the substantial positive utility and opportunity provided by the platforms would likely outweigh the alleged negative externalities. The policy rationale of strict products liability—protecting unsuspecting users from products unfit for their intended use and other reasonably foreseeable uses—does not translate to the social media sphere. The claims that social media platforms are harming children are subjective claims, whereas products liability requires an objective analysis. It asks whether a reasonable person would choose to use a product if that person knew of the potential negative externalities. Because this answer is currently yes, major platforms are not defective products as a matter of law. It is up to lawmakers to provide a set of rules to social media companies that represent the interests of their constituents. In the absence of this regulation, it will remain impossible for social media companies to determine exactly which online safety measures are compulsory and which are merely optional. By regulating the conduct of social media platforms, providing an enforcement mechanism based on distinct and express policy goals, and emphasizing the importance of digital citizenship, we can progress toward limiting the impact of the negative externalities associated with society moving increasingly online.

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²⁰² See AM. PSYCH. ASS'N, *supra* note 80, at 8 (citing support for premise that increase in “digital literacy” can help to increase the portion of online interactions which are positive).

²⁰³ *Spain v. Brown & Williamson Tobacco Corp.*, 872 So. 2d 101, 120 (Ala. 2003) (Johnstone, J., concurring in part). But see Millicent Ball, Note, *Broken Shields: Holding Social Media Giants Accountable for the Youth Mental Health Crisis*, 66 B.C. L. REV. 1403, 1442 (arguing that potential products liability litigation can serve as an effective prod for platforms to prioritize product safety).

