"If Man Will Strike, Strike Through the Mask": Striking Through Section 230 Defenses Using the Tort of Intentional Infliction of Emotional Distress

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Nearly everything that can be done offline can now also be done online. The ubiquity of the Internet means that nearly all of the harm people can cause each other offline can now also be transmitted online. The price paid for the freedom and connectivity that the Internet affords its users is the decreased cost of harm to the aggressor and the increased cost of harm to the victim. Regulation of a unique medium like the Internet, however, should take note of its unique features and tread lightly. Torts like the tort of intentional infliction of emotional distress offer potential solutions as they are flexible enough to adapt to the unique features of the Internet and to avoid over-regulation. Currently, the Communications Decency Act often stymies any such tort actions. Yet this shield is not an intractable problem; recent case law offers courts the perfect opportunity to use the tort of intentional infliction of emotional distress to break through the Communications Decency Act and offer victims of online harm, actual remedies.

I. INTRODUCTION

In the fall of 2006, Jason Fortuny conducted an experiment.[1] Fortuny, posing as a woman, posted a personal ad on Craigslist

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1. Mattathias Schwartz, *Malwebolence*, N.Y. TIMES MAG., Aug. 3, 2008, at 24, 26.

soliciting violent sexual encounters with men.[2] Over one hundred men responded by e-mail and revealed their names, photographs, phone numbers and addresses to Fortuny.[3] Fortuny then took this information — including the photographs, many of them explicit — and posted it on his blog.[4] Fortuny quickly became the most famous villain on the Internet; at least until Lori Drew, the mother of a teenage girl, impersonated a boy on MySpace and exchanged insulting messages with thirteen-year-old Megan Meier, who later killed herself.[5]

Fortuny is just one of many "trolls," who intentionally cause mischief and emotional distress over the Internet.[6] His actions severely harmed the men whose information he spread over the Internet: some lost their jobs, others their relationships. Only one of Fortuny's victims filed a lawsuit for invasion of privacy[7] and ultimately secured a default judgment against Fortuny.[8] Nevertheless, most of the information Fortuny obtained is still available online.[9]

That was in 2006. It is now 2010, and Facebook is being used by more than a third of North Americans.[10] We can now live most of our lives, personal and professional, online.[11] Though the information disseminated over the Internet is usually meant for friends and colleagues, how it is used and who it reaches often cannot be controlled. The potential for harmful use of this information is great, and it is being realized.

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2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* ("In the late 1980s, Internet users adopted the world 'troll' to denote someone who intentionally disrupts online communities."). Fortuny is part of an Internet group called Anonymous. *Id.*; *see also infra* note 154 and accompanying text.
7. Schwartz, *supra* note 1, at 26.
8. *See Doe v. Fortuny*, CITIZEN MEDIA LAW PROJECT (Aug. 8, 2008), http://www.citmedialaw.org/threats/doe-v-fortuny.
9. In the interest of these men's privacy, no source will be given.
10. *Facebook: Facts & Figures for 2010*, DIGITALBUZZ BLOG (Mar. 22, 2010), http://www.digitalbuzzblog.com/facebook-statistics-facts-figures-for-2010/. Currently, approximately 100 million North Americans are members of Facebook. *Id.*
11. *See generally* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009). Much of the rest of the world can too. *World Internet Usage & Population Statistics*, INTERNET WORLD STATS, http://www.internetworldstats.com/stats.htm (last updated June 30, 2010).

Offline, emotional harm is ubiquitous; information and words are used to hurt others. But the channels through which this harm travels limit its efficacy. Constrained by offline mediums, harm can rarely reach many people, and increased efforts to spread harm offer diminishing returns. The Internet, however, is not reined in by social restraints or physical limitations.[12]

In some circles, this lack of control, enforceable norms, and rules is celebrated.[13] The Internet facilitates free expression that would be riskier in the offline world, but the sword cuts the other way, too.[14] The same features of the Internet that allow us more freedom also allow us to harm one another with greater ease and in more powerful ways.[15]

But harm needs a medium. The Internet supplies this medium through message boards, comment sections, Facebook, YouTube, and any other website with a business model predicated on user-generated content. These are the new channels through which harms may pass. They are, undoubtedly, incredibly useful social tools,[16] but they also make online harm possible and give it strength. These sites, in the majority of cases, are also not liable for whatever harm their users create and publish.[17]

Users — posters of information — are liable for what they write, but content creators are often difficult or impossible to track down.[18] Any lawsuit filed against the creator of the content

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12. *See generally* John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, *available at* http://www-usr.rider.edu/~suler/psycyber/disinhibit.html (explaining why offline social controls fail online).

13. *See, e.g.*, John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), http://homes.eff.org/~barlow/Declaration-Final.html; *see also* Alfred C. Yen, *Western Frontier or Feudal Society?: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L.J. 1207, 1216–31 (2002) (discussing and critiquing the analogy between the Internet and the Wild West).

14. Summarizing the double-edged nature of the Internet, one commentator has said, "New technologies generate economic progress by reducing the costs of socially productive activities. Unfortunately, those same technologies often reduce the costs of socially destructive activities." Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009).

15. *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 17–49 (2007) (discussing how quickly information spreads on the Internet).

16. *See id.*

17. *See infra* notes 34–39.

18. Schwartz, *supra* note 1, at 26. Fortuny, after getting death threats because of the Craigslist ad, purged his real address and phone number from the Internet. *Id.* Other trolls completely wipe out their offline identities. *Id.* Internet Protocol ("IP") addresses

may be expensive in the discovery it requires, fruitless in the damages it yields, and powerless to stop the harm.[19] On the other hand, a lawsuit against the website that hosts the content will be barred by the Communications Decency Act ("CDA"). Thus, unless plaintiffs are well represented and quick to the draw, there is little chance they can bring meaningful lawsuits for personal redress.[20]

Several scholars have written about the inequities, especially related to women and minorities, of online harm. Some propose new law; others propose liability in tort and alteration of the CDA.[21] This Note will argue that online harm is a unique monster and that the tort of intentional infliction of emotional distress ("IIED") is best suited for dealing with it. In addition, it will argue that to be practically useful, the tort needs to be employed against entities other than the creators of harmful content, who are only partially responsible for the harm caused. Finally, this Note suggests that recent interpretations of the CDA illuminate the path the law should take in achieving this goal.

To effectuate this purpose, Part II of this Note begins by explaining the law and principles underlying both the CDA and IIED. Part III discusses the specific problems that online content creates and why a focus on creator liability is ineffective at solving them. Part IV concludes by discussing some of the ways to resolve these issues and why an effective response need not alter much of the current law.

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can be used to identify users' locations, but they can be "spoofed" to hide the location of a user or to impersonate a different network. *See* Major Arie J. Schaap, *Cyber Warfare Operations: Development and Use Under International Law*, 64 A.F. L. REV. 121, 137 (2009). Alternatively some websites may actively avoid tracking or collecting IP addresses; indeed, this obfuscation may be part of their allure. *See* Citron, *supra* note 14, at 118 ("Generally, the operators of destructive websites either have information that could identify abusive posters or have made a conscious decision not to obtain or retain that information. Some website operators function as crowd leaders, influencing the mobs' destructiveness."). If it is possible to trace someone, such a trace is only temporary; ISPs routinely flush their data. *Id.*

19. *See* Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993, 1008–09 (2009).

20. *See* Kim, *supra* note 19, at 1008–9; *see also* Citron, *supra* note 14, at 119.

21. *See* Citron, *supra* note 14, at 122–25.

II. THE COMMUNICATIONS DECENCY ACT AND THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Communications Decency Act of 1996 is less than fifteen years old,[22] but the statute, especially its built-in defenses, has drawn much ire and litigation.[23] To understand the CDA, it is essential to first appreciate the reasons behind its inception. To that end, Part II.A describes a problem central both to the development of the CDA and to this Note: should the provider of online content be held liable under defamation or libel for that content, even if the provider was not involved in its creation? Under the CDA, online content providers have largely been shielded from legal action for content they did not create, though a recent Ninth Circuit decision has questioned that stance. Part II.B then switches focus to the tort of intentional infliction of emotional distress, first describing the historical context of the tort and then explaining that it usually reduces to one element — outrage — the importance of which is explained and analyzed.

A. THE HISTORY AND SCOPE OF SECTION 230 DEFENSES

1. *Why the CDA Was Created*

In the mid-1990s, the Internet grew as a commercial force[24] and began generating a number of novel legal problems. One such problem concerned whether a proprietor of an online message board could be liable for defamatory statements posted on the board, even though the statements were made by an independent third party.[25] In *Stratton Oakmont, Inc. v. Prodigy Ser-*

22. The Communications Act of 1996, Pub. L. 104-104, 110 Stat. 137.

23. *See infra* Part IV.A (describing some of the academic literature that has taken issue with the CDA).

24. In its legislative findings, Congress recognized the growing prominence of the Internet. 47 U.S.C. § 230(a)(1) (2006) ("The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens."). Congress additionally acknowledged that the Internet provided an excellent forum for discussion and cultural development. § 230(a)(3). But Congress noted that legislation in this area need tread carefully; the Internet had flourished with a "minimum of government regulation." § 230(a)(4).

25. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., Index No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act

vices Co., a New York trial court held that a website hosting, but not creating, content — despite the site's limited control over the content — could be liable for defamation.[26] The court reasoned that since the site's administrators had chosen to edit and remove some posts, they had acted as publishers and had opened the site to liability for all posts.[27]

Soon after, Congress, concerned with the increasing availability of pornography on the Internet, passed the CDA.[28] Congress, however, was aware of the *Stratton Oakmont* decision and was unwilling to penalize good-faith efforts to police the content of online communications. Consequently, it also established several defenses to liability under the Act.[29] Parts of the CDA that criminalized certain behavior were soon struck down as unconstitu-

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of 1996, Pub. L. No. 104-104, 110 Stat. 56, *as recognized in* Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997). In *Stratton Oakmont*, plaintiff, a securities investment firm, sued Prodigy, an early Internet service provider, over allegedly libelous statements Prodigy users had made on a Prodigy-provided, financially themed message board. *Id.* at *1. The case hinged on whether Prodigy could be considered the "publisher" of this third-party content. *Id.*; *cf.* 47 U.S.C. § 230(c)(1).

26. *Stratton Oakmont*, 1995 WL 323710. The case turned on Prodigy's actions and statements regarding the content of its message boards. *Id.* at *3 ("[T]he critical issue to be determined by this Court is whether the . . . evidence establishes a prima facie case that PRODIGY exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."). Prodigy had previously portrayed itself as a service that "exercised editorial control over the content of messages posted on its computer bulletin boards" and likened itself to a newspaper. *Id.* at *2. The court held that these express statements indicated that Prodigy exercised sufficient editorial control over the content of its message board to render it as liable as a normal newspaper would be. *Id.* at *5. The deciding factors were that Prodigy (i) held itself out to control the content of its message boards and (ii) that it implemented control over the same boards with screening software. *Id.* Prodigy was making decisions over content, which amounted to editorial control and thus justified finding liability. *Id.* at *4–5.

27. *Id.* at *3.

28. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 57 (1996) (explaining that the main purpose of the act was to criminalize the communication of pornographic material to minors).

29. *Id.* at 59–62. The first defense was a "mere access" defense. *Id.* at 59–60. An Internet service provider ("ISP") would not be liable as long as the provider did not create the content provided; there would be no liability without control. *Id.* at 60. The second defense was the "good faith defense," prompted by the decision in *Stratton Oakmont*. *Id.* at 61–62. This defense was intended to eliminate the "'Hobson's choice' between creating 'child safe' areas that expose the ISP to liability as an editor . . . or publisher, and doing nothing in order to protect the ISP from liability." *Id.* at 62

tional;[30] but the defenses, in Section 230 of the CDA, remained and protected the "publication" of third-party content.[31]

Two defenses are available under Section 230. The first protects websites from being held liable as publishers of the content they host — as long as they do not create it: "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[32] The second defense protects good-faith attempts to regulate content, shielding providers of interactive computer services from liability on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider . . . considers obscene, lewd, . . . harassing, or otherwise objectionable."[33]

One of the first interpretations of Section 230 defenses arrived in *Zeran v. America Online, Inc.*[34] In *Zeran*, the court held the Internet service provider ("ISP"), America Online ("AOL"), immune from liability for defamatory third-party content on its message boards, citing the plain language of the statute.[35] The court reasoned that since the ISP was being sued as a publisher, as required by the tort of defamation, AOL was immune.[36] The

30. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

31. Cannon, *supra* note 28, at 59–62. Congress also articulated the policy behind these defenses: the desire to promote the continued development of the Internet, to encourage the development of technology that encourages user control over content received by users, and to incentivize the development of filtering and blocking technologies to help users choose which content they receive. 47 U.S.C. § 230(b)(1), (3), (4) (2006).

32. § 230(c)(1).

33. § 230(c)(2)(A). These two subsections are respectively, the "mere access" and "good faith" defenses. *See supra* note 29.

34. 129 F.3d 327 (4th Cir. 1997). *Zeran* concerned posts on one of AOL's message boards, which claimed that Zeran was selling paraphernalia that made light of the then-recent Oklahoma City bombing. *Id.* at 329. The poster gave Zeran's phone number; he received threatening phone calls — sometimes as many as one every two minutes — but could not disconnect his phone because he relied on it for work. *Id.*

35. *Id.* at 330.

36. The court first noted that any lawsuit seeking to hold a service provider liable for exercising a "publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content" would be barred. *Id.* at 330. Zeran attempted to argue around this statutorily imposed stance by suggesting that AOL be considered a "distributor," who could be liable for defamatory statements of which it had "specific knowledge." *Id.* at 331. The court rejected this argument: first, it held that, for the purposes of defamation, AOL was ultimately a publisher, even if it was also a distributor. *Id.* at 332–33 ("[B]ecause the publication of a statement is a necessary element in a defamation action, only one who publishes can be subject to this form of tort liability." *Id.* at 332.). If AOL was a publisher, then, under the plain language of the CDA, it could not be held liable for third-party content. *Id.* at 330 ("Specifically, § 230 precludes courts from

court added that any notice that the plaintiff gave AOL about the posted content was irrelevant, referencing the Congressional desire to overturn *Stratton Oakmont*.[37]

Soon after the *Zeran* decision, other circuits echoed the *Zeran* court's interpretation of the Section 230 defenses.[38] In addition, the other circuits extended the defenses to causes of action other than defamation.[39]

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entertaining claims that would place a computer service provider in a publisher's role."). Finally, the court cited two Congressional policy considerations regarding ISP immunity: the threat tort suits would pose to the growth of free speech on the Internet and Congress's desire — in light of the decision in *Stratton Oakmont* — to encourage good-faith self-regulation. *Id.* at 330–31.

37. *Id.* at 333. Zeran was attempting to flesh out his claim that AOL should be liable as a distributor for allegedly defamatory comments of which it had specific knowledge, i.e., comments whose defamatory nature he had given notice of. *Id.* at 331–32. The court rejected this argument because, first, AOL could not be a distributor only for purposes of a defamation action, and, second, predicating Internet publisher liability on notice would frustrate First Amendment interests and discourage the good-faith self-regulation that the CDA favors. *Id.* at 332–33.

38. *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003). The case featured a dating website on which an unknown third party had posted a fake profile, pictures, and telephone number of a well-known actress. *Id.* at 1121. The court held that although some of the allegedly defamatory material was created in response to a questionnaire created by the website, this prompting did not make the website an "information content provider," as the website did not actively create or develop the content. *Id.* at 1124–25. The court additionally emphasized the policy behind CDA immunity: "to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material." *Id.* at 1122. *See also* Green v. America Online, 318 F.3d 465 (3d Cir. 2003). The court there held that the plaintiff's tort claim — that AOL was negligent in not removing harmful content from its network — treated the defendant as a publisher as it attempted to hold "AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network." *Id.* at 471.

39. *See* Gentry v. eBay, Inc., 121 Cal. Rptr. 2d 703 (Ct. App. 2002). In this case, eBay was sued for its role in the sale of sports merchandise marked with forged autographs. *Id.* at 707–08. The court held that eBay was only a disseminator of representations made by third parties that the merchandise was authentic. *Id.* at 714–15. Thus, eBay was being sued as a publisher and through Section 230 defenses was not liable. *Id. See also* Ben Ezra, Weinstein & Co. v. America Online Inc., 206 F.3d 980, 986 (10th Cir. 2000) (holding AOL not liable for false stock information available on its network because that information was developed by a third party and because attempting to hold AOL liable would treat it as a "publisher" of the information); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir.), *cert. denied*, 129 S. Ct. 600 (2008) (holding MySpace not liable for its failure to create basic safety measures to protect minors). In *MySpace*, the plaintiff circumvented the website's age restrictions by lying about her age, which allowed her profile to be viewed by other users — one of whom ended up sexually assaulting her. *Id.* at 416. The court stated that it was obvious that the plaintiff was attempting to hold MySpace liable for the content it displayed but that was actually created by the plaintiff: her profile. *Id.* at 419–20.

2. *New Directions for the CDA?*

Nearly all of the cases interpreting Section 230 defenses have found the ISPs immune.[40] A recent case, however, has changed the landscape of what courts will allow Section 230 defenses to protect. In *Fair Housing Council v. Roommates.com, LLC* an ISP was found liable for the illegality of hosted content.[41] In an en banc decision, the court held that Roommates.com, a website that assists people in finding roommates, was liable under the Fair Housing Act ("FHA") for discriminatory third-party content that it helped create and subsequently displayed.[42]

The court began its discussion by outlining contemporary Section 230 analysis. First, the court stated that the CDA "immunizes providers of interactive computer services against liability arising from content created by third parties."[43] Second, the court found that the immunity only applies if "the interactive computer service provider is not also an 'information content provider.'"[44] An information content provider is "someone who is 'responsible, in whole or in part, for the creation or development of' the offending content."[45] While a website that passively displays content is solely a "service provider," a website that is also responsible for the genesis or augmentation of content can be both a "service provider" and a "content provider."[46]

As Roommates.com was considered a service provider, the court determined if and when it had become a content provider in order to evaluate its immunity under Section 230.[47] To find a roommate on Roommates.com, a user must first create a profile.[48] In doing so, the user is prompted by the site to choose certain preferences for a potential roommate, including gender, sexual orientation, and marital status.[49] This detailed questionnaire is followed by an optional open-ended essay, which contains no prompt

40. See *supra* notes 34–39.
41. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc).
42. *Id.*
43. *Id.* at 1162.
44. *Id.* (quoting 47 U.S.C. § 230(f)(3) (2006)).
45. *Id.* (quoting § 230(f)(3)).
46. *Id.* at 1162–63.
47. *Id.* at 1163–65.
48. *Id.* at 1161.
49. *Id.*

for specific content.[50] The nature of the questionnaire proved decisive in the court's decision to find Roommates.com a content provider.

The court first held that Roommates.com was a content provider of the questionnaire itself; after all, Roommates.com had written it and required its users to respond to its questions.[51] Thus the site was also liable for the display of its subscribers' responses to those questions. The court reasoned that the site had helped develop the profile pages of its users by forcing them to complete the questionnaire[52] — Roommates.com did not just display discriminatory content; it also helped to create it by inducing responses to its questionnaire.

As *Roommates.com* was the first time any court had addressed the question of when a service provider could become a content provider, the court spent some time attempting to define what it could mean for a website to "develop" content.[53] The court stated that a developer of content is someone who "materially contribut[ed] to its alleged unlawfulness," not someone who "merely" augmented it.[54] Accordingly, to develop content under the CDA the ISP must amplify whatever factor made the content illegal. Though the court did not give examples of what would constitute development — other than the facts presented — it did offer examples of what would *not* constitute development.[55]

According to the court, using a neutral search engine to return an illicit search result does not constitute development,[56] nor does

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50. *Id.*

51. *Id.* at 1166.

52. *Id.* at 1165 ("[T]he fact that users are information content providers does not preclude Roommate from also being an information content provider by helping 'develop' at least 'in part' the information in the profiles. . . . [T]he party responsible for putting information online may be subject to liability, even if the information originated with a user."). Roommates.com used drop-down menus that limited users to certain answers and thus induced users' discriminatory preferences. *Id.* Roommates.com was also stripped of CDA immunity for its search engine, which allowed users to perform searches based on discriminatory criteria identified in user profiles. *Id.* at 1167. This liability, however, would not extend to similar searches on neutral search engines, such as Google, as they are not designed to make use of unlawful criteria; finding liability in these instances would stretch the term "develop" too far because all search engines "develop" search results. *Id.* at 1167–68.

53. *Id.* at 1166–68.

54. *Id.* at 1167–68.

55. *Id.* at 1169.

56. *Id.* The court believed this definition of development would be too broad; additionally, the court worked to distinguish the instant facts from a previous case, *Carafano*

a roommate-matching website that allows users to create their own criteria for desirable roommates,[57] nor a dating website which required users to state their sexual orientation or religion.[58] Since it is not illegal to choose one's dates based on their sexual orientation, the court reasoned that assisting a user in creating such a profile should not subject a service provider to liability.[59] In addition, plain editorial changes to content, such as fixing spelling and grammar, would not constitute "development" as they do not make content any more or less illegal.[60] The logic of the decision is that since Roommates.com had induced illegal, discriminatory answers, it had also developed the resulting content and, in turn, had become a content provider.[61]

By contrast, the court held that Roommates.com was not a content provider of any content created in response to the open-ended essay section of the user profile, as the site had not induced that content.[62] Roommates.com did not urge users to put discriminatory content in the open-ended essay; it was wholly optional.[63] Similarly, in an earlier Seventh Circuit case, Craigslist was held not liable for the passive role it played in allowing discriminatory housing postings on its website.[64] The difference was that while Craigslist hosted harmful content, the site did not contribute to its illegal nature by requesting potentially discriminatory answers.[65]

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v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003). The *Roommates.com* court differentiated this earlier case, which concerned a defamatory profile posted on a dating website, by noting that, in *Metrosplash.com*, the allegedly libelous website was created with "neutral tools" and thus Metrosplas.com did not encourage the allegedly defamatory profile. *Roommates.com*, 521 F.3d at 1171. To become a developer, a service provider needs to make the illegal content easier to create, enhance its sting, or encourage illegality. *Id.* at 1172.

57. This assertion is consistent with the earlier *Craigslist* decision. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

58. *See Roommates.com*, 521 F.3d at 1169 & n.23.

59. *Id.*

60. *Id.* at 1169.

61. *Id.*

62. *Id.* at 1173.

63. *Id.* at 1174.

64. *Id.*; *see also Chi. Lawyers' Comm.*, 519 F.3d at 666. This case was very similar to *Roommates.com*, the main difference being that Craigslist never prompted the user with questions whereas Roomates.com used open-ended essay questions. *Id.* at 668.

65. *Roommates.com*, 521 F.3d. at 1172 n.33.

This is where Section 230 immunity law stands today: if the offensive content is posted on a website where the site did not create the content and is being sued as a publisher,[66] the site will retain immunity under *Zeran* and its progeny. If, on the other hand, the website helped develop the content, it may be liable for the content only if it encouraged, or contributed materially to, the illegal nature of the content. Though the *Roommates.com* decision moves into uncharted water, insofar as it lowers the threshold for what constitutes development of content, the Section 230 defenses still allow websites more immunity from liability than the average print newspaper receives for content that could appear in its pages.[67]

B. THE TORT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

1. *A Very Brief History*

The development of the tort of intentional infliction of emotional distress, or infliction of mental suffering,[68] was partially premised on the idea that mental injuries — anxiety, grief, rage, etc. — are akin to physical injuries and should allow for recovery.[69] The tort's development was accompanied by fears of the difficulty of evaluating mental harm, of creating legal standards to measure mental harm, and of proof.[70] Many were also concerned that IIED would become a tort of "mere bad manners," forcing courts to deal with trivialities and encouraging the public to be over-sensitive to social harms.[71] Presumably, the tort would have to be rarely invoked in order to be taken seriously.

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66. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101–02 (9th Cir. 2009) ("[W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.").

67. *See* Batzel v. Smith, 333 F.3d 1018, 1037 (9th Cir. 2003) (Gould, J., concurring in part, dissenting in part) ("Congress believed this special treatment would 'promote the continued development of the Internet and other interactive computer services' . . . 'largely unfettered by Federal or State regulation.'" (quoting 47 U.S.C. § 230(b)(1)–(2) (1996))).

68. *See generally* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

69. *Id.* at 876.

70. *Id.* at 875; *see also* DAN B. DOBBS, THE LAW OF TORTS § 302 (2000).

71. Prosser, *supra* note 68, at 877 (arguing that the law should not allow recovery for every hurt feeling).

IIED began its formal life when Professor William Prosser recognized it in a 1937 article that gave the tort its name.[72] In 1948, the *Restatement of the Law of Torts* officially recognized IIED.[73] The *Restatement*, using Prosser's formulation, now divides the tort into four elements: (1) the defendant must act intentionally or recklessly, (2) the conduct must be extreme and outrageous, (3) and this conduct must be the cause (4) of severe emotional distress.[74]

The second element, limiting liability to "outrageous" conduct, responded to fears that the tort would allow litigation over trivial matters and minor slights.[75] It also quieted worries over the difficulty of evaluating emotional harm.[76] Thus, the tort was limited to a class of heinous conduct as a proxy for the harm likely to result and to ensure that the tort would not inspire frivolous litigation.[77]

Today, as then, IIED can only be used to recover for "outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance."[78] Some incivility must be tolerated, and "the plaintiff . . . must necessarily be expected and required to be hardened to a certain amount of rough language."[79] The notion underlying this limitation is that there should be a social "safety valve" available so that people may blow off more or

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72. *See id.*

73. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43–44 (1982) (describing the history of the tort).

74. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

75. Givelber, *supra* note 73 at 44–45.

76. *See* Prosser, *supra* note 68, at 877–78.

77. *Id.* at 878 ("[I]n such intentional misconduct [that gives rise to liability] there is an element of outrage, which in itself is an important guarantee that the mental disturbance which follows is serious, and that it is not feigned."); *see also* FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 9.1 (3d ed. 2006).

78. *See* Prosser, *supra* note 68, at 879. The emphasis here is on outrageous conduct: while the threshold for liability is quite high, the tortfeasor does not need to subjectively intend to cause harm for his conduct to be outrageous. *Id.*; *see also* Givelber, *supra* note 73, at 46 ("[I]ntending to inflict serious emotional distress on another does not establish liability in the absence of outrageous conduct, [and] similarly, when the defendant behaves outrageously, the plaintiff will not usually be required to show either intention to cause distress or even a deliberate disregard of a high degree of probability that it will result.") Outrageous conduct is an objective standard. *See* Prosser, *supra* note 68, at 879; *see also* Givelber, *supra* note 73, at 46–47.

79. Prosser, *supra* note 68, at 887.

less "harmless steam"[80]: not every unfavorable opinion need be swallowed from fear of liability. To this end, courts police the boundaries of what is legally sufficient to be outrageous.[81]

Over the years, courts have attempted to clarify the concept of outrage and have found several kinds of behavior to qualify. Certain extreme practical jokes have allowed recovery, as has harassment by creditors, and the manner in which employment was terminated.[82] Words, as long as they are sufficiently heinous, have also yielded liability in several contexts; these situations usually hold owners of premises catering to the public — theaters, amusement parks and the like — liable for the insults of their employees.[83] Although, Prosser cautioned that there was no reason "for limiting such liability to public utilities."[84]

The kind of behavior that would qualify as outrageous is hard to predict; outrage is a flexible standard.[85] What is clear is that the act performed is not as important as its context and the relationships between the parties involved.[86] More crucial than what a defendant does is an analysis of when and where he or she did it.[87] This analysis has garnered some scholarly attention.

2. *Outrageousness and a Tort in Need of a Context*

Contemporary commentators note that analysis of IIED reduces to one element: the outrageousness of the conduct.[88] Outrageousness has been difficult to define, however, and has neces-

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80. *Id.* Professor Rabin has emphasized that this tort has a special policy concern for "crushing liability." Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1200–02 (2009).

81. Jacqueline Becerra et al., *Common Law Intentional Infliction of Emotional Distress, Assault, and Battery*, PRAC. LITIGATOR, March 2009, at 29, 30 (noting that courts are first to decide whether a course of conduct could reasonably be interpreted as outrageous).

82. *See* HARPER ET AL., *supra* note 77, §§ 9.1, 9.2 (describing several contexts and actions likely to give rise to a cause of action under the tort).

83. Prosser, *supra* note 68, at 882–83; *see also* HARPER ET AL., *supra* note 77, § 9.1 ("Common carriers, telegraph companies, and other public utilities became especially vulnerable for emotional distress intentionally caused by their employees."). The acts of any defendant, who was in a special position to harm or harass the plaintiff, especially when such harm was likely to be particularly oppressive, are more carefully scrutinized by courts. *Id.*

84. Prosser, *supra* note 68, at 883.

85. Givelber, *supra* note 73, at 62–63.

86. *See* DOBBS, *supra* note 70, § 304.

87. *Id.*

88. Givelber, *supra* note 73, at 46.

sitated scrutiny of the context of the conduct.[89] The "relationship of the parties is important in relation to the tortious character of the defendant's conduct."[90]

"Outrage" is a naturally imprecise term,[91] but this lack of precision is also a virtue of the tort, allowing it to evolve with changes in time and place.[92] Actions that would lead an average member of the community to exclaim "outrageous!" will change between different generations and social situations.[93] It is a tort that reflects social norms.[94] In addition, some argue that judicial determinations of outrageous conduct can also serve signaling functions.[95] At least one scholar has suggested that the tort is used by judges to create a form of "private due process" between unequals.[96] In addition, this tort's built-in contextual analysis makes it uniquely adept at dealing with bad behavior on the Internet.[97] As will be shown later, the Internet requires special care.[98]

Courts have dealt with many variations of outrageousness, and there have been some contexts that have been particularly

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89. *See id.* at 62–63.

90. HARPER ET AL., *supra* note 77, § 9.1.

91. The Restatement defines "outrageous conduct" as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

92. *See* Rabin, *supra* note 80, at 1205–06 (quoting Robert C. Post, *Tort Law and the Communitarian Foundations of Privacy*, RESPONSIVE COMMUNITY, Winter 1999/2000, at 19, 26).

93. *See id.*; *see also* Givelber, *supra* note 73, at 52–53.

94. *See* Rabin, *supra* note 80, at 1205 (asserting that IIED polices "the boundary between tolerable and unacceptable behavior"). The common law has an interest in punishing only egregious breaches of social norms; otherwise, courts would be inundated with trivial lawsuits. *Id.* at 1206.

95. *See generally* Givelber, *supra* note 73. Givelber argues that IIED is unique in that it is intended to punish outrageous behavior, rather than compensate the individual harmed. *Id.* at 54. The tort is used as a tool for social regulation and helps signal social norms. *See* Rabin, *supra* note 80, at 1205–07.

96. Givelber, *supra* note 73, at 43. Some examples of these relationships are creditor-debtor, insurer-insured, employer-employee. *Id.* For more examples of such relationships, see Becerra et al., *supra* note 81, at 30–31. The existence of this pattern of relationships reinforces the idea that the tort is used to help signal social norms.

97. Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1, 33 (2002) ("[IIED] is still developing and is sufficiently flexible to address new situations that evolve from Internet activity. . . . [T]he central component of the tort, determining whether the defendant's conduct is extreme and outrageous, requires a contextual analysis.").

98. *See infra* Part III.D.

likely to give rise to outrage.[99] Abusive speech may be sufficiently outrageous,[100] especially when there is a relationship "in which the victim of the abuse is peculiarly vulnerable to injury."[101] The "outrageousness" of abusive speech, however, is susceptible to the qualification that not every slight need be addressed by the law.[102] Other factors, such as an authority relationship existing between two parties, or a pattern of harassment, are also taken into consideration in determining outrage.[103] Yet another factor helpful in evaluating the nature of the harm is whether it took place in the public or private sphere.[104] Different environments give rise to different probabilities of recovery,[105] because different environments — different contexts — yield different expectations of acceptable behavior.[106]

Abusive speech is also more likely to be actionable when it happens in conjunction with a trespass,[107] or if the victim has a reason to expect civility — such as while using a common carrier.[108] Common carriers have even been held liable if they failed to protect passengers from the harmful conduct of other passengers.[109] Similar logic has been applied to telegraph companies.[110] In short, outrage is context-specific. Outrageousness is difficult to define in the abstract; instead, analysis focuses on the parties

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99. *See* Givelber, *supra* note 73, at 62–75.
100. This Note focuses on speech, as it is most relevant to this Note's discussion.
101. HARPER ET AL., *supra* note 77, § 9.2.
102. *Id.*
103. *See* Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 200, 209–11 (1995) (chronicling the various relationship structures that are more likely to yield outrage).
104. *Id.* at 209–11. The difference between the public and private sphere is the expectation of peace and tranquility in one's home and with one's family — the private sphere — and the lack of this expectation in locations within the public sphere — such as at the workplace. *Id.* Sometimes certain levels of abuse may even be expected or even valued at work. *Id.* at 210 (quoting Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 1 (1988)).
105. *Id.* at 209.
106. *Id.*
107. HARPER ET AL., *supra* note 77, § 9.2.
108. *Id.* § 9.3. Common carriers are more akin to the private sphere than the public sphere and thus create different expectations of tolerable conduct. *See* Weiner, *supra* note 103, at 209–10.
109. HARPER ET AL., *supra* note 77, § 9.3.
110. *Id.*

involved, their relationships, their expectations, and even their locations.

Finally, the kind of harm that an IIED victim normally experiences has been likened to a dagger thrust,[111] a traumatic shock.[112] This Note, however, argues that there should be special considerations for protracted harm.[113] Harms that persist, like a knife twisting in a wound, should be given greater weight in determining whether there has been outrage.[114]

It is important to remember that the tort of IIED was not revolutionary. It was not created in response to special social or economic problems.[115] Conduct did not change at the turn of the 20th century. There was no terrible increase in bad behavior in the years leading up to 1937. What changed was the law's understanding of how people suffered harm and what relationships and situations could give rise to harm.[116] Today, the law must deal with a changing world.[117] The Internet has now allowed conduct to change, and the law must respond.

Yet Section 230 defenses stand in the way of any such response.[118] Any suit over content posted online, regardless of how base the content is, will entail suing the service provider as a publisher,[119] which will trigger the defenses. The remainder of this Note will argue that this bar to liability is in tension with the purposes of IIED and that the Ninth Circuit's *Roommates.com* decision demonstrates the way to resolving this issue.

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111. Rabin, *supra* note 80, at 1208.

112. *Id.*

113. *See id.* Rabin argues that there is a longitudinal element to both the damages required and whether there is liability in the first place. *See id.* at 1208–09.

114. *Id.*

115. Givelber, *supra* note 73, at 74 (noting the unassuming way in which the tort developed).

116. Although some have noticed that IIED is a sometimes-disfavored cause of action. *See generally* Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983 (2008).

117. The issue of cyber-bullying has garnered its own research center. *See* CYBERBULLYING RESEARCH CENTER, http://www.cyberbullying.us/ (last visited Sept. 27, 2010).

118. *See* Rabin, *supra* note 80, at 1205.

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

III. CHANGING CONDUCT, CHANGING STANDARDS, AND SOME ACADEMIC RESPONSES

Some argue that the Internet has become a utopia free from the prejudices associated with physical appearances.[120] Others highlight the dangers of the Internet and warn that claims of utopia are unfounded.[121] Whatever the virtues of the Internet, it also has a thriving, dark underbelly that has long been actively protected by the Communications Decency Act.[122] Nearly every time a suit is filed for false or malicious content posted online, the host of the content — the ISP — escapes liability and the creator of the content cannot be found. Shielding ISPs leaves victims unable to recover damages and powerless to stop the harm.

It has been suggested that "lawyers should consider the tort of intentional infliction of emotional distress to challenge and deter . . . cyberassment."[123] But words are a particular freedom enjoyed by, valued by, and protected for all: "Name-calling is ordinarily not regarded as actionable under the Anglo-American legal system, no matter how opprobrious or violent the epithet."[124]

This Part argues that words can cause more severe harm online than offline and that this harm should be legally actionable. It also contends that creator liability,[125] the only liability currently available, is an ineffective and incomplete cure. Thus Part III.A first describes what online harm is and how it manifests itself. Part III.B follows by elaborating upon the features of the

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120. *See* Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 19 COLUM. J. GENDER & L. (forthcoming 2011) (manuscript at 8–10), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374533.

121. *See generally id.* Professor Franks notes that cyberspace idealists resist regulation of the Internet — especially of speech — because any regulation can only deprive users of liberty; this argument assumes that the natural state of the Internet maximizes liberty. *Id*. at 11–13. Franks then argues that only some enjoy the unrestrained freedom of the Internet and that others, mostly women, experience "a loss of liberty and a reentrenchment of physical restraints already unequally imposed upon them in the offline world." *Id.* at 19. Thus cyberspace has never equally offered liberty to all, and legal regulation is desirable. *Id.* at 21.

122. *See supra* Part II.A. Many Internet users have been victims of, or have witnessed acts of, online harm or cyber harassment. *See* Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 392 (2009).

123. Smith, *supra* note 97, at 6–7.

124. John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 63 (1950).

125. Creator liability limits liability to the person that created the content.

Internet that can make words particularly harmful. Part III.C then argues that the underlying harm of online content is derivative of how it spreads, not what it is, and Part III.D explains that regulating the Internet should be done carefully and with acknowledgement that it is not a uniform space.

A. BAD BEHAVIOR AND WORDS ON THE INTERNET

1. *What Is Online Harm?*

Online harm takes many forms. First, online harm may include actual threats of physical violence coupled with personal references to the victim, which indicate familiarity and greater danger.[126] Second, assailants may invade their targets' privacy by obtaining information such as medical data, Social Security numbers, and home phone numbers and posting them online.[127] Third, online assaults may attempt to damage the future economic opportunities of their victims by disseminating false information online.[128] Attackers may claim that their victims are sexually promiscuous or have mental illnesses.[129] There are other types of online harm,[130] and online harm will have offline effects,[131] but the focus of this Note is on the types of harm described above — spe-

126. *See* Citron, *supra* note 14, at 69 (chronicling the different forms of online harm that the author and others have identified).

127. *Id.* at 70. The invasion and publication of personal information is described as a longer-termed harm. *Id.* ("Victims feel a sustained loss of personal security and regularly dismantle their online presence to avoid further devastation of their privacy.").

128. *Id.* at 71. This harm is akin to "digital 'scarlet letters' that destroy reputations." *Id.*

129. *Id.* at 70.

130. For more examples, see Richard Morgan, *Revenge Porn*, DETAILS, http://www.details.com/sex-relationships/porn-and-perversions/200809/revenge-porn (last visited Nov. 2, 2010); Patti Weaver, *OSU Student Faces Blackmail Charge*, TULSA WORLD, Sept. 28, 2007, at A8.

131. First, victims may be dissuaded from going online. *See* Citron, *supra* note 11, at 385. Second, victims may begin to change their behavior offline for fear that online harm will manifest itself offline. *Id.* Third, victims can be emotionally distressed for long periods of time. *See* David Margolick, *Slimed Online*, PORTFOLIO (Feb. 11, 2009), http://portfolio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying. Finally, any of the previously discussed harms may begin to affect victims' professional reputations and their future ability to find work. *See* Ellen Nakashima, *Law Students Feel Lasting Effects of Capricious Remarks*, WASH. POST, Mar. 7, 2007, at A1.

cifically, the harm of having sensitive information, true or not, easily accessible and permanently available, online.

The case of AutoAdmit.com — an online, law school–themed message board — presents a striking example of the wide-reaching consequences of online verbal assaults.[132] The case concerned two female Yale Law students who were attacked on AutoAdmit.com.[133] The students' photos were taken, without their permission, and posted online; they were verbally abused, at first unbeknownst to them, and Google searches of their names began to return AutoAdmit posts.[134] The harassment only grew worse when they learned of the posts and asked the proprietors of AutoAdmit to take the content down.[135] Even today, after a high-profile lawsuit, a search of their names will yield AutoAdmit content.[136] Since online harm begins with words, this Note next examines how words and information posted online are different from the same when said or distributed offline.

2. *There Are Words, and Then There Are Words on the Web*

The above-discussed reluctance to enforce tort actions for words is premised on the necessity for a social steam vent.[137] Sometimes people need to express anger or frustration. Such expression is not a serious enough issue to allow recovery; indeed, it even serves a valid social purpose. As long as this speech is done in the appropriate context, it is to be expected and cannot meet the definition of outrage.[138]

Courts and commentators, however, have expressed an increased sensitivity to the harm that words can cause.[139] Moreo-

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132. Citron, *supra* note 11, at 381–82.
133. *See* Margolick, *supra* note 131.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See* Prosser, *supra* note 68, at 887.
138. *See supra* Part II.B.2 (explaining the nature of outrage).
139. *See* Wade, *supra* note 124, at 66–67; *see also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing the development of liability for racial insults). There have even been calls to create a specific tort for abusive words. *See generally id.* These proposals have been met with resistance, however, on First Amendment grounds. *See generally* Marjorie Heins, *Banning Words: A Comment on "Words that Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983) (exploring potential First Amendment problems with the cause of action that Professor Delgado proposes); *see also* Eugene Volokh, *Freedom of Speech and*

ver, courts have allowed words to be actionable in some cases, such as those involving the liability of a common carrier.[140] Common carriers can be held liable for both the words of their employees and, more importantly for this discussion, for failing to protect a passenger from third-party abuse.[141]

The law singles out common carriers because an evaluation of outrage hinges on the expectations of a given situation[142]: what is outrageous depends on what is expected. The words people expect to be subject to — and, in turn, those words' power to hurt — change, once people place themselves in the care and safety of a common carrier.[143] Where, how, and from whom people encounter words determine their ability to inflict harm more than does their substance. Location and expectations — two elements that make up context — matter greatly in deciding whether certain words are outrageous.[144]

Expectations and place should be used in analyzing the effect of words on the Internet. Accordingly, this Note argues that online content should be examined with a focus on both the features of the Internet that give words their force and the concept of different "places" on the Web. Sometimes innocuous offline content becomes unexpectedly powerful online; sometimes vile offline content is powerless and even banal online.

This is because online words are different from offline words in several respects. First, the Internet has the power to change how people behave while online.[145] Second, the Internet helps provide anonymity to content creators and thus emboldens them and changes the social calculus of their actions — harm becomes

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Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You, 52 STAN. L. REV. 1049 (2000). A specific tort for words is unnecessary; the expansion and wider acceptance of IIED can provide the liability needed.

140. Wade, *supra* note 124, at 66–71. This logic has also extended to hotels, theaters, innkeepers, and elevators in general officer buildings. *Id.* at 69.

141. *Id.* at 66–67.

142. *See* HARPER ET AL., *supra* note 77, §§ 9.2. 9.3 (discussing why words accompanying a trespass are more likely to be actionable and citing the right to be free of insults from those unwelcome in one's home).

143. *Id.* § 9.3.

144. *See supra* notes 104–106 and accompanying text (explaining that outrage usually hinges on where the conduct was performed and that outrage is more easily found when wrongful conduct invades the private sphere).

145. *See* Suler, *supra* note 12.

less costly.[146] Third, the Internet magnifies the power and reach of content, altering its nature.[147]

B. FEATURES OF THE INTERNET THAT ENHANCE THE POWER OF WORDS

1. *How the Internet Changes Behavior*

Cyberspace is liberating; this freedom can change how people think and behave towards others.[148] The change can drastically alter what people are willing to do and say.[149] Online, people may become much more vitriolic than they are offline.[150] This is called the Online Disinhibition Effect.[151]

It is easier to be vile if one can avoid looking his or her victim in the eye.[152] Offline, aggressors have to anticipate their targets' reactions, look out for possible retaliations, and fear damage to their own reputations. Online, people have few social cues and restraints.[153] Moreover, this effect is aggravated when people act in mobs, as they often do online.[154] This means that online words have a greater tendency to be base and painful than offline words and that online abuse is less psychologically costly for the abuser.

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146. *See id.*
147. Smith, *supra* note 97, at 21.
148. *See* Suler, *supra* note 12.
149. *See generally id.* Professor John Suler gives several reasons for these behavioral changes. *Id.* Internet users may experience dissociate anonymity, in which they no longer feel they are themselves; invisibility; "asynchronicity" or not having to witness a counter party's immediate reaction to something; solipsistic interjection, or feeling that the social interaction is taking place solely in one's mind; dissociate imagination, a divergence between what is real and what is online; and minimizing authority, or feeling that, online, everyone is on a level playing field. *Id.*
150. *Id.*
151. *Id.*
152. *See supra* note 149.
153. *Id.*
154. Citron, *supra* note 14, at 81–84. Professor Danielle Keats Citron argues that the Web, especially Web 2.0 platforms "create a feeling of closeness among like-minded individuals," which makes these individuals exceptionally aggressive and bold in their actions. *Id.* at 83.

2. *Anonymity and the Internet*

Most of the effects described above are a direct result of the anonymity of the Internet.[155] Offline, people rarely socialize with strangers.[156] The ability to be a stranger and to meet strangers is part of the allure of the Internet[157] but is also the reason that online harm is easier to perpetrate.

The Internet provides two kinds of anonymity: identity anonymity and access anonymity.[158] Identity anonymity is the ability to create information and publish it anonymously or under a pseudonym.[159] ISPs can request user information before users are allowed to post content,[160] but there is no guarantee that this information is reliable.[161] Access anonymity, on the other hand, allows users to retrieve information anonymously.[162] Access anonymity implies that content creators have no idea and little control over who accesses their content.[163] This creates two unknowns: who created the information and who consumes it.

The two anonymities exaggerate the effect of online harm.[164] First, as discussed above, identity anonymity is integral to the Online Disinhibition Effect. Second, if victims do not know who

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155. *See* Suler, *supra* note 12.

156. *See* SOLOVE, *supra* note 15, at 32–38 (describing the role that access to new, anonymous social circles plays in allowing online harm to spread).

157. *See* Franks, *supra* note 120, at 8–10 (describing the Internet's attractive potential to shed the body).

158. Smith, *supra* note 97, at 25.

159. *Id.*

160. *Id.* With the near-ubiquitous prevalence of Completely Automated Public Turing Test to Tell Computers and Humans Apart ("CAPTCHA") technology on websites, it is fair to say that false information is a continuous and, for now, intractable problem for Internet service providers. John C. Abell, *Google Does Captcha One Better*, WIRED (Apr. 17, 2009), http://www.wired.com/epicenter/2009/04/google-goes-cap/. Identity anonymity is advantageous in that it allows people to speak more freely. Smith, *supra* note 97, at 25. Such anonymity, however, can also encourage increasingly outrageous conduct undeterred by the threat of identification or exposure. *Id.* at 26.

161. *See supra* note 18 and accompanying text (explaining how individuals, with extensive effort, may be able to hide who they are online).

162. Smith, *supra* note 97, at 26–27.

163. *Id.* at 27. Again, this anonymity has both positive and negative repercussions. *Id.*

164. *Id.* at 25–27. Anonymity may have other perverse results, too. Anonymity can make deception easier. Citron, *supra* note 14, at 124. It may allow people to say things they deeply regret later on. *See* Margolick, *supra* note 131 (reporting that the AutoAdmit posters eventually admitted remorse). Professor Daniel J. Solove has noted that anonymous posts make it more difficult to "know what information to trust and what not to trust." SOLOVE, *supra* note 15, at 145.

is posting content about them, they cannot gauge the level of threat posed.[165] Third, since the content creator has little control over who accesses the content, the creator does not know whether the content will be contained or spread.[166] Anonymity gives content creators a false sense of security that their posts are obscure when their posts may actually be viewed by thousands.[167]

Anonymity is problematic, but online anonymity is slightly misperceived. It is difficult to completely mask one's identity online; IP addresses, even if cloaked, can usually be traced back to their users[168] as they may still leave behind enough information to be traced.[169] Ultimately, anonymity can be eliminated; however, it is not clear that this drastic measure needs to be employed against one of the more treasured features of the Internet.[170] Locating a content creator may allow suits for damages but will do little to control harmful content.

3. *How Content Spreads on the Internet*

On the Internet, content has no natural life span. Visitors to a website that find the content noteworthy can copy and re-post the content on the same or another website. They can also store it. Others that find the content interesting can then link to the new site or copy and repost the content themselves.[171] In addition, some sites automatically store copies of website content.[172] Google, whenever it is asked to search a term, records the text of the websites it crawls over.[173] These cached pages, however, are not automatically updated if a website's content is revised, effec-

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165. Smith, *supra* note 97, at 42. The author argues that anonymity may leave a victim particularly terrified of and helpless to oppose content posted about them. *Id.* at 44.

166. *Id*. Some have argued that anonymity may also reduce the likelihood that users can resolve conflicts over posted content through nonlegal means. Kim, *supra* note 19, at 1010 ("If the victim of a post is unable to identify the poster, he or she is unable to resolve any conflicts or clarify an issues in a nonlegal manner.").

167. *See supra* note 160.

168. *See* SOLOVE, *supra* note 15, at 144, 147 (explaining that traceable anonymity already exists on the Internet).

169. *Id.*

170. *See* Franks, *supra* note 120, at 8–10.

171. *See* SOLOVE, *supra* note 15, at 61. Professor Solove describes linking as one of the fastest ways that information grows on the Internet. *See id.* at 50–54.

172. Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 712 (9th Cir.), *amended by* 508 F.3d 1146 (9th Cir. 2007).

173. *Id.*

tively preserving historical versions of web pages.[174] A cached page will persist and is accessible in lieu of the current version of the page, for some time.[175] Once content is out on the Internet it cannot be taken back; it is "sticky" and difficult to contain.[176] One can request that the proprietors of a site take the content down, but such requests lack teeth because proprietors generally are not liable for the content they host.[177] Content on the Internet is difficult to destroy, and the most popular content will be difficult to avoid.[178]

Moreover, it is likely that salacious content — content that the subject of such content will find objectionable — will be the content most frequently replicated. Additionally, the Internet is a "force multiplier."[179] It empowers users to reach very large groups of people very quickly.[180] This capacity allows salacious content to spread quickly and may even warrant normally unobjectionable content — such as a phone number or medical data that is harmless if contained to a limited number of viewers — to become so widespread as to become outrageous. Words benign between two persons can turn outrageous when posted on an Internet message board.[181] The change in context is crucial. Once information is notorious enough to rise to standards of outrage, it is beyond any one user's control. At that point, the only entity capable of controlling the content is its medium.[182] This feature of the Internet should be taken into account when evaluating the nature of harmful content.

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174. *Id.*

175. *Id.*

176. *See* SOLOVE, *supra* note 15, at 42 ("[I]n today's world, foolish deeds are preserved for eternity on the Internet.").

177. *See* Part II.A.

178. *See* Franks, *supra* note 120, at 27.

179. Smith, *supra* note 97, at 21–24 ("Unlike any other medium, the Internet permits anyone with ideas, information, or a message to reach vast numbers of people." *Id.* at 21.). Professor Smith notes that, in the past, the costs of distributing content increased with the size of the audience desired; the Internet largely eliminates this limitation. *Id.* at 21–22.

180. *Id.* Though the ability to reach a large group of people may be advantageous, this ability can also be used to make harassment and humiliation of others easier. *Id.* at 22.

181. *See id.*; *see also* Part II.B.2 (noting that common carriers were often held liable for the emotional distress that passengers inflicted upon one another and for the distress their employees inflicted upon the passengers).

182. Entities capable of controlling content include message board administrators and website proprietors.

However, some argue that greater access to information is socially beneficial.[183] The desire for privacy has been called a desire to "misrepresent one's self to the rest of the world."[184] Nonetheless, information spread too easily can do more harm than good.[185] Since online information is easily tied to a name, reputations are at stake.[186] Furthermore, the law has an expressed interest in emotional tranquility.[187] The balancing scale is not limited to what information is socially useful and what information is not; the harm this information creates must also be taken into account.

All of these factors — anonymity, the dissociative nature of online interaction, and the way content spreads online — make words online more powerful than the same words offline. Some argue that this combination of factors even puts online harm in a class by itself,[188] but online harm inflicts the same emotional pain that offline harm does. The crucial difference between the offline and online worlds is what creates the harmful effect of the words.

C. ONLINE HARM CANNOT BE STOPPED BY CREATOR LIABILITY

The popularity of social networking, message boards, and other websites featuring user-generated content poses a problem. Nearly all social-networking sites encourage, and thrive on, user-

183. *See* SOLOVE, *supra* note 15, at 66. The more people know about others, the argument goes, the more accurately they can gauge one another, and the more frictionless interactions will become. *Id.* The counter-argument is that learning out-of-context facts about another person can lead to inaccurate judgments. *Id.* at 67. Out-of-context facts can also lead to judgments based on social stigma and other potentially irrational reasons. *Id.* at 70–71. Professor Solove proceeds to discuss the shaming phenomenon that can accompany online content and the potential value of such shaming. *See id.* at 77–81. He argues that shaming helps enforce social norms, which are much more useful than law in keeping people in check. *Id.* at 83–87. Online shaming, however, can be disproportionate to the harm, or performed for vengeance. *Id.* at 94–99.

184. Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994).

185. *See* SOLOVE, *supra* note 15, at 101.

186. *See id.* at 33. In addition, attacks on reputations that introduce irrelevant — e.g. medical history — or untrue considerations have little value.

187. *See supra* Part II.B (discussing the tort of IIED).

188. *See* Kim, *supra* note 19, at 1010–12. This Note does not discuss the argument surrounding whether non-Internet derived law should be applied to the Internet. For a discussion on that argument, see generally Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

generated content.[189] The more people post content online, the more likely it is that the content can become harmful.[190] Content posted online is hard to control, even by its creator.[191] Once that control is lost it is irretrievable.[192]

The above is a unifying theme for all of online harm. What plaintiffs fear is not that something was written; it is that countless others will be able to read it.[193] Intentional infliction of emotional distress claims usually involve a special relationship between the victim and his or her aggressor, so that the harm is derived from who speaks, not just from what is said.[194] Most victims of online harm, however, have no idea who their attackers are.[195] Indeed, the specific words used need not be that heinous to seriously affect their victims.[196] The harm is the fear caused by the persistence of the content, the fear that the content will be seen by others and transmitted again. It is similar to the kind of harm that IIED has dealt with in the past; the tort must simply adjust to a new context.

If what victims of online harassment fear most is the constant visibility of attacks, content creators do not necessarily create the harm, and creator liability is ineffective at stopping online harm. The purpose of a lawsuit is as much to scrub the plaintiff's name

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189. Bruce L. Mann, *Social Networking Websites — A Concatenation of Impersonation, Denigration, Sexual Aggressive Solicitation, Cyber-Bullying or Happy Slapping Videos*, 17 INT'L J.L. & INFO. TECH. 252, 253 (2009). Social networks' reliance upon voluntary submission of user-submitted content may mean that anonymity is less of a problem on sites like Facebook, which require registration, but access anonymity will still exist, and fake profiles can still be created. *See, e.g.*, *Man Libelled Ex-Pal on Facebook*, SKYNEWS (July 24, 2008), http://news.sky.com/skynews/Home/Technology/Facebook-Libel-Case-Won-In-High-Court-By-Mathew-Firsht-Against-His-Former-Friend-Grant-Raphael/Article/200807415052473.

190. SOLOVE, *supra* note 15, at 4; *see also* Citron, *supra* note 11, at 386.

191. *See* SOLOVE, *supra* note 15, at 76–83. This loss of control is a result of the inability to classify other social network users as anything other than friends or not friends; the author argues that human relationships are more complex than such a simple binary opposition. *Id.* at 26–27.

192. *Id.* at 100.

193. People do not fear what is written about them in a dark corner of the Internet; they fear what appears when someone Googles their names or looks up their Facebook profiles. *See* Steven J. Horowitz, *Defusing a Google Bomb*, 117 YALE L.J. 37 (Supp. 2007).

194. *See supra* notes 103–106 and accompanying text.

195. *See supra* notes 164–165 and accompanying text.

196. *See* Brittan Heller, Responding to Internet Harassment, *Of Legal Rights and Moral Wrongs: A Case Study of Internet Defamation*, 19 YALE J.L. & FEMINISM 279, 280 (2007) (arguing that what is written online may be laughable and unrealistic and yet still powerfully harmful).

as it is for damages. Creator liability may allow a plaintiff to receive damages, but what plaintiffs more often seek is the deletion of harassing materials,[197] which creator liability cannot accomplish.[198] This Note argues that if the law desires to effectively control and stop the spread of online harm, and even erase harmful content, the law needs to move beyond creator liability and recognize that the true harm is caused by the medium of expression.

The creator of the content is not always the creator of the harm. Indeed, until the content comes to prominence, the victim rarely knows it exists. If the content were to remain in an obscure corner of the Internet, there would be neither harm nor outrage.

D. THE INTERNET IS NOT ONE PLACE AND SHOULD NOT BE TREATED AS SUCH

The tort of intentional infliction of emotional distress relies on context to determine whether or not there has been harm.[199] As discussed previously, one facet of context is location; another is the plaintiff's expectations of civility.[200] Evaluations of online harm should take into account similar considerations of context. Some places, or websites, on the Internet are more akin to common carriers[201] or even homes — places people expect to feel safe and in control. A good example of such a place is Facebook. Other places are more akin to dark alleys and bars; places where

197. *See supra* Part II.A; *see also* Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 67–69 (1993).

198. *See supra* Part III.B.3 (describing how content spreads uncontrollably on the Internet). Google and other search engines can be manipulated. *See generally* James Grimmelmann, *The Google Dilemma*, 53 N.Y.L. SCH. L. REV. 939 (2009). Large scale versions of this phenomenon are called "Google-bombs." *Id.* A "Google-bomb" is a way of manipulating Google's search algorithm to push certain websites to the top of the search results list. *Id.* at 941–43. These bombs can be quite pernicious. *Id.* at 943. Google is generally unwilling to "defuse" a Google bomb. *See* Citron, *supra* note 14, at 74 n.82 (stating the Google is usually unwilling to "fix" search results that have been altered, except in a few well known cases).

199. *See supra* Part II.B.2 (analyzing the importance of context in evaluating outrage).

200. *See id.*; *see also* Weiner, *supra* note 103, at 207–13 (contrasting the difficulty of finding outrage in the workplace with the ease of finding outrage in the home).

201. *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d. 666, 668 (7th Cir. 2008) (likening some online services to classifieds in newspapers and some to common carriers).

people have little to no expectation of civility — AutoAdmit.com is one example.[202]

AutoAdmit.com was created in response to increased censorship and monitoring that its creator experienced on another message board he had used.[203] The underlying principle of AutoAdmit was that no thread would ever be deleted by a moderator.[204] The creator believed that there would be a "deeper and much more mature level of insight in a community where the ugliest depths of human opinion are confronted."[205] Posters were attracted to this freedom, as they could become "briefly, crazily irresponsible"; "spout outrageous lies"; and "invent entirely new personalities."[206] In short, posters could do many of the things that attract everyone to the promised "utopia" of the Internet.[207]

If the idea that the law needs to provide for a social steam vent is taken seriously — and IIED does take this venting seriously[208] — then there is little reason this exception should not also be applied to conduct on the Internet. To do this, the law must respect the different expectations and rules of civility on the Internet. The same rules do not and should not apply to Facebook and AutoAdmit; the two sites are antitheses of each other. Though posts on AutoAdmit might cause harm,[209] they generally will not, alone, be outrageous. On the other hand, similar content on Facebook would be much more likely to be outrageous. Posts on Facebook are analogous to an attack on one's character in one's own home; posts on AutoAdmit are more akin to obscure and anonymous shouts in the night. Accordingly, the power of harmful content on a site like Facebook is much different from the power of the same content on AutoAdmit.

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202. *See* Brian Leiter, *Autoadmit Updates: "Two Subpoenas Away*," BRIAN LEITER'S LAW SCHOOL REPORTS (Nov. 6, 2008, 3:20 PM), http://leiterlawschool.typepad.com/leiter/2008/11/autoadmit-updat.html. Another example is 4chan.org. *See* Schwartz, *supra* note 1, at 24–26.

203. Margolick, *supra* note 131.

204. *Id.*

205. *Id.*

206. *Id.*

207. *See supra* note 120 and accompanying text.

208. *See* Givelber, *supra* note 73, at 57.

209. *See* Franks, *supra* note 120; *see also* Complaint, Doe v. Ciolli, 611 F. Supp. 2d 216 (D. Conn. 2009) (No. 3:07-CV-909 (CFD)) (listing the actual harm the two plaintiffs suffered). Both plaintiffs sought counseling, did worse in school, and incurred substantial costs. *Id.* at paras. 39, 61. In addition, they experienced difficulty finding jobs. *Id.*

Online content, however, can move at incredible speeds.[210] This fluidity means that standards for outrage must be able to respond to content that moves to different contexts.[211] What is not outrageous in one space, or at one level of popularity, can become so if it moves to another space or level.[212] Content, once hidden and innocuous, can become outrageous if it enters the public sphere.[213] Legal analysis of online harm should take into consideration the importance of context and what happens when content becomes widely accessible.

In considering online context, an excellent benchmark of content movement is Google searches. As content moves higher up the results list, it becomes more likely that this content will be considered outrageous: the content will be more visible, popular and more likely to be accessed and passed on; its context will change.[214] This evaluation will also hinge on the substance of the content, but even content that is normally benign can be outrageous if highly visible.[215]

IV. STOPPING ONLINE HARM USING CURRENT TOOLS

The tort of intentional infliction of emotional distress accounts for the different contexts of offline harm; the same logic should apply to online harm. Blunderbuss regulation could chill beneficial conduct and speech. In addition, any cure to online harm must acknowledge how information spreads on the Internet.

Part IV of this Note discusses several proposals to regulate the Internet and some of their shortcomings. This Part ultimately concludes that IIED is the best way to approach the problem of online harm and that the Ninth Circuit has given us the tools to

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210. *See supra* Part III.B.3 (describing how quickly and easily content spreads on the Internet).

211. Realizing there can be different contexts on the Internet may help the law perform its teaching function. *See* Weiner, *supra* note 103, at 195 ("Tort law generally, and the tort of intentional infliction of emotional distress in particular, frames what interests we value as a society and prescribes how human beings should treat each other.").

212. *See supra* Part II.B.2.

213. *See* Weiner, *supra* note 103, at 209–10.

214. *See supra* Part II.B.2 (noting that words said on a common carrier can be actionable as outrageous specifically because they were said in the context of being on a common carrier).

215. *See* SOLOVE, *supra* note 15, at 35–40 (discussing several examples of content that was harmless when private but debilitating to the victim when spread).

be able to do so. Thus Part IV.A showcases the scholarly attention that online harm has garnered and what this attention ignores. Part IV.B discusses the reasons why the tort of intentional infliction of emotional distress is best suited for the problem, and Part IV.C explains how the Ninth Circuit's *Roommates.com* decision can be used to deter online harm.

A. THE ATTENTION ONLINE HARM HAS RECEIVED

1. *Solutions to Online Harm*

Issues of online harm have been identified with various focuses. A few commentators have focused on the problem of cyberbullying[216] — how children abuse one another on the Internet.[217] Other scholarship, broader in scope, has argued that using classic sexual harassment doctrine and making full use of Title VII of the Civil Rights Act can combat online harassment.[218] University of Miami Law School Professor Mary Anne Franks argues that sexual harassment law should be extended to cover cases in which "the harassment is not only committed outside of the protected setting, but committed by people who are not tied to the protected setting."[219] Another scholar also argues that we should view online harm, as it is so often directed at women and minori-

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216. *See* Emily Bazelon, *Have You Been Cyberbullied?*, SLATE (Jan. 16, 2010), http://www.slate.com/id/2242666/ (noting that nearly a third of teens report being cyberbullied and that cyberbullying has been linked to some suicides).

217. *See* Shira Auerbach, Note, *Screening out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641 (2009); KrisAnn Norby-Jahner, Comment, *"Minor" Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability*, 32 HAMLINE L. REV. 207 (2009). For a discussion of how cyberbullying might be regulated by schools — and First Amendment problems with such government action — see Stacy M. Chaffin, Comment, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773 (2008); Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651 (2009). For a brief discussion of how social networks respond to threats, sexual solicitation, and other illegal activities within the networks, see Sander J.C. van der Heide, Note, *Social Networking and Sexual Predators: The Case for Self-Regulation*, 31 HASTINGS COMM. & ENT. L.J. 173 (2008).

218. *See generally* Mary Anne Franks, Sexual Harassment 2.0 (Mar. 28, 2010) (unpublished manuscript) (on file with author).

219. Franks, *supra* note 218, at 12.

ties, as a civil rights abuse.[220] In addition, there are proposals to induce website sponsors to make anonymity more difficult.[221]

Alternatively, some argue that those desiring to deter and destroy online harm could rely on the private sector. But private sector services, like ReputationDefender — which promises to monitor the Internet and get rid of content tied to its customers' names — may not be very effective.[222] Interpersonal solutions are at times possible, though often victims do not know their attackers; worse yet, a victim attempting to resist an attack may merely incite more harassment.[223] Other private remedies are feasible but would require those who are inexpert to expend a great amount of effort and resources.[224] Moreover, while these responses might bury information, they are unlikely to destroy it, thus missing the root of the problem.[225] They also fail to address the issue of emotional harm accompanying the publication of information. Recently there has also been a proposal to use promissory estoppel, avoiding the CDA defenses altogether.[226] Solu-

220. *See* Citron, *supra* note 11, at 378–90. The article notes that most often women are harassed and that the harassment is generally exclusively sexual in nature. *Id.* at 378–84. Some of the most infamous cases are those affecting women: Kathy Sierra, the online blogger who was pushed offline by threats, *id.* at 380–81; Jill Filipovic, the NYU Law student harassed on AutoAdmit, *id.* at 381–82; and Alyssa Royse, another blogger who was terrorized, *id.* at 382–83. For more examples, see *id.* at 383–84.

221. *See generally* Kim, *supra* note 19. Professor Nancy Kim's proposal is quite complex. She argues that anonymity should be made more difficult for posters of content — to help reduce the costs of litigation — and suggests policies that will slowly make non-anonymity the default rule online. *Id.* at 1019–23. Professor Kim also argues that websites should be enticed to police themselves through various carrot-like measures and that proprietorship liability should be imposed upon website sponsors. *Id.* at 1026–47. She would have all websites that *might* be used as businesses — in effect all websites — be held to the same standards as those usually applied to possessors of land. *Id.* at 1038. Such liability, she argues, would encourage websites to prevent and deter future online harm. *Id.* at 1042–43.

222. *See* Bartow, *supra* note 122, at 421, 423–28. ReputationDefender is an online service used by some victims of online harm. *Id.* at 391–92. Professor Ann Bartow argues that such services exploit and stand to profit from online misery. *Id.* at 419. They may also attempt to destroy legitimate information. *Id.* at 425. Finally, she argues that such firms' business models rely on continual Internet harm, which incentivizes them to "perpetuate the conditions" that initially made their services useful. *Id.* at 429.

223. *Id.* at 399; *see also* Citron, *supra* note 11, at 399–400.

224. Citron, *supra* note 14, at 103–06 (arguing that interpersonal solutions are ludicrously ineffective, especially for the lay individual).

225. *Id.* at 104.

226. *See* Barnes v. Yahoo!, Inc., 570 F. 3d 1096, 1106–09 (9th Cir. 2009).

tions in contract law, however, get little mention in case law and academic literature[227] and are outside the scope of this Note.

Generally, the above proposals rightly assume that ISPs are in the best positions to prevent online harm from third-party content creators,[228] but many of them are still flawed.

2. *Why These Proposals Fail*

First, proposals to limit anonymity attempt to strip the Internet of one of its most valuable resources. Anonymity is integral to the Internet's utility as a tool of expression and communication. Moreover, disposing of anonymity would only solve some of the "disinhibitive" effects of online behavior.[229] On the Internet anonymity is the default,[230] which suggests that it is a necessary and valuable feature of the medium. In addition, it should be remembered that anonymity is already partially illusory.[231]

Second, these proposals take a scattershot approach to the Internet and fail to realize that the Internet is made up of different spaces with different social rules and expectations.[232] Since the law differentiates between actions in different contexts offline,[233] the law should take the same approach with online actions. Certain websites are attractive because of the freedom they grant their users to post harmful content.[234] But the law values some incivility among citizens, and mental toughness to same, as long as it is confined to a certain context.[235] Websites are designed to serve different values and different purposes; some should be allowed to serve the vilest desires if for no other reason than to maintain a social steam vent.

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227. *Id.* The court briefly limns the issue and makes no definite pronouncement. There has been no academic writing on this possibility.

228. *See generally* Kim, *supra* note 19.

229. *See* Suler, *supra* note 12 (discussing the characteristics of the Internet that make its users crueler to one another). Moreover, disposing of anonymity could greatly chill free expression. *See generally* Volokh, *supra* note 139.

230. *See* Kim, *supra* note 19, at 1016–17.

231. *See supra* Part III.B.2.

232. *See supra* Part III.D.

233. *See supra* notes 102–106.

234. Kim, *supra* note 19, at 1045; *see also* Margolick, *supra* note 131 (detailing what made AutoAdmit so attractive to its users).

235. *See supra* Parts II.B.2, III.A.2 (describing the need for a social steam vent).

One of the victims of the AutoAdmit.com case spoke about her experience, describing the allegations against her as "absurd."[236] She also stated that those who did not know her would not know what to believe.[237] The law should help people understand when content should be trusted and when it should not be.[238] Users should approach information on sites like AutoAdmit with caution, and the law can help reflect this.

Third, policing content creators and forcing websites to deter harmful content is ineffective at stopping online harm. Nearly all proposals fail to recognize that it is content mediums that are the crucial cause of the harm.[239] Holding content creators liable might deter particularly egregious behavior, but content on the Internet is rarely ex ante outrageous. Online harassment only becomes outrageous ex post, after it is transmitted and popularized by others; the content creator often cannot control this distribution.[240] One post rarely makes for actionable or distressing online harm, making individual posts difficult to deter.[241]

Fourth, many of these proposals contradict the case law interpreting the CDA — attempts to hold Internet service providers liable for third-party content on their websites have been forbidden under the CDA[242]; or offer novel theories of liability using other areas of the law that fail to address the nuances of online activity. The law should tread carefully if it is to regulate the Internet; the Web has required minimal interference before. Ideally, the law should protect the features of the Internet that

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236. Heller, *supra* note 196, at 280.

237. *Id.* She also claimed that the AutoAdmit board is "laced with sexist, racist, homophobic, and threatening content." *Id.* at 281.

238. *See* Citron, *supra* note 11, at 411 (discussing the teaching function of the law in the context of her proposal for cyber civil rights). Professor Citron argues that the law can (1) help the public to understand the problem of online sexual harassment and the scope of damage that it inflicts upon women; (2) validate the harm in the eyes of those who suffered it; (3) change the way law enforcement and courts respond to online harm; and (4) legitimize and solidify current private efforts to eliminate online harm. *Id.* at 410–12.

239. Others who have written on this issue wish to hold content creators liable as they are the best cost-avoiders. *See generally* Kim, *supra* note 19.

240. *See* SOLOVE, *supra* note 15, at 37 (arguing that taking control of content is essential to continued freedom on the Internet).

241. As noted, the problem is often compounded by mob behavior. *See* Citron, *supra* note 14. In addition it is difficult to tell what content will become popular and what content will not. The AutoAdmit case was not, at first, a concentrated effort to harass the victims. *See* Margolick, *supra* note 131. The harm was real, but no one person caused it.

242. *See supra* Part II.A.

make it valuable. Any new law must be able to distinguish benign, beneficial content from harmful, valueless content. Finally, the law should be powerful enough to destroy content, not just provide damages.

B. HOW IIED CAN HELP CURB ONLINE HARM IN CONJUNCTION WITH THE CDA

1. *Why IIED Can and Should Be Used*

The advantage of the tort of intentional infliction of emotional distress is its flexibility. The tort does not take an indiscriminate approach to liability.[243] Much like the tort respects different contexts offline, it can also respect the different contexts of the Internet and recognize that even verifiably true, seemingly innocuous words can wreak great emotional harm if spread.[244] IIED also acknowledges all forms of emotional harm and can even deal with the protracted nature of online harm.[245] Use of this tort can reinforce the idea that different spaces on the Internet are created for different content, and the tort can help police these divisions.[246] Moreover, some theories of the tort suggest that it is a good placeholder for more slowly emerging, novel doctrine and can help create situational justice[247] as well as a kind of private due process.[248] Though online harm is not perfectly analogous to the power imbalances that the tort has heretofore dealt with,[249] aspects of online harm, such as its cost imbalances between the

243. *Id.*

244. *See* SOLOVE, *supra* note 15, at 35–38 (detailing how some content can be very harmful if widely distributed though harmless if seen by only a few).

245. *See supra* Parts II.B, III.C.

246. *See supra* Part III.D (arguing that the Internet is made up of different types of contexts). *See also* Delgado, *supra* note 139 (describing the teaching power of the law). The notion is that places that generate outrageous content are also places that solicit such content and thus often should not be supposed to be striving for truth.

247. *See* Givelber, *supra* note 73, at 74–75 ("[A] court can believe that any given decision represents a response to particularly egregious facts and not a general statement respecting legal rights.").

248. *Id.* at 75 ("The doctrine has typically been invoked, and is likely to continue to be invoked, on behalf of the noninstitutional, nonprofessional party to a variety of significant economic and commercial relations."). Professor Givelber's theory is that the tort should right wrongs that are otherwise intractable. This approach is applicable to online harm.

249. *See supra* notes 96 and 103–104.

creator and the victim of the harm, involve similar considerations.[250]

Furthermore, though there are other torts available that might achieve similar results, they are less appropriate for online harm. Examples are torts protecting privacy[251] and the tort of defamation.[252] These torts are not as malleable as IIED and may have defenses that render them ineffective.[253] Other torts likewise have little chance of getting past Section 230 defenses.[254]

Finally, some torts are friendlier to the idea of enabler liability,[255] which focuses on the entity that "set the stage for the suffering that unfolded" rather than the immediate cause of the harm.[256] The common law of IIED reflects a desire to impose liability on both the first creator of the harm and the entity that enabled the harm.[257] IIED, in allowing for common carrier liability, considers whether the party that created the context of the harm could have prevented the harm.[258]

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250. *See supra* note 146 and accompanying text (arguing that online harm is less costly to the creator and more costly to the victim). In a way, the power imbalance between attacker, distributor, and victim is similar to the kind of power dynamics that the tort has traditionally been concerned with policing. *See supra* Parts III.B.1–2 (describing the anonymous nature of most online harm). Such harm is often mob inflicted and creates natural power imbalances between victim and aggressor.

251. *See* Kim, *supra* note 19, at 1006–07, 1055–56. For a discussion of the tort of privacy, see generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4. HARV. L. REV. 193 (1890). Newsworthiness is a common law defense and has proved crippling to this tort, which has thus "floundered." Rabin, *supra* note 80, at 1204.

252. *See* Kim, *supra* note 19, at 1007.

253. Defamation is also problematic because the truth of a statement is a defense, and therefore assertions that are true, though outrageous, would not be actionable. *See* Kim, *supra* note 19, at 1007.

254. *See supra notes* 34–39 (principal alternative tort employed in CDA cases has been defamation).

255. *See generally* Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999)

256. *Id.* at 437–38.

257. *See generally* Rabin, *supra* note 80.

258. *See supra* notes 83–84 and 107–110. Enabler liability is not a new idea. Rabin, *supra* note 255, at 438. Rabin discusses several examples of enabler liability in the context of negligent entrustment. A hallmark case was one in which a great-aunt was held liable for the grand-nephew's harm because she provided him with the money to buy a car and "paved the way for a truly reckless individual to be imposing serious risks of injury on the public at large." *Id.* at 439. The author views this case under the lens of "risk facilitation" and likens it to several older cases: *Hines v. Garrett*, 108 S.E. 690 (Va. 1921), and *Cruz v. Middlekauf Lincoln-Mercury, Inc.*, 909 P.2d 1252 (Utah 1996). The former case involved a railroad conductor who forced a woman to deboard the train at a point after her stop; he was held liable for her subsequent rapes because he exposed her to the risk of walking in an unsafe area. Rabin, *supra* note 255, at 439. The latter case involved a car

Professor Robert L. Rabin, a torts scholar at Stanford, argues that enabler liability is appropriate in situations where "traditional case-by-case identification [of who caused the harm] is simply too complex a proposition to be workable."[259] When third parties enable risky situations, especially those in which a plaintiff cannot control his or her environment — e.g. parking lots, apartment complexes[260] — those that enable the harm are more likely to be held liable.[261] Many of these considerations are reflected in online harm cases. When finding the first creator is impracticable, and when the provider is not wholly responsible for the harm, creator liability is ineffective at deterring or erasing online harm. However, before IIED can strike through creator liability and hold ISPs liable, the law must be able to overcome the Section 230 defenses. With the *Roommates.com* decision, it can.

2. *Using the* Roommates.com *Decision*

Roommates.com stripped ISPs of their immunity in cases in which the ISPs were involved in "development" or "materially contributing to [the] alleged unlawfulness" of the content the ISP for which the ISP is being sued.[262] The Ninth Circuit was careful in its definition of "develop" and noted that its meaning for web-

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dealership that left the key to a car in its ignition; the car was later stolen and used to harm others. *Id.* at 440–41.

259. *Id.* at 451; *see also* Alex Kozinski & Josh Goldfoot, *A Declaration of the Dependence of Cyberspace*, 32 COLUM. J.L. & ARTS 365 (2009) (discussing some aspects of enabler liability with regard to online harm).

260. Enabler liability often focuses on situations in which a third party, usually one with deeper pockets, affirmatively enhanced the risk of the conduct. Rabin, *supra* note 255, at 449–50. Another example, somewhat more relevant to this discussion, is *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). Rabin argues that the main thrust of the opinion is to "emphasize a deterrence rationale for creating a duty to protect against third-party violence." Rabin, *supra* note 255, at 444. Rabin notes that "[n]ot only is the renter in a better position than the tenant to adopt precautionary measures, but the renter is better situated than the police to diminish the risk of criminal assault on the premises." *Id.* A similar case concerning an attack in a parking lot of a shopping center found the shopping center liable even though there had been no prior similar incidents on the premises. *Id.* at 445–46.

261. *See* Rabin, *supra* note 255, at 444-46.

262. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1169–68 (9th Cir. 2008) (internal quotation marks omitted).

sites should be context-specific.[263] The court discussed several meanings of development but ultimately focused on one most helpful for the context of the Internet: making content "usable or available."[264] In addition, the court concentrated on the idea that an ISP develops content if it adds to or creates the illegal nature of the content.[265]

The harm alleged in *Roommates.com* was a violation of the Fair Housing Act.[266] The harm anticipated by the FHA was the harm derived from discriminatory housing practices,[267] and Roommates.com was liable because it helped make those practices "possible and respectable."[268] The harm anticipated by the tort of IIED, in the context of the Internet, is that the content spreads, becomes popular, and shows up in Internet searches of one's name.[269] While the analytical tools provided by *Roommates.com* are imperfect, they confer the ability to hold ISPs liable for the harm they create.

It is imperative to remember that outrage is largely the result of how Internet mediums encourage and allow content to spread and become popular. Popularity is assisted by the willingness of ISPs to host certain content. It is also assisted by their willingness to promote themselves as places on the Internet that are receptive to salacious and malicious content. They are the ones that enable the content to spread and proliferate. Though the *Roommates.com* decision was predicated on the fact that Roommates.com had at least partially required the user to create con-

263. *Id.* at 1168–69 (noting that an overly narrow definition of "develop" would not take into account the "swift and disorderly changes that are the hallmark of growth on the Internet").

264. *Id*. (internal quotation marks omitted).

265. *Id.* at 1169 ("A website operator who edits user-created content — such as by correcting spelling, removing obscenity or trimming for length — retains his immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality. However, a website operator who edits in a manner that contributes to the alleged illegality — such as by removing the word 'not' from a user's message reading '[Name] did not steal the artwork' in order to transform an innocent message into a libelous one — is directly involved in the alleged illegality and thus not immune." (modification in original)).

266. *See id*. at 1162.

267. *Id.* at 1164 n.13.

268. *Id.* at 1170 n.26.

269. *See supra* Parts III.B.3, III.C (explaining that the true cause of online harm is the spread of injurious information).

tent in a certain way,[270] the underlying logic is that the site helped "contribute to any alleged illegality."[271] The site made illegal housing preferences more possible.[272] Similarly, ISPs contribute, develop, and make possible the outrageous — illegal — nature of the content they host. Posts, reposts, and the permanence of the content that ISPs enable, contribute to the outrageousness of the content, which is largely drawn from such content's ubiquity.[273] These posts and their content are what make sites popular and garner them revenues; they are their life-blood. *Roommates.com* asks whether the ISP helped create the illegal nature of the content;[274] ISPs that help make content outrageous also help make it illegal.

In *Roommates.com*, liability was predicated on the way in which Roommates.com helped to create its content's discriminatory nature.[275] With IIED, liability would be predicated on allowing and encouraging the content to rise to a level of popularity that makes it outrageous.[276] This approach makes the *Roommates* decision applicable to the harm and augmented illegality that ISPs create by hosting, encouraging, and popularizing harmful content. This approach is also consistent with the court's interpretation of "development" as making content "usable or available."[277]

Unlike Roommates.com, sites like AutoAdmit do not explicitly solicit outrageous content. Taken as an example, AutoAdmit, however, is a place on the Internet that is known to be uncensored and unmoderated.[278] Those who believe their hostile content will be deleted if posted elsewhere will post on AutoAdmit.[279] Normally, such an editorial decision should be acceptable and

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270. *Roommates.com*, 521 F.3d at 1167.
271. *Id.* at 1169.
272. *Id.* The court also explained that Roommates.com was being held liable for "the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal." *Id.* at 1170.
273. *Id.* at 1171 ("[E]ven if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer.").
274. *Id.*
275. *Id.* at 1169.
276. *See supra* Parts III.A, D.
277. *Roommates.com*, 521 F.3d at 1168 (internal quotation marks omitted).
278. *See supra* notes 202–207 and accompanying text. (explaining the nature of sites like AutoAdmit.com).
279. See Margolick, *supra* note 131.

unrestricted, as this content will be harmless. Until, that is, the content rises to the level of outrage. AutoAdmit's policy of not erasing or censoring content is a part of its business model and attractiveness. This policy enhances the sting of content and encourages posts of potentially outrageous content.[280] Sites that live off of the harmful content of others should be responsible for enabling this content.[281]

3. *Why the CDA Should Move in This Direction*

This proposal has several advantages. First, it is consistent with recent case law and does not require new Congressional action or radical change. It is also consistent with the common law surrounding IIED. Second, it avoids the *Roommates.com* court's fear of "death by ten thousand duck-bites,"[282] as the threshold legal issue would be whether or not activity could be reasonably deemed outrageous.[283] Third, it can better serve the goals of deterring online harm by, first, actually allowing plaintiffs to be rid of harm — ISPs are more likely to take down outrageous content when they can be liable for it — and, second, making websites aware that they must closely monitor content as it rises in popularity.[284] Fourth, it respects the different places of the Internet and does not attempt to quash content confined to reasonable contexts. Finally, fifth, it is flexible as to what kinds of content it can affect.

V. CONCLUSION

If civility cannot always be expected in the offline world, then it should also not always be expected in the online world. New technology must be embraced for its power to benefit people, even

280. Such an approach parallels the *Roommates.com* court's own litany of factors that would help it determine whether the ISP had developed content. *Roommates.com*, 521 F.3d at 1172.

281. Similarly, in *Roommates.com*, the court argued that Roommates.com "elicits the allegedly illegal content and makes aggressive use of it in conducting its business." *Id.* at 1172; *see also* Skyler McDonald, Note, *Defamation in the Internet Age: Why* Roommates.com *Isn't Enough to Change the Rules for Anonymous Gossip Websites*, 62 FLA. L. REV. 259 (2010) (arguing that *Roommates.com* can be extended to sites that solicit gossip).

282. *Roommates.com*, 521 F.3d at 1174.

283. *See* Givelber, *supra* note 73, at 46.

284. Monitoring is much easier to do with popular content than with all posts.

though it can also hurt them. We can, however, embrace new technologies while also attempting to control new harms. Holding creators liable is ineffective, counter-productive, and may over-deter. Some things, no matter how heinous, will not be outrageous in certain contexts; some things, even though seemingly innocuous, can become outrageous. Harm is created by the spread of information and that information's context, not merely by the creation of information.

The recent push through CDA Section 230 defenses may be the best direction in which the law can grow. Nevertheless, the law should tread carefully when potentially restricting speech. Broad new legislation or unconsidered reliance on civil rights or other doctrine may have heretofore unknown repercussions. A fear of change, though, should not leave plaintiffs — truly harmed — with no remedies.