# RESHAPING THE FRAMEWORK AROUND LIABILITY FOR SOCIAL MEDIA COMPANIES: HOW THEIR ALGORITHMS CAN LEAD TO PRODUCTS LIABILITY CLAIMS

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## PART I: INTRODUCTION

Social media has significantly impacted society by creating an immersive experience that allows users to easily access various new information and content. Since its existence, society has benefited from social media due to its ability to connect people from all over the world, share stories, spread awareness on issues, and even act as a vehicle for users to make a profit. Although these benefits can be vast, their adverse effects can be just as extraordinary. Social media apps have been linked to issues of distraction, disruption in sleep, exposure to bullying, unrealistic perceptions of life, and deficiencies in people's mental health.[1] These negative effects create genuine concern for user safety, but with that concern comes little to no action from social media companies to protect their users. Therefore, social media companies should be held accountable for turning a blind eye toward potential harm their users may encounter on their apps.

This potential harm is a result of how social media companies engineer their algorithms. The algorithm determines how the app will function.[2] Social media companies program their algorithms to pull data from users'

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1. Mayo Clinic Staff, *Teens and Social Media Use: What's the Impact?*, MAYO CLINIC: HEALTHY LIFESTYLE (Feb. 26, 2022), https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/teens-and-social-media-use/art-20474437#:~:text=Social%20media%20harms,much%20social%20media%20teens%20use.

2. *See* Brent Barnhart, *Everything You Need to Know About Social Media Algorithms*, SPROUT SOCIAL, (Mar. 26, 2021), https://sproutsocial.com/insights/social-media-algorithms/.

interactions to make a highly personal experience.[3] This allows these companies to keep users scrolling for as long as possible, which generates more money into their pockets because the more time a user spends scrolling, the more social media companies profit from advertisement revenue.[4] This engineering and business model can lead to social media companies putting their own needs before their users and ignoring the potential safety threats their apps create for the user.[5] This profit-centric mindset, paired with the processes of algorithms, begs the question: Who is liable for the harm these algorithms may cause to a user?

Social media companies have long escaped liability through Section 230(c) of the Communications Decency Act. This act states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[6] Thus, it protects interactive computer service providers, like social media companies, by treating them as passive publishers of third-party content.[7]

Section 230(c) has been broadly interpreted since its adoption, which has led to companies like Twitter, Meta, and TikTok escaping any liability when their apps cause harm.[8] This broad interpretation is especially cause for concern since companies are no longer passive publishers but are engineers that assemble their algorithms in a specific manner to deliver high profits.[9] It is only fair that these users are allotted some relief when these companies are creating their algorithms with the intention to disregard user safety.[10]

However, one way users could try and seek relief is through a claim of products liability. Products liability claims would avoid Section 230(c) rebuttals and consider the app's algorithm as a product. Additionally, products liability would allow users to keep the benefits of social media apps

3. *Id.*

4. *See* Hilary Andersson, *Social Media Apps are 'Deliberately' Addictive to Users*, BBC (July 4, 2018), https://www.bbc.com/news/technology-44640959; *Hearing before Sub-Comm. on Consumer Protection, Prod. Safety, and Data Sec. of the S. Comm. on Com., Sci. and Transp.* (Oct 4, 2021)(statement of Frances Haugen) https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49.

5. *See* Haugen, *supra* note, 4 at 2.

6. 47 U.S.C. § 230 (2022).

7. *See* Andrew R. Klein, *Balancing Interests Under Section 230(c) of the Communications Decency Act: Using the Sword as Well as the Shield*, 55 Loy. L.A. L. REV. 645, 649 (2022).

8. *Id.*

9. Haugen, *supra* note 4, at 2.

10. Haugen, *supra* note 4, at 1 (finding that Frances Haugen believes Facebook knows how to make its app safer but chooses not to because it risks minimizing its profits).

while also creating an incentive for social media companies to monitor their algorithms to keep their product safe.

Part I of this Note will examine the impact self-learning algorithms have on society and if social media companies can face liability through products liability claims. Part II explains how social media algorithms are engineered and how companies use them to their advantage. Part III distinguishes how Section 230(c) of the Communications Decency Act worked in the old world of social media. Part IV explores how algorithms work in the new world of social media and how products liability policies would fit with these issues. Finally, Part V concludes with a summarization of the observations made in this Note.

## PART II: BACKGROUND

### *A. The Engineering of Algorithms*

Algorithms are the power behind the product. At its core, an algorithm is "a procedure used for solving . . . (problems) or performing a computation. [Algorithms] can act as an exact list of instructions that conduct specified . . . step-by-step [actions]."[11] They are used for a multitude of different tasks that society encounters on a day-to-day basis.[12] However, no matter what tasks these algorithms are engineered to accomplish, they all start with the same process.[13] First, engineers start with a problem, which can either be developing a program or solving a real-world problem.[14] Next, engineers design an algorithm that is a clear set of instructions to command the computer to perform calculations.[15] Once the algorithm is created, it provides "the necessary and desired inputs" into the processing unit that will produce the "desired output."[16] This output is the outcome or the result of the program that is seen by the users.[17] Although this process sounds simple, it is far from it, and as technology advances, so do our algorithms.

The evolution of algorithms has been extremely apparent in the functionality of social media apps. These algorithms are constantly updating

11. Alexander S. Gillis, *What is an Algorithm?*, TECHTARGET, https://www.techtarget.com/whatis/definition/algorithm (last visited Sept. 17, 2023).

12. *See id.*

13. *See id.*

14. *See* Soni Upadhyay, *What is an Algorithm? Definition, Types, Characteristics*, SIMPLILEARN, https://www.simplilearn.com/tutorials/data-structure-tutorial/what-is-an-algorithm (last visited Sept. 17, 2023).

15. *Id.*

16. *Id.*

17. *See id.*

and changing due to the highly competitive nature of keeping users engaged. In this new age of social media, users no longer have to intentionally seek out content.[18] Instead, once a user downloads an app, the content is available at their fingertips.[19] For example, Instagram's algorithm no longer places content in chronological order on your feed. Instead, it dictates how and when a user sees "the best posts" on their feed, stories, reels, and the explore page.[20] The algorithm picks what "the best posts" are by ranking three factors: the relationship the user has with certain content or profiles, "the interest the user has conveyed" by their interactions on the app, and the "relevancy of the post."[21]

Like Instagram, TikTok has also created a system that sorts through posts and filters them to their users. However, TikTok has taken an even more aggressive approach by designing its algorithm to "decide which videos a user might like based on their interests."[22] By doing so, TikTok aims to personalize each user's "For You Page" so that no two persons have the same exact page.[23] TikTok does this by their algorithm which tracks users' interaction with the app, which allows the algorithm to "understand of human nature (and) . . . human's tendencies toward boredom" to create one of the most addicting app.[24] This approach has earned TikTok the title of "the most successful video app in the world."[25]

Although these algorithmic processes are creating a highly entertaining portal for users, there are some recent findings that these companies might be intentionally ignoring the concerns their algorithms have on user safety.[26] A recent *Wall Street Journal* reporter stated that "TikTok's [algorithm] relies heavily on how much time you spend watching each video to steer you toward more videos that will keep you scrolling . . . [which] can . . . lead young viewers down dangerous rabbit holes . . . [particularly] towards content that promotes suicide or self-harm."[27] Additionally, a confidential

18. *See* Roddy Linsday, *I Designed Algorithms at Facebook. Here's How to Regulate Them.*, N.Y. Times (Oct. 6, 2021) https://www.nytimes.com/2021/10/06/opinion/facebook-whistleblower-section-230.html.

19. *Id.*

20. Fran Saraco, *How the Instagram Algorithm Works: Up-to-Date for 2023*, SHOPIFY: SHOPIFY BLOG (June 14, 2023), https://www.shopify.com/blog/instagram-algorithm.

21. *See id.*

22. Jacqueline Zote, *The TikTok Algorithm Explained*, SPROUT SOCIAL (May 2, 2022), https://sproutsocial.com/insights/tiktok-algorithm/.

23. *Id.*

24. Smith, *supra* note 20.

25. Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html.

26. *See id*.

27. *Id.*

document was revealed to the *New York Times* by a person who was "disturbed by the app's push toward 'sad' content that could induce self-harm."[28]

These same issues were exposed when former designers of Facebook's algorithms spoke out about the troubling business methods Facebook practices to keep users engaged.[29] Roddy Lindsay, a former algorithm designer for Facebook, stated:

> "When data scientists and software engineers blend content personalization and algorithmic amplification- as they do to produce Facebook's News Feed and YouTube's recommendation engine- they create uncontrollable, attention-sucking beasts. Through these algorithms . . . they perpetuate biases and affect society in ways that are barely understood by their creators, and much less users or regulators."[30]

Since these algorithms are self-learning, the more data they collect, the more they adapt and grow, and in some ways, they grow in a manner the programmers did not foresee. Demonstrating that these companies know the risk their algorithm has on users but have little to no incentive to program, monitor, or regulate the algorithm in a way that promotes safety. Therefore, products liability would be a way to correct these problems and promote social media companies to put out a safer product.

### *B. Policies behind Products Liability*

Products liability has become one of the most dynamic theories of law due to its ability to adapt to the complexities of our ever-changing society.[31] In general, products liability refers to "liability . . . [against] a manufacturer, seller, or other party along a product's manufacturing or distribution chain for [their product causing] . . . a consumer or third-party user of that product . . . personal or property damage."[32]

Products liability sits on several policies. One of those policies is that it aims to protect the consumers rather than the manufacturers since the manufacturers are the ones putting a product out for consumer

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28. *Id.*

29. *See* Linsday, *supra* note 17.

30. *Id.*

31. John Villasenor, *Products Liability Law as a Way to Address AI Harms*, BROOKINGS (Oct. 31, 2019), https://www.brookings.edu/research/products-liability-law-as-a-way-to-address-ai-harms/.

32. CONG. RSCH. SERV., R40148, PRODUCTS LIABILITY: A LEGAL OVERVIEW (2014), https://www.everycrsreport.com/files/20140128_R40148_73b84d8c0b03e61b9c2d64dedac6f8b44742acc5.pdf.

consumption.[33] This rationale stems from corrective justice principles that aim to compensate the victim for the manufacturer not taking steps to ensure safety in the consumer market.[34] In the *Escola v. Coca Cola Bottling Co.* case, the Supreme Court of California backed this policy by stating that "those who suffer injuries from defective products are unprepared to meet the consequences."[35] The court notes that since those consequences are burdensome, the manufacturer is in a better position to cover those consequences.[36]

Additionally, products liability aims to deter and incentivize manufacturers from exposing the public to dangerous products by holding manufacturers accountable for negligently made products or not taking steps to safeguard the product's safety.[37] Thus ensuring that "future actors [have] a material incentive to either take precautions while acting or to avoid the activity altogether."[38] This rationale assumes that individuals make certain business decisions based on weighing the costs and benefits of their activity.[39] However, most individuals only consider costs that they will "have to bear [and not] the cost imposed [onto] others."[40] Consequently, the possibility of facing a products liability claim forces these individuals to consider the external costs of their actions when they choose to act.[41] Deterrence recognizes that without this enforcement, many actors feel very little incentive to operate in accordance with social welfare principles.[42]

The above policies speak to the lack of support social media users have in the modern world. When social media algorithms harm a user, there are few outlets for these users to seek any form of recovery. Therefore, products liability claims would be a way for users to get around roadblocks and get the justice they deserve to be awarded.

33. *See* Karni A. Chagal-Feferkorn, *Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, 30 STAN L. POL'Y. REV. 61, 77- 81 (2019); *Id.* at 77.

34. *See* John C. P. Goldberg, *Twentieth Century Tort Theory*, 91 Geo. L. J. 513, 570 (2003).

35. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944).

36. *See id.*

37. *See* Chagal-Feferkorn, *supra* note 31 at 77–82 (2019).

38. Goldberg, *supra* note 32, at 544.

39. *See id.*

40. *See id.* at 545.

41. *See id.*

42. *See id.*

## PART III: IDENTIFYING THE PROBLEM UNDER THE CURRENT SYSTEM

Social media companies have long escaped liability through the current judicial framework. Courts have repeatedly viewed Section 230(c) of the Communications Decency Act as a way to immunize social media companies from users' lawsuits. Section 230(c) states, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[43] Thus, Section 230(c) protects social media companies by treating them as publishers of content[44] and therefore eliminating responsibility for the content posted by the user. Additionally, it allows these companies to make editorial changes by deciding what content they want to remove without being liable for what they did not remove.[45]

Legislators adopted Section 230(c) after the unfavorable ruling of the 1995 *Stratton Oakmont* case.[46] This case involved an anonymous user posting on Prodigy Services' online bulletin board accusing Stratton Oakmont of fraudulent activity.[47] Stratton then sued Prodigy for acting as an active "publisher" of the poster's defamatory statements.[48] The court found that Prodigy was liable for the user's post because they "exercised editorial control" in its forums, [and therefore Prodigy] was no longer a passive publisher of information.[49] Many legislators disagreed with placing this type of liability on sites like Prodigy and instead wanted to encourage online activity while providing internet service providers with robust protection. [50] Thus, legislators invoked Section 230(c) to allow for the activity demonstrated by Prodigy Services and to reduce the risk of online platforms being "sued out of existence."[51]

From 1995 to 1997, the courts accessed issues similar to *Stratton Oakmont* and accurately applied Section 230(c). In *Zeran v. America Online* (AOL), the court found immunity for AOL, an online bulletin board, when Zeran sued AOL for "[taking an] unreasonable [amount of time] . . . in removing defamatory messages posted by an [anonymous] third party, [refusing] to post [a retraction] of those messages, and failing to screen for

43. 47 U.S.C. § 230 (2022).

44. *See id* at § 230.

45. *See* Klein, *supra* note 7, at 649.

46. *See id.* at 648-652; *see* Stratton Oakmont v. Prodigy Serv. Co., 1995 N.Y. Misc. LEXIS 229 *1, *9 (1995).

47. *See* Klein, *supra* note 7, at 648-49; *See generally* Stratton*,* 1995 N.Y. Misc. LEXIS 229.

48. *See* Klein, *supra* note 7, at 653; *See* Stratton*,* 1995 N.Y. Misc. LEXIS 229 at *7-10.

49. *See* Klein, *supra* note 7, at 648-49; Stratton*,* 1995 N.Y. Misc. LEXIS 229 at *3 & *7.

50. *See* Klein, *supra* note 7, at 648-49.

51. *Id.* at 649.

similar posting thereafter."[52] The court stated that Section 230(c) of the Communications Decency Act immunizes AOL from liability for information that originates from third parties.[53] Thus, the court reinforced that internet services providers cannot be responsible for what a user posts on their platform.

Similar to the court in *Zeran*, in *Hassell v. Bird*, the court examined if Yelp was liable for Hassel's former client posting disparaging comments about Hassel on Yelp's platform.[54] In the trial court, Hassel won and Bird was ordered to take down the comments.[55] The trial court also ordered Yelp to take down any existing and any future reviews by Bird and her agents.[56] Yelp contended this ruling, stating that the ruling violates Section 230(c).[57] The California Supreme Court agreed with Yelp that this ruling went beyond the scope of Section 230(c) and should be revised to comply with Section 230(c) to not impose any liability on Yelp.[58] Thus, *Hassel v. Bird* demonstrates the court's solidity in removing liability from social media companies when they are facing issues that Section 230(c) was born to prevent.

However, the above cases also demonstrate how Section 230(c) is not applicable to the developing complexities of the social media ecosphere. *Stratton Oakmont v. Prodigy Services, Hassel v. Bird,* and *Zeran v. American Online* pose repetitive issues: an online service provider facing liability for defamatory statements posted by an anonymous user. These issues are precisely what Section 230(c) aims to prevent, so it is easy to understand the outcome of the above cases. However, in today's social media world, issues of a third party suing an online service provider for another user's defamatory posts are almost obsolete. Instead, users face issues that pose much more significant harm.

Much of the harm that users face today does not stem from third-party content but derives from the platform's algorithm and the programmers' control over what users see on the platforms. For example, in *Doe v. Backpage.com*, multiple minors sued Backpage.com for the website promoting them for illicit sex trade and sex trafficking to predators.[59] The

52. Zeran v. Am. Online Inc., 129 F.3d 327, 328 (4th Cir. 1997).

53. *See id.* at 328.

54. Hassel v. Bird, 420 P.3d 776, 778-779 (Cal. 2018); HAWKINS PARNELL & YOUNG, LLP, *Hassel v. Bird: What's the Big Hassle, Yelp?*, https://www.hpylaw.com/publications/hassell-v-bird-whats-the-big-hassle-yelp/ (law firm blog discussing the *Hassel* case)(last visited Sept. 17, 2023).

55. *See Hassel*, 420 P.3d at 795.

56. *See id.* at 795-96.

57. *See id.* at 796.

58. *See id.* at 779.

59. Doe v. Backpage.com, 104 F. Supp.3d 149, 151 (Mass. D. 2015).

plaintiff argues that Backpage had active control over the content on the website "by: (1) posting illegal materials in sponsored ads; (2) stripping metadata from posted photos; (3) coaching the crafting of ads by allowing misspellings of suggestive terms; and (4) designing the escorts section of the website in such a way as to signal to readers that sex with children is sold here." [60] Thus, the plaintiffs argued that Backpage cannot be a passive publisher of information and should not be afforded immunity under 230(c) because their deceptive business practices are what caused the harm suffered by the plaintiffs.[61] However, the court still saw this as a Section 230(c) issue and found immunity for Backpage.com.[62] This ruling indicates that courts are willing to apply Section 230(c) when the harm has escalated to something so dangerous as child sex trafficking. Furthermore, this case shows the fatal flaws of applying Section 230(c) when the issue is not similar to that of *Stratton Oakmont v. Prodigy Services*.

In addition to issues and harms escalating since the enactment of Section 230(c), so have algorithms. Prodigy, AOL, and Yelp's algorithms allowed these platforms to act as hosts, which made users affirmatively seek out specific information on their platforms. However, this type of programming is outdated for internet service providers like social media companies. When users go onto Instagram, TikTok, Facebook, Twitter, or YouTube, they no longer need to seek out information; it is at their fingertips. Instead of programming algorithms that display content, social media companies have developed algorithms that affirmatively push content onto the users, dictating how the user interacts with the app. Thus, no longer making these social media companies passive publishers, and instead giving them the power to dictate how their platforms affect users.

Therefore, the broad interpretation of Section 230(c) leaves users without a remedy while social media companies are advancing their algorithms in ways that generate serious harm. Although Section 230(c) has a place in the legal system, there needs to be another way to check social media companies to minimize the risk of the harm their apps may cause. Having social media companies adhere to the laws of products liability would shift the focus of liability towards taking measures to safely program, regulate, and monitor their algorithms. Thus, the issue is no longer about third-party content on the app, but it's about the lack of oversight over a product.

To further this distinction, consider the current complaint filed against TikTok and Byte Dance. Saltz Mongeluzzi and Bendesky are the parents of

60. *See id.* at 156.
61. *See id.* at 162.
62. *See id.* at 165.

their ten-year-old daughter, Nylah, who passed away doing the viral TikTok challenge called "the blackout challenge."[63] If the court sees this as a Section 230(c) issue, there is no way for these parents to receive relief because the court would most likely find TikTok immunized from this lawsuit since they are the publisher of the third-party content.

However, a products liability argument does not concern itself with holding the company liable for being a publisher of content. Instead, it seeks to hold TikTok liable for its defective product. In a products liability lawsuit, courts would view TikTok as a manufacturer or distributor of their algorithm and assess whether the algorithm is programmed safely and given the proper oversight. Therefore, it is clear that a products liability claim does not entirely shut the door for the plaintiff and instead opens up a new door for the possibility of relief. Furthermore, it replaces the Section 230(c) scapegoat argument with a new framework that looks at social media companies' business practices rather than what is on the app.

## PART IV: WHY PRODUCTS LIABILITY CAN BE A SUCCESSFUL ALTERNATIVE

### *A. The New World*

Social media is vastly different from what users experienced during the birth of Section 230(c) due to the advancement of algorithms. TikTok, Instagram, Twitter, YouTube, and Facebook all intentionally program their algorithms to learn about their users to target specific content toward them.[64] Through this programming, third-party content is no longer the only source of harm; instead, social media companies play a massive role in putting users at high risk of mundane and severe harm.

Unlike the bulletin board platforms in *Stratton Oakmont v. Prodigy*, *Zeran v. American Online*, and *Hassell v. Bird*, most of the social media platforms now program their algorithms to be self-learning creating a highly personalized and addictive experience.[65] A self-learning algorithm is

63. Aleez Furman, *TikTok's Algorithm Blamed for Girl's Death in 'Blackout Challenge' Stunt in Products Liability Lawsuit*, THE LEGAL INTELLIGENCER ONLINE, (May 13, 2022), https://www.law.com/thelegalintelligencer/2022/05/13/tiktoks-algorithm-blamed-for-girls-death-in-blackout-challenge-stunt-in-products-liability-lawsuit/?slreturn=20230823031210.

64. *See* Kc Ifeanyi, *Inside the Good, Bad, and Very Ugly of Social Media Algorithms*, FAST COMPANY (June 6, 2022), https://www.fastcompany.com/90761087/inside-the-good-bad-and-very-ugly-of-social-media-algorithms.

65. *See* Rajat Narang, *4 Ways Self Learning Algorithms are Impacting Business- And Customers Don't Even Realize It*, ABSOLUTDATA, https://www.absolutdata.com/blog/4-ways-self-learning-algorithms-are-impacting-business-and-customers-dont-even-realize-

programmed to "refine its own performance"[66] by simulating human learning, which "allows [the algorithm] to identify and acquire knowledge from the real world, and improve [its] performance tasks, based on [its] new knowledge."[67] Due to this programming, the algorithms have the power to act in ways that programmers did not anticipate, these unanticipated actions can result in risks like users developing "depression, anxiety, loneliness, self-harm, and even suicidal thoughts" [68] from interacting with the algorithm.

These algorithms have free rein to learn and adapt from the collected data, which can create harmful pitfalls like the "'rabbit hole'" effect.[69] The algorithm creates this effect by serving up content related to what the users like and interact with on the app.[70] When this algorithmic behavior is unchecked the algorithm collects more data and streamlines more "niche or extreme" content to keep the user's attention.[71] This can lead users down a dark hole of content that promotes addiction rather than health.[72]

Instead of social media companies addressing these issues, they use them to their advantage. Companies like Facebook specifically program their algorithms to target vulnerable groups like young teenagers because there is a greater chance that they become addicted to the app which ensures more advertisement revenue.[73] TikTok also follows these practices and is now facing multiple lawsuits from the parents of multiple children, ages eight to ten, all of whom died due to a TikTok challenge that was aggressively pushed onto their feed.[74] Eight-year-old Lalani Erika Walton, nine-year-old

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it/#:~:text=Essentially%2C%20a%20self%2Dlearning%20algorithm,analyze%20a%20ton%20of%20information (last visited Sept. 17, 2023).

66. *Id.*

67. Maria Alessandra Golino, *Algorithms in Social Media Platforms*, Institute for Internet & the Just Society (Apr. 24, 2021) https://www.internetjustsociety.org/algorithms-in-social-media-platforms.

68. Lawrence Robinson and Melinda Smith, *Social Media and Mental Health*, HELPGUIDE.ORG (Dec. 20, 2022), https://www.helpguide.org/articles/mental-health/social-media-and-mental-health.htm#:~:text=The%20negative%20aspects%20of%20social%20media&text=However%2C%20multiple%20studies%20have%20found,about%20your%20life%20or%20appearance.

69. *See* Anna McKenzie, *Social Media's Problem with Predatory Algorithms*, THE MEADOWS (Apr. 12, 2022), https://www.themeadows.com/blog/social-medias-problems-with-predatory-algorithms/.

70. *See id.*

71. *Id.*

72. *Id.*

73. Natasha Lomas, *Facebook Accused of Continuing to Surveil Teens for Ad Targeting*, TECHCRUNCH (Nov. 16, 2021), https://techcrunch.com/2021/11/16/facebook-accused-of-still-targeting-teens-with-ads/.

74. *See* Furman, *supra* note 59; *Social Media Victim Law Center Files Wrongful Death Lawsuits against TikTok for Two Children's Death Resulting from its "Blackout Challenge,"* SOCIAL MEDIA VICTIMS L. CTR. (July 5, 2022), SMVLC Files Wrongful Death Lawsuits Against

Arriani Jaileen Arroyo, and ten-year-old Nylah all passed away from the "Blackout Challenge" that TikTok's algorithm kept broadcasting to them when it understood they were vulnerable to that type of content.[75]

Therefore, it is not the content harming the user, but it is the algorithms that these companies are actively programming to target individuals and keep their attention for as long as possible. These companies lack any interest in safely regulating or programming their algorithms, and instead, they would rather run the risk of a lawsuit since the courts have created a "fortress of protection around them."[76] Products liability may be a new avenue to hold these companies accountable and make apps safer.

### *B. How These New World Issues Fit Within Products Liability*

Products liability can be a successful way for users to seek compensation for the harm they experience from interacting with social media algorithms. When looking at the harm done to the user, products liability would shift the narrative to social media companies acting as manufacturers or sellers of their product. Courts can have a new approach to reconcile the vast deference they have given to social media companies by viewing an algorithm as a defective product or a defective component of a product.[77]

One of the main goals of products liability is to compensate the victim so that they are "restored back to a position they were in prior to the defendant's harmful conduct."[78] This rationale is born from the corrective justice principles in which tort liability aims to "correct the wrong committed based on justice and fairness considerations."[79] This general principle aligns with the current issues our legal systems face with the evolution of algorithms. There seems to be a lack of fairness to the user that these product liability goals could correct.

Because products liability aims to protect the consumer, it applies a special responsibility towards manufacturers and sellers that want to distribute their product into the consumer market.[80] Products liability assumes that the users who purchased the product rely on the manufacturer's

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TikTok for Two Children's Deaths Resulting from its "Blackout Challenge" Social Media Victims Law Center

75. *See* Furman, *supra* note 59; *See* SOCIAL MEDIA VICTIMS L. CTR., *supra* note 71.

76. *See* Klein, *supra* note 7, at 654.

77. *See* Chagal-Feferkorn, *supra* note 31, at 86.

78. *See id.* at 77; Sahara Shrestha, *Nature, Nurture, or Neither?: Liability for Automated and Autonomous Artificial Intelligence Torts Based on Human Design and Influences*, 29 GEO. MASON L. REV. 375, 379 (2014).

79. Chagal-Feferkorn, *supra* note 31, at 77.

80. *See id.* at 78.

advertisements that the product is safe.[81] Hence, it is only fair that a consumer is compensated when a manufacturer profits off the consumer's purchase but doesn't live up to the end of their promise.[82]

Therefore, when social media companies are programming their algorithms to gather personal data from their users, they should be held to the same special responsibility manufacturers are held toward their consumers. They are not only putting their product out in public, but they are also intruding on their consumers' private conduct to learn how to target certain advertisements and content toward each user.[83] Although this leads to the apps being an interactive success, it also leads to significant harm, as demonstrated above. Thus, these companies should have a special responsibility towards their consumers to obtain safety requirements that users rely on, especially since these companies lack transparency about the inter-workings of their algorithms.[84]

Products liability aims to deter manufacturers and sellers from creating dangerous products and incentivizes these companies to create a product that avoids future harm.[85] With the threat of liability on the other side of public distribution, manufacturers and sellers are more likely to improve the safety of their product.[86] With little to no incentive from the courts, social media companies do not take steps to ensure they have safe operating algorithms.

Instead, these companies use their self-learning algorithms to their advantage without regulating them after they have been programmed.[87] This allows the algorithms to grow stronger, and even though they are working exactly how they are supposed to, they garner too much power over users and create an unsafe environment.[88] Therefore, it is imperative that these companies feel a need to step in and regulate their algorithms to maintain a safe product.

Moreover, these companies are the ones with full knowledge and understanding of how their algorithms work, which puts them in the best position to "eliminate or reduce the risk associated with the product and take

81. *See id.*

82. *See id.*

83. *See* Lomas, *supra* note 69.

84. Lee Rainie, Cary Funk, Monica Anderson, and Alec Tyson, *Mixed Views about Social Media Companies using Algorthims to Find False Information*, Pew Rsch. Ctr. (Mar. 17, 2022), https://www.pewresearch.org/internet/2022/03/17/mixed-views-about-social-media-companies-using-algorithms-to-find-false-information/.

85. Chagal-Feferkorn, *supra* note 31, at 78; Shrestha *supra* note 74, at 379.

86. Chagal-Feferkorn, *supra* note 31, at 78.

87. *See* Haugen, *supra* note 5, at 2.

88. *See id*; *See* Ifeanyi, *supra* note 60.

quality control measures."[89] However, as it is known now, social media companies do not do any of this. Instead, they intentionally program their algorithms to become self-learning beasts that will keep users' attention to gather more revenue.[90]

In addition to these companies being the programmers of the algorithms, these companies are generally in a better position to absorb the costs of damages rather than the consumer carrying the financial weight of their injury.[91] Companies like Meta, Twitter, and TikTok are all billion-dollar companies, which makes them well-equipped to take on the financial burden when their product subjects harm to their users.[92]

One way to view algorithms in the framework of products liability is to look at algorithms as a design defect.[93] This type of products liability claim shifts the focus on the "algorithmic decision makers."[94] A design defect is a flaw in the product's design and is governed under strict liability.[95] Strict liability does not concern itself with the manufacturer's or seller's knowledge about the defect; instead, it only looks at whether a consumer was harmed, and if so, the manufacturer can be held strictly liable.[96]

For a design defect, the question to consider is whether "the design defect occurred when foreseeable risks associated with the product could have been minimized by using a feasible [and] safer alternative."[97] There are some criticisms of applying this type of rationale toward algorithms.[98] One criticism is that manufacturers lack the capacity and foresight to program the intelligent AI to avoid all situations that might result in harm. AI behaves unpredictably while AI also reaches goals that the programmer asked for; programmers cannot understand how the AI reached that goal."[99]

However, social media companies are purposely programming their algorithms to learn like human beings by collecting data and predicting users' interactions on the app[100], indicating that these companies can foresee how

89. Chagal-Feferkorn, *supra* note 31, at 79.

90. *See* Andersson, *supra* note 4.

91. Chagal-Feferkorn, *supra* note 31, at 78.

92. *See generally,* Shelley Walsh, *The Top 10 Social Media Sites & Platforms 2022*, SEARCH ENGINE J. (May 30, 2022), https://www.searchenginejournal.com/social-media/biggest-social-media-sites/#close.

93. *See* Chagal-Feferkorn, *supra* note 31, at 80.

94. *Id.*

95. *See id.*

96. *See id.* at 79.

97. *Id.* at 80.

98. Shrestha, *supra* note 81, at 385.

99. *Id.*

100. *See id.*

AI will perform. Maybe earlier in the development of algorithms, this foreseeability would be harder to manage, but in today's world, it seems these companies know about the risk and choose not to act.

Additionally, Frances Haugen, the Facebook Whistleblower, has made it known that Meta knows how to "make Facebook and Instagram safer" but chooses not to because they put their "immense profits before people."[101] Furthermore, "Facebook has realized that if they change the algorithm to be safer, people will spend less time on the site, and [Facebook] will make less money."[102] Thus, it is clear that there is another alternative to creating safer algorithms, but with the lack of liability these companies face, there is no incentive to act on that alternative.

A design defect is one way for users to try and hold social media companies liable. Products liability is an umbrella term with many different avenues for plaintiffs to bring a claim against the manufacturer or seller. This opens the door for users to bring a claim best suited to the harm they face through these unsafe algorithms.

Additionally, this Note provides clear evidence that allowing free rein for social media companies to experiment with the innovation of algorithms has only led to innovations that have put more money in their pockets. Although society has intangibly profited off these apps, it comes with a sufficient risk. Therefore, product liability allows social media companies to be held accountable in a matter that looks beyond liability over third-party content.

## PART V: CONCLUSION

Social media apps' power over society has grown exceptionally over the years, and with that power comes a lack of oversight and safety interest from their owners. It is time that social media companies are held liable for their affirmative action in their self-learning algorithms. Their knowledge of the risk they are putting their users in can no longer be tolerated when they have created a system that purposely "amplifies division, extremism, polarization, violence, self-hatred, and even death."[103]

This Note aims to show an alternative avenue for users to seek compensation against these companies by moving away from Section 230(c) discussion and moving towards a new claim of products liability. Products

101. Haugen, *supra* note 4.

102. Chad De Guzman, *The Facebook Whistleblower Revealed Herself on 60 Minutes. Here's What You Need to Know*, TIME (Oct. 4, 2021), https://time.com/6103645/facebook-whistleblower-frances-haugen/.

103. Haugen, *supra* note 4.

liability rationales align with the issues society faces in the new world of social media algorithms. Additionally, products liability allows these companies to be publishers of third-party content while still creating boundaries for social media companies by incentivizing them to create a safe platform. By shifting the focus onto products liability, the court would give users a fighting chance to be compensated for the harm the algorithm caused them.