

# A WRONG IN SEARCH OF A DUTY: PUBLIC NUISANCE, SOCIAL MEDIA AND THE YOUTH MENTAL HEALTH CRISIS

*Charles Bachmann\**

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\* Staff Editor, *Cardozo Journal of Equal Rights and Social Justice*, Volume 30; J.D. Candidate (May 2025), Benjamin N. Cardozo School of Law; B.A., Philosophy and Chinese Language, Hunter College, 2017. I would like to express my gratitude to Nigel Halliday and Tyler Nappo for their exceptional assistance in editing my manuscript and refining my thesis. Professor Anthony Sebok gave thoughtful feedback and asked challenging questions. The CJERSJ staff worked hard to make this piece the best that it could be. Brittany, Rosalie, Mom, Dad, Tracey, Kenny, and Larry provided endless love and encouragement. Finally, I owe my entire career in law to the support and mentorship of Parvin Aminolroaya, Dave Buchanan, and everyone else at Seeger Weiss LLP.

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*It's not unusual for us to receive an email from somebody saying, 'I spend all of my time on your website and now I have less of a social life than I had before.'"*

– Mark Zuckerberg, November 2004.<sup>1</sup>

*"I'm sorry for everything you've all gone through. It's terrible. No one should have to go through the things that your families have suffered."*

– Mark Zuckerberg, January 2024,  
speaking directly to parents whose children's suicides  
or sexual exploitation were facilitated by Instagram.<sup>2</sup>

## PART I: INTRODUCTION

In the early years of this century, social media<sup>3</sup> was touted as a transformative force for good, with the power to enrich the human experience and create more free and just societies.<sup>4</sup> The founders of social media

<sup>1</sup> Matt Nagowski, *The Face Behind Thefacebook.com*, MSNBC (Nov. 30, 2004), <https://web.archive.org/web/20041204092758/http://www.msnbc.msn.com:80/id/6596533/site/newsweek>.

<sup>2</sup> Angela Yang, *Mark Zuckerberg Apologizes to Parents at Online Child Safety Hearing*, NBC (Jan. 31, 2024, 12:40 PM) <https://www.nbcnews.com/tech/social-media/mark-zuckerberg-apologizes-parents-online-child-safety-hearing-rcna136578> [<https://perma.cc/UFN9-JQES>].

<sup>3</sup> This Note is principally concerned with the five social media platforms used most by American children: Facebook, Instagram, TikTok, YouTube, and Snapchat. EMILY A. VOGELS, RISA GELLES-WATNICK & NAVID MASSARAT, PEW RSCH. CTR., *TEENS, SOCIAL MEDIA AND TECHNOLOGY 2022 3* (August 2022). Facebook is centered around the “News Feed” which is composed of text, video, and image-based updates from the profiles of other users, and Instagram, which is focused on image and video content, are both owned by Meta, Inc. Mark Hall, *Facebook*, BRITANNICA MONEY (Aug. 17, 2024), <https://www.britannica.com/money/Facebook> [<https://perma.cc/5CSS-3SGG>]; Allison Elridge, *Instagram*, BRITANNICA MONEY (Aug 17, 2024), <https://www.britannica.com/money/Instagram> [<https://perma.cc/TH9R-EKTR>]. TikTok, owned by ByteDance, exclusively hosts short-form videos. TARA RAMANATHAN, ENCYC. BRITANNICA, *TIKTOK* (Feb. 16, 2024), <https://www.britannica.com/topic/TikTok> [<https://perma.cc/2VL9-6VMP>]. YouTube, owned by Alphabet (formerly known as Google), is a video-hosting platform that also uses algorithms to serve videos to users and incorporates commenting and community features. WILLIAM L. HOSCH, *YOUTUBE*, ENCYC. BRITANNICA (Feb. 16, 2024), <https://www.britannica.com/topic/YouTube> [<https://perma.cc/33QX-W344>]. Snapchat, owned by Snap, Inc., focuses on “ephemeral” videos and images, which disappear permanently after a period of time. Pares Dave & David Pierson, *Cheap Content, Growing Reach Make Snapchat a Fast-Rising Star*, L.A. TIMES (Apr. 16, 2015), <https://www.latimes.com/business/la-fi-snapchat-new-business-20150417-story.html>.

<sup>4</sup> For a representatively hagiographic profile of Facebook, see, e.g., DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD 9* (2010). In the prologue, Kirkpatrick wonders whether Facebook “[c]ould . . . become a factor in helping bring together a world filled with political and religious strife and in the midst of environmental and economic breakdown?” *Id.* In the political sphere, social media companies were quick to congratulate themselves for their role in catalyzing pro-democracy protests in authoritarian states. See, e.g., Brad Stone & Noam Cohen, *Social Networks Spread Defiance Online*, N.Y. TIMES (June 15, 2009), <https://www.nytimes.com/2009/06/16/world/middleeast/16media.html> (discussing the alleged importance of its product in protests against the Iranian government, Twitter delayed “a planned shutdown

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companies thought of themselves as social engineers more than just businesspeople and technologists and prided themselves on moving fast and breaking things.<sup>5</sup> Although social media has indeed proven to be a profoundly disruptive technology, the optimism of those early years has soured.<sup>6</sup> Social media has been employed by genocidaires in Myanmar,<sup>7</sup> terrorist groups in Western Asia,<sup>8</sup> and political saboteurs around the world.<sup>9</sup> It is used to snoop on journalists<sup>10</sup> and hosts massive repositories of child sexual abuse material.<sup>11</sup> The quotidian operations of social media companies

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for maintenance for a day, citing “the role [it] is currently playing as an important communication tool in Iran”). With the benefit of hindsight, however, it seems that the ability of social media platforms to foment social movements and revolutions has been significantly overstated. See MAGDALENA WOJCIESZAK, BRIAR SMITH & MAHMOOD ENAYAT, FINDING A WAY - HOW IRANIANS REACH FOR NEWS AND INFORMATION 38 (2013) (during the 2009 unrest, “Twitter was the least prevalent new media platform used by both the general population and the youth samples”); Chonghyun Christie Byun & Ethan J. Hollander, *Explaining the Intensity of the Arab Spring*, 24 DIGEST OF MIDDLE EAST STUD. 26, 40 (2015) (“Certainly, we do not find any evidence that access to electronic media contributed to the likelihood of unrest [during the Arab Spring]. Neither Internet access, nor cell phone penetration, nor Twitter or Facebook use correlated in any significant way with higher levels of unrest.”).

<sup>5</sup> In 2012, Mark Zuckerberg wrote in a letter to investors that “Facebook was not originally created to be a company. It was built to accomplish a social mission—to make the world more open and connected.” Facebook Inc, Registration Statement under the Securities Act of 1933 at 67 (Form S-1) (Feb. 1, 2012). He further bragged that “[w]e have a saying: ‘Move fast and break things.’ The idea is that if you never break anything, you’re probably not moving fast enough.” *Id.* at 70.

<sup>6</sup> Kara Swisher, a long-time Silicon Valley insider and journalist, is illustrative of this arc. In her 2024 memoir, she wrote, “I love tech, I breathe tech. And I believe in tech. But for tech to fulfill its promise, founders and executives who ran their creations needed to put more safety tools in place. They needed to anticipate consequences more. Or at all.” KARA SWISHER, BURN BOOK: A TECH LOVE STORY 10 (Feb. 27, 2024).

<sup>7</sup> See generally AMNESTY INT’L, THE SOCIAL ATROCITY: META AND THE RIGHT TO REMEDY FOR THE ROHINGYA (2022), <https://www.amnesty.org/en/documents/asa16/5933/2022/en> [<https://perma.cc/5RVF-MFEE>].

<sup>8</sup> See generally JYTTE KLAUSEN, THE ROLE OF SOCIAL NETWORKS IN THE EVOLUTION OF AL QAEDA-INSPIRED VIOLENT EXTREMISM IN THE UNITED STATES, 1990-2015, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE (Nov. 2016), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/role-social-networks-evolution-al-qaeda-inspired-violent-extremism> [<https://perma.cc/PTC2-ERFB>]; see also Gabriel Weimann & Natalie Masri, *Research Note: Spreading Hate on TikTok*, STUD. CONFLICT & TERRORISM 2 (Jun. 19, 2020) (discussing the role of TikTok in recruitment for ISIS).

<sup>9</sup> See *In re Cambridge Analytica, LLC*, 2019 FTC LEXIS 83, \*6-\*20 (2019) (discussing the covert influence operation that leveraged privacy vulnerabilities with Facebook’s privacy settings that enabled micro-targeting of political ads to users in the U.S. and the U.K.). Even Meta has been forced to admit that social media can have a “corrosive” effect on democracy. Samidh Chakrabarti, *Hard Questions: What Effect Does Social Media Have on Democracy?*, META (Jan. 22, 2018), <https://about.fb.com/news/2018/01/effect-social-media-democracy/> [<https://perma.cc/UEZ5-RH9E>].

<sup>10</sup> See Emily Baker White, *Exclusive: TikTok Spied on Forbes Journalists*, FORBES (Dec. 22, 2022), <https://www.forbes.com/sites/emilybaker-white/2022/12/22/tiktok-tracks-forbes-journalists-bytedance>.

<sup>11</sup> See Zoë Schiffer & Casey Newton, *How Twitter’s Child Porn Problem Ruined Its Plans for an OnlyFans Competitor*, THE VERGE (Aug. 30, 2022), <https://www.theverge.com/23327809/twitter-onlyfans-child-sexual-content-problem-elon-musk> [<https://perma.cc/5KX5-YRE3>].

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systemically violate user privacy<sup>12</sup> and cause psychological trauma to employees tasked with content moderation.<sup>13</sup> Although it has become evident that irresponsible deployments of social media are deeply harmful, little has been done to curb these abuses.

As social media metastasized into the fabric of modern life, evidence of its harmful effects on mental health began to accumulate.<sup>14</sup> Dramatic effects were observed among children<sup>15</sup> in particular.<sup>16</sup> The concern is not just with the content, but with the ways that content is served to users by bespoke algorithmic targeting and the design features of social media apps that

<sup>12</sup> See, e.g., Press Release, Fed. Trade Com'n, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions-facebook> [<https://perma.cc/RWD9-M9RJ>] (discussing a fine levied for “deceiving users about their ability to control the privacy of their personal information” in violation of an earlier FTC Order); Lorenzo Franceschi-Bicchierai, *Facebook Snooped on Users' Snapchat Traffic in Secret Project, Documents Reveal*, TECHCRUNCH (Mar. 26, 2024), <https://techcrunch.com/2024/03/26/facebook-secret-project-snooped-snapchat-user-traffic> [<https://perma.cc/H4BB-ASZX>] (discussing Facebook’s secret program to decrypt and monitor user’s data from competing social media sites).

<sup>13</sup> See Daniel Wiessner, *Judge OKs \$85 Mln Settlement of Facebook Moderators' PTSD Claims*, REUTERS (July 23, 2021, 11:59 AM), <https://www.reuters.com/legal/transactional/judge-oks-85-mln-settlement-facebook-moderators-ptsd-claims-2021-07-23>.

<sup>14</sup> See, e.g., Daniele La Barbera, Filippo La Paglia & Rosaria Valsavoia, *Social Network and Addiction*, 144 ANN. REV. CYBERTHERAPY & TELEMEDICINE 33, 36 (2009) (reviewing the literature and concluding that young people might “develop addictive behaviors” with respect to social media). Indeed, researchers in the late 1990s documented that use of the pre-social media internet was associated, likely causally, with statistically significant increases in both loneliness and depression. See Robert Kraut, Michael Patterson, Vicki Lundmark, Sara Kiesler, Tridas Mukopadhyay & William Scherlis, *Internet Paradox: A Social Technology That Reduces Social Involvement and Psychological Well-Being?*, 57 AM. PSYCH. 1017, 1028 (1998). This effect is even more pronounced among teenagers. See *Id.*

<sup>15</sup> The term “child” is frustratingly ambiguous. In medical contexts, persons are typically considered children until the age of eighteen, although the exact boundary between “childhood” and “adulthood” is nebulous. Compare *Inclusion Across the Lifespan*, NAT'L INST. OF HEALTH (Jan. 10, 2023), <https://grants.nih.gov/policy/inclusion/lifespan.htm> [<https://perma.cc/LU9A-NSV3>] (defining child as a person eighteen years of age or younger) with Amy P. Hardin, Jesse M. Hackell & Am. Acad. Pediatrics Comm. on Practice & Ambulatory Med., *Age Limit of Pediatrics*, 140 PEDIATRICS e20172151, (Sept. 2017) at 1-2 (suggesting that there are no hard cutoffs for the end of adolescence and that even twenty-one is an “arbitrary demarcation line” as important emotional and intellectual maturation is still ongoing). In American law, persons are legally children until the age of majority, which is eighteen in most jurisdictions. *Child*, LEGAL INFO. INST. (Nov. 2021), <https://www.law.cornell.edu/wex/child> [<https://perma.cc/3FLZ-NV9X>]. The Convention on the Rights of the Child deems every human below the age of eighteen a child. Convention on the Rights of the Child, Art. I. See U.N. Convention on the Rights of the Child, Nov. 20, 1989, 18 I.L.M. 1448. Dictionaries typically embrace the spirit of both the medical and legal definitions. See, e.g., *Child*, MIRIAM WEBSTER (Feb. 18, 2024), <https://www.merriam-webster.com/dictionary/child> [<https://perma.cc/S96K-PJT9>] (“a: a young person, typically between infancy and puberty; b: a person not yet of the age of majority”). This Note similarly embraces the general legal definition of child, so the term should be read to refer to all persons younger than eighteen.

<sup>16</sup> See Jean Twenge, Gabrielle N. Martin & W. Keith Campbell, *Decreases in Psychological Well-Being Among American Adolescents After 2012 and Links to Screen Time During Rise of Smartphone Technology*, 18 EMOTION 765, 778 (2018).

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encourage compulsive use.<sup>17</sup> In the 2020s, the combination of the burgeoning youth mental health crisis<sup>18</sup> and damning disclosures from whistleblowers and leakers<sup>19</sup> brought the harmful design of social media platforms to the public consciousness.<sup>20</sup>

Lawyers across the country have begun to fight back against social media companies for their intransigence. As of this writing, there are three major litigations against social media companies alleging harm to children: (1) a consolidated California state court proceeding centralized in Los Angeles Superior Court,<sup>21</sup> (2) a federal Multidistrict Litigation (“MDL”) centralized in the Northern District of California,<sup>22</sup> and (3) a single lawsuit brought by over 30 state attorneys general.<sup>23</sup> Suits alleging a public nuisance

<sup>17</sup> See Mark D. Griffiths, *Adolescent Social Networking: How Do Social Media Operators Facilitate Habitual Use?*, 36 EDUC. & HEALTH J. 66, 67-68 (2018).

<sup>18</sup> See, e.g., *AAP-AACAP-CHA Declaration of a National Emergency in Child and Adolescent Mental Health*, AM. ACAD. PEDIATRICS (Oct. 19, 2021), <https://www.aap.org/en/advocacy/child-and-adolescent-healthy-mental-development/aap-aacap-cha-declaration-of-a-national-emergency-in-child-and-adolescent-mental-health> [<https://perma.cc/H4ED-JBMH>].

<sup>19</sup> See, e.g., Ruth Reader, Even Peng, Carmen Paun & Erin Schumaker, *A Meta Whistleblower Speaks Up*, POLITICO (Nov. 21, 2023, 2:00 PM), <https://www.politico.com/newsletters/future-pulse/2023/11/21/a-meta-whistleblower-speaks-up-00128125> [<https://perma.cc/TB48-GH2T>].

<sup>20</sup> For a representative account in the popular press, see The Ezra Klein Show, *Why Are Teens in Crisis? Here’s What the Evidence Shows*, N.Y. TIMES (May 19, 2023) (transcript available at <https://www.nytimes.com/2023/05/19/podcasts/transcript-ezra-klein-interviews-jean-twenge.html>). Mental health tops the list of parental anxieties, with forty percent of parents being either “very” or “extremely” concerned that their children may be struggling with anxiety or depression. RACHEL MINKIN & JULIANA M. HOROWITZ, PEW RSCH. CTR, *Parenting in America Today* 5 (Jan. 24, 2023), <https://www.pewresearch.org/social-trends/2023/01/24/parenting-in-america-today> [<https://perma.cc/L6S4-2GQT>].

<sup>21</sup> See *In re Coordinated Proc. Special Title Rule 3.550 Soc. Media Cases*, No. JCCP 5255, slip op. at 2 (Cal. Sup. Ct. Jun. 6, 2024). In June of 2024, public nuisance claims by schools were dismissed by the trial court judge. See *In re Coordinated Proc. Special Title Rule 3.550 Soc. Media Cases*, 2023 Cal. Super. LEXIS 76992 (Cal. Sup. Ct. 2023).

<sup>22</sup> See Plaintiff Master Complaint, *In re Soc. Media Adolescent Addiction Pers. Inj. Prods. Liab. Litig.*, No. 22-md-03047 (N.D. Cal. 2023). See also, Emily Field, *Suits Pile Up Ahead of Key Moment in Social Media MDL*, LAW360 (Oct. 26, 2023, 8:14 PM), <https://www.law360.com/articles/1737379/suits-pile-up-ahead-of-key-moment-in-social-media-mdl> [<https://perma.cc/F2SK-QEG8>]. In October of 2024, the district court denied defendant’s motion to dismiss public nuisance claims brought by public schools in the MDL. See Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss the School District and Local Government Entities’ Master Complaint at 1, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, No. 4:23-CV-05448-YGR, MDL No. 3047 (N.D. Cal. Oct. 24, 2024) [hereinafter MDL Order Denying Motion to Dismiss I] (discussing negligence claims); Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss the School District and Local Government Entities’ Claims of Public Nuisance at 1, *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, No. 4:23-CV-05448-YGR (N.D. Cal. Nov. 15, 2024). The issues presented in these orders do not precisely align with the subject of this Note, but for further discussion of this decision within the framework of this Note’s proposal, see *infra* notes 96, 132, 151, 168, 231, 237.

<sup>23</sup> See Complaint for Injunctive and Other Relief at 145-198, *Arizona v. Meta Platforms, Inc.*, No. 23-cv-05448 (N.D. Cal. filed Oct. 24, 2023). Unlike many other actions, this lawsuit is focused solely on

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theory of liability have been brought by school districts in both the state and federal consolidated actions.<sup>24</sup> A number of other unrelated actions have been filed, including some in state courts by attorneys general.<sup>25</sup>

These cases are a part of the ongoing resurgence of public health impact litigation and the public nuisance doctrine in particular.<sup>26</sup> Starting with the massive tobacco settlements reached in the twilight of the twentieth century, state actors have sought to use public nuisance theories to hold various corporate actors civilly liable for systemic harms such as gun violence, climate change, and lead contamination—albeit with mixed success.<sup>27</sup> Despite this spotty track record, judges and legal academics criticize the so-called “new” public nuisance as an unprecedented and unprincipled expansion of tort liability.<sup>28</sup> In the words of one judge, public nuisance could “become a monster that would devour in one gulp the entire law of tort.”<sup>29</sup> Academics cite a variety of deficiencies, ranging from the fee structure of private lawyers who assist government attorneys in such cases<sup>30</sup> to separation of powers concerns.<sup>31</sup>

This Note proposes that courts hearing claims of public nuisance against social media companies should: (1) balance concerns about the democratic legitimacy of novel public nuisance claims with overwhelming evidence of the intransigent conduct of social media companies with respect

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Meta and alleges violations of various state consumer protection statutes rather than public nuisance. *Id.* at 145-198.

<sup>24</sup> For an example of a school district alleging public nuisance claims in the California State action, see, e.g., Complaint at 87, *Bend-La Pine Admin. Sch. Dist. No. 1 v. Meta Platforms, Inc.*, No. 23STCV20531 (Cal. Sup. Ct. filed Aug. 24, 2023), ECF No. BL-9. For an example of a school district doing the same in the MDL, see, e.g., *Kent Sch. Dist. No. 415 v. Meta Platforms, Inc.*, No. 2:23-cv-000045 (W.D. Wash. filed Jan. 9, 2023).

<sup>25</sup> For an example of a state court action brought by an attorney general, see Complaint at 1-3, *Arkansas v. Meta Platforms Inc.*, No. 57cv-23-47 (Ark. Cir. Ct. filed Mar. 28, 2023). For an example of a federal lawsuit unrelated to the MDL, see, e.g., *Greco v. TikTok, Inc.*, No. 5:22-cv-00916 (BKS/ML), 2023 U.S. Dist. LEXIS 72372 (N.D.N.Y. Apr. 26, 2023).

<sup>26</sup> For a discussion of the public health dimension of mass torts, see generally Cheryl Health, *The Tobacco Master Settlement Agreement — Strategic Lessons for Addressing Public Health Problems*, 379 *NEJM* 997 (2018).

<sup>27</sup> See Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 *YALE L.J.* 702, 705-06 (2023).

<sup>28</sup> For a representatively skeptical treatment by a court, see, e.g., *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719 (Okla. 2021) (“[W]e refuse to expand public nuisance to claims against a product manufacturer.”). For skeptical treatment in the literature, see generally Thomas W. Merrill, *The New Public Nuisance Illegitimate and Dysfunctional*, 132 *YALE L.J.* F. 985 (2023); Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Can Governments Impose a New Tort Duty to Prevent External Risks*, 44 *WAKE FOREST L. REV.* 923 (2009); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 *U. CIN. L. REV.* 741 (2003).

<sup>29</sup> *Tioga Pub. Sch. Dist. #15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).

<sup>30</sup> See Merrill, *supra* note 28, at 1003; Schwartz, Goldberg & Appel, *supra* note 28, at 931-35.

<sup>31</sup> See generally Michael DeBow, *State Tobacco Litigation and Separation Powers State Governments: Repairing the Damage*, 31 *SETON HALL L. REV.* 563 (2001).

to youth mental health and the abject failure of this country to regulate them appropriately; and (2) take a broad, context-sensitive approach to evaluating duty in the context of harm to children because of the special status that children enjoy in the law.

## PART II: BACKGROUND

### *A. Social Media Plays an Important Role in the Youth Mental Health Crisis*

American children use social media incessantly. A recent national survey found virtually all teenagers have access to digital devices—smartphones in particular are nearly ubiquitous—and are daily internet users.<sup>32</sup> Most teenagers are checking their phones at least once an hour, and over forty percent are checking every fifteen minutes or less.<sup>33</sup> Less than twenty percent of teens report that they never use social media.<sup>34</sup> Estimates of time spent on social media range from ninety minutes to five hours per day.<sup>35</sup> Nearly half of teens described themselves as being online “almost constantly”—a figure that has nearly doubled since 2015—with thirty-five percent spending that time on at least one social media site.<sup>36</sup> More than a third of teens think they spend “too much time” on social media, and more than half think it would be at least somewhat difficult to give up social media use.<sup>37</sup>

<sup>32</sup> Vogels, Gelles-Watnick & Massarat, *supra* note 3, at 5.

<sup>33</sup> DAVID BICKHAM, ELIZABETH HUNT, BENOÎT BEDIU & MICHAEL RICH, DIGIT. WELLNESS LAB, ADOLESCENT MEDIA USE: ATTITUDES, EFFECTS, AND ONLINE EXPERIENCES 9 (2022), [https://digitalwellnesslab.org/wp-content/uploads/Pulse-Survey\\_Adolescent-Attitudes-Effects-and-Experiences.pdf](https://digitalwellnesslab.org/wp-content/uploads/Pulse-Survey_Adolescent-Attitudes-Effects-and-Experiences.pdf) [<https://perma.cc/JP9P-2MTY>].

<sup>34</sup> VICTORIA RIDEOUT & MICHAEL B. ROBB, COMMON SENSE MEDIA, THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS 39 (Oct. 28, 2019), [https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web\\_0.pdf](https://www.commonsensemedia.org/sites/default/files/research/report/8-18-census-integrated-report-final-web_0.pdf) [<https://perma.cc/25BF-D7P6>].

<sup>35</sup> JONATHAN ROTHWELL, INST. FOR FAM. STUD., HOW PARENTING AND SELF-CONTROL MEDIATE THE LINK BETWEEN SOCIAL MEDIA USE AND YOUTH MENTAL HEALTH 7 (2023), <https://ifstudies.org/blog/how-parenting-and-self-control-mediate-the-link-between-social-media-use-and-youth-mental-health> [<https://perma.cc/BF2P-PKV6>].

<sup>36</sup> Vogels, Gelles-Watnick & Massarat, *supra* note 3, at 8.

<sup>37</sup> *Id.* at 15-18. These trends hold true across the entire world. A recent World Health Organization report discovered an increase in “problematic” social media use in children overall between 2017/2018 and 2021/2022. MEYRAN BONIEL-NISSIM, CLAUDIA MARINO, TOMMASO GALEOTTI, LUKAS BLINKA, KRISTINE OZOLIŅA, WENDY CRAIG, HENRI LAHTI, SUZY L. WONG, JUDITH BROWN, MARY WILSON, JO INCHLEY AND REGINA VAN DEN EIJNDEN, A FOCUS ON ADOLESCENT SOCIAL MEDIA USE AND GAMING IN EUROPE, CENTRAL ASIA AND CANADA - HEALTH BEHAVIOUR IN SCHOOL-AGED CHILDREN INTERNATIONAL REPORT FROM THE 2021/2022 SURVEY 14 (2024).



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The mental health of children in America has declined precipitously alongside the rise of social media.<sup>38</sup> Although the COVID-19 pandemic greatly accelerated this trend, there is no doubt that the mental health crisis has pre-pandemic roots.<sup>39</sup> The data paint a stark image. From 2009 to 2019, the share of high school students with “persistent feelings of sadness or hopelessness” increased by forty percent.<sup>40</sup> Youth psychiatric emergency room visits increased by more than a quarter between 2011 and 2015, and suicides rates among people age ten to twenty-four increased by more than half between 2007 and 2018.<sup>41</sup>

Studies examining the relationship between social media and children’s mental well-being have found dramatic effects. One systematic review of the literature found that “[a]ll . . . categories [of social media use] were . . . correlated with depression, anxiety and psychological distress.”<sup>42</sup> Another cross-sectional evaluation of a large dataset derived from American teens found that “heavy users” of social media were sixty-four percent more likely to report being unhappy than light users, after accounting for controls.<sup>43</sup> Beyond the strong correlational data, epidemiological studies have shown that social media use often precedes declines in mental health.<sup>44</sup> The existing experimental data also support the hypothesis that social media use can decrease mental well-being.<sup>45</sup>

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<sup>38</sup> See U.S. SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL’S ADVISORY 8 (2021), <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf> [<https://perma.cc/8B2L-W26P>]. *AAP-AACAP-CHA Declaration of a National Emergency in Child and Adolescent Mental Health*, *supra* note 18.

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Betül Keles, Niall McCrae & Annmarie Grealish, *Systematic Review: Influence of Social Media on Depression, Anxiety and Psychological Distress in Adolescents*, 25 INT’L J. OF ADOLESCENCE & YOUTH 79, 90 (2019).

<sup>43</sup> See Jean M. Twenge & W. Keith Campbell, *Digital Media Use Is Linked to Lower Psychological Well-Being Evidence from Three Datasets*, 90 PSYCHIATRIC Q. 311, 324 (2019), <https://doi.org/10.1007/s11126-019-09630-7> [<https://perma.cc/7XC4-LGKN>].

<sup>44</sup> See, e.g., *id.* at 774 (finding that “psychological wellbeing was lowest in years when adolescents spent more time online, on social media”); Cara L. Booker, Yvonne J. Kelly & Amanda Sacker, *Gender Differences in the Associations Between Age Trends of Social Media Interaction and Well-Being Among 10-15 Year Olds in the UK*, 18 BMC PUB. HEALTH, art. no. 321, 2018, at 9 (finding that “greater interaction on social media at age ten was associated with worsening socio-emotional difficulties with age among females”); Holly B. Shakya & Nicholas A. Christakis, *Association Facebook Use with Compromised Well-Being: Longitudinal Study*, 185 AM. J. EPIDEMIOLOGY 203, 208-10 (2017) (finding that not only was present Facebook use associated with reduced well-being, but that it was associated with an increased likelihood of diminished future well-being).

<sup>45</sup> See Morten Tromholt, *Facebook Experiment: Quitting Facebook Leads to Higher Levels Well-Being*, 19 CYBERPSYCHOLOGY BEHAV. & SOC. NETWORKING 661,664-65 (2016) (finding that, in a study of Danish adults, people who stopped using Facebook for a week experienced “higher levels of both cognitive and affective well-being”); Melissa G. Hunt, Rachel Marx, Courtney Lipson & Jordyn Young, *No More FOMO: Limiting Social Media Decreases Loneliness and Depression*, 37 J. SOC. & CLINICAL

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Although the exact mechanism linking social media use to mental health problems is likely multifactorial and still an area of active research, several theories have emerged. Some researchers and clinicians have concluded that certain design features of social media products promote compulsive use and addictive behavior.<sup>46</sup> This is consistent with the experiences of young people, many of whom report that they think they use social media too much, but also that it would be difficult for them to curtail their social media use.<sup>47</sup> Social media use also interferes with teens' sleep,<sup>48</sup> which is associated with worsened mental health.<sup>49</sup>

Social media is awash with suicide-related content.<sup>50</sup> Social media platforms not only permit posts about and discussions of self-harm but actually serve that content directly to users who may themselves be at risk, including vulnerable children.<sup>51</sup> Studies have consistently found that viewing self-harm-related content on social media can lead children to engage in self-

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PSYCH. 751, 763 (2018) (finding that, among college students, drastically limiting time spent on social media sites "had a significant impact on well-being," and even led to the reduction of depressive symptoms).

<sup>46</sup> See Griffiths, *supra* 17, at 67-68 (cataloging design features that promote compulsive use of social media, such as the allure of social affirmation measured in "likes" and audio and haptic notifications that disrupt activities and encourage users to return to social media applications); Conghui Su, Hui Zhou, Liangyu Gong, Binyu Teng, Fengji Geng & Yuzheng Hu, *Viewing Personalized Video Clips Recommended by TikTok Activates Default Mode Network and Ventral Tegmental Area*, 237 NEUROIMAGE, art. no. 118136, 2021, at 9 (finding that viewing videos recommended by the TikTok personalized algorithm activated regions of the brain associated with addiction and compulsive behavior); Rasan Burhan & Jalal Moradzadeh, *Neurotransmitter Dopamine (DA) and its Role in the Development Social Media Addiction*, 11 J. NEUROLOGY & NEUROPHYSIOLOGY, art. no. 507, 2020, at 1-2 (suggesting that social media use may alter dopamine feedback signals in the brain in a way observed in gambling and other addictive behaviors); Anindita Chakraborti, *Facebook Addiction: An Emerging Problem*, 11 AM. J. PSYCHIATRY RESIDENTS' J. 7, 8 (2017) ("Similar to other addictions, individuals with Facebook addiction can present with symptoms of tolerance, withdrawal, salience, conflict, and relapse.").

<sup>47</sup> See Vogels, Gelles-Watnick & Massarat, *supra* note 3, at 15-18.

<sup>48</sup> See, e.g., Holly Scott, Stephany M. Biello & Heather Cleland Woods, *Social Media Use and Adolescent Sleep Patterns: Cross-Sectional Findings from UK Millennium Cohort Study*, 9 BMJ OPEN e031161, at \*1 (2019).

<sup>49</sup> See Charles F. Reynolds & Ruth O'Hara, *DSM-5 Sleep-Wake Disorders Classification: Overview for Use in Clinical Practice*, 170 AM. J. PSYCHIATRY 1099, 1099 (2013) ("Sleep disorders are also established risk factors for the subsequent development of common mental illnesses.").

<sup>50</sup> See SAMARITANS, HOW SOCIAL MEDIA USERS EXPERIENCE SELF-HARM AND SUICIDE CONTENT 4 (2023),

[https://media.samaritans.org/documents/Samaritans\\_How\\_social\\_media\\_users\\_experience\\_self-harm\\_and\\_suicide\\_content\\_WEB\\_v3.pdf](https://media.samaritans.org/documents/Samaritans_How_social_media_users_experience_self-harm_and_suicide_content_WEB_v3.pdf) [<https://perma.cc/G667-Z7XA>] ("More than three-quarters of people in the survey saw self-harm content online for the first time at age fourteen or younger.").

<sup>51</sup> Ysrael Gerard & Tarleton Gillespie, *When Algorithms Think You Want to Die*, WIRED (Feb. 21, 2019, 12:41 PM), <https://www.wired.com/story/when-algorithms-think-you-want-to-die> [<https://perma.cc/M2FH-HMSJ>]. AMNESTY INT'L, DRIVEN INTO DARKNESS: HOW TIKTOK'S 'FOR YOU' FEED ENCOURAGES SELF-HARM AND SUICIDAL IDEATION (2023).

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harm.<sup>52</sup> Suicide by cyberbullying—harassment conducted using online platforms—has long been recognized as a problem of internet communication.<sup>53</sup> While cyberbullying requires the active intent of users, the operations of social media platforms themselves appear to push users to suicide in some instances. A U.K. coroner ruled that the suicide of a fourteen-year-old girl was due in part to “images, video clips and text concerning or concerned with self-harm [and] suicide” that were served to her by various social media applications and “affected her mental health in a negative way and contributed to her death in a *more than minimal way*.”<sup>54</sup> Recent studies suggest that Meta continues to promote self-harm-related content.<sup>55</sup>

Social media also enables childhood sexual abuse, which often has long-term mental health consequences.<sup>56</sup> Unfortunately, many teens who use social media experience unwanted sexual conduct.<sup>57</sup> The structure of many

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<sup>52</sup> Karima Susi, Francesca Glover-Ford, Anne Stewart, Rebecca Knowles Bevis & Keith Hawton, *Research Review: Viewing Self-Harm Images on the Internet and Social Media Platforms*, 65 CHILD PSYCH. & PSYCHIATRY 1115, 1133 (2023) (“All studies found potentially harmful effects of exposure to images of self-harm, such as individuals being ‘triggered’ emotionally and cognitively, which could lead to self-harm . . .”). See also AM. PSYCH. ASS’N. HEALTH ADVISORY ON SOCIAL MEDIA USE IN ADOLESCENCE 6 (May 2023), <https://www.apa.org/topics/social-media-internet/health-advisory-adolescent-social-media-use.pdf> [<https://perma.cc/9CF4-EVZQ>] (“[O]nline social reinforcement of [maladaptive behavior, including suicide and self-harm] may be related to an increased risk for serious psychological symptoms, even after controlling for offline influences.”).

<sup>53</sup> See Ariel Schonfeld, Dale McNeil, Takeo Toyoshima & Renee Binder, *Cyberbullying and Adolescent Suicide*, 51 J. AM. ACAD. PSYCHIATRY & L. 112 (2023).

<sup>54</sup> H.M. CORONER ANDREW WALKER, REGULATION 28 REPORT TO PREVENT FUTURE DEATHS REGARDING THE DEATH OF MOLLY ROSE RUSSEL (Oct. 13, 2022) (emphasis added), [https://www.judiciary.uk/wp-content/uploads/2022/10/Molly-Russell-Prevention-of-future-deaths-report-2022-0315\\_Published.pdf](https://www.judiciary.uk/wp-content/uploads/2022/10/Molly-Russell-Prevention-of-future-deaths-report-2022-0315_Published.pdf) [<https://perma.cc/XG3V-LJGQ>]. The coroner specifically recommended that the government consider legislation “to ensure the protection of children from the effects of harmful on-line content and the effective regulation of harmful on-line content,” and concluded that “action should be taken to prevent future deaths” by responding parties, including Meta and Snap. *Id.* An expert who testified at the inquest said that the material the girl saw was “so ‘disturbing’ and ‘distressing’ that it caused him to lose sleep for weeks.” Adam Satariano, *British Ruling Pins Blame on Social Media for Teenager’s Suicide*, N.Y. TIMES (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/business/instagram-suicide-ruling-britain.html>.

<sup>55</sup> See Miranda Bryant, Instagram Actively Helping Spread of Self-harm Among Teenagers, Study Finds, GUARDIAN (Nov. 30, 2024), <https://www.theguardian.com/technology/2024/nov/30/instagram-actively-helping-to-spread-of-self-harm-among-teenagers-study-suggests> (finding that not only did Instagram’s filters fail to identify and remove self-harm content, but that children were suggested to connect with accounts sharing self-harm materials).

<sup>56</sup> AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMM. OPINION NO. 498, ADULT MANIFESTATIONS OF CHILDHOOD SEXUAL ABUSE, 1-2 (August 2011), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2011/08/adult-manifestations-of-childhood-sexual-abuse.pdf> [<https://perma.cc/NN7K-W2KH>].

<sup>57</sup> THORN, RESPONDING TO ONLINE THREATS: MINORS’ PERSPECTIVES ON DISCLOSING, REPORTING, AND BLOCKING IN 2021 16 (Feb. 2023), [https://info.thorn.org/hubfs/Research/Responding%20to%20Online%20Threats\\_2021-Full-Report.pdf](https://info.thorn.org/hubfs/Research/Responding%20to%20Online%20Threats_2021-Full-Report.pdf) [<https://perma.cc/J5FR-GFA5>]. Nearly a quarter of children who use Instagram and Snapchat report “potentially harmful” contact from other users. *Id.* See also David Finkelhor, Heather Turner & Deirdre

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social media sites systemically promotes sexual harm to children.<sup>58</sup> Snapchat's disappearing messages, which are completely unrecoverable after twenty-four hours, have made it a favorite application for pedophiles looking to meet and groom children.<sup>59</sup> A retrospective review limited to publicly available data about sexual abuse in youth sports in the United States managed to identify ninety-nine discrete instances of child sexual abuse facilitated by Snapchat over eight years.<sup>60</sup> The limited scope of this review relative to the large number of incidents suggests that the overall scale of the problem must be much higher. Children are frequently tricked into sending explicit images on social media, which are sometimes used purely for extortion but sometimes are actually distributed as child sexual abuse materials.<sup>61</sup>

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Colburn, *The Prevalence of Child Sexual Abuse with Online Sexual Abuse Added*, 149 CHILD ABUSE & NEGLECT, art. no. 106634, 2024, at 1 ("The addition of the online abuse to the generic questions about child sexual abuse raised the overall prevalence rate from 13.5 % to 21.7 %.").

<sup>58</sup> See e.g., Jeff Horwitz & Katherine Blunt, *Instagram Connects Vast Pedophile Network*, WALL ST. J. (June 7, 2023, 7:05 AM), <https://www.wsj.com/articles/instagram-vast-pedophile-network-4ab7189> ("Instagram connects pedophiles and guides them to content sellers via recommendation systems that excel at linking those who share niche interests . . .").

<sup>59</sup> Rosamund Urwin & Tom Calver, *Predators Flock to Teen App Snapchat, a Safe Space for Child Abuse*, SUNDAY TIMES (May 26, 2019, 12:01 AM) ("Police are investigating three child sexual exploitation cases a day that involve Snapchat") <https://www.thetimes.co.uk/article/predators-flock-to-snapchat-a-safe-space-for-child-abuse-9ztwf0tf9> [<https://perma.cc/73TH-4GWL>]; Isha Bhargava, *Child Luring and Exploitation Through Snapchat is on the Rise. Here's What You Should Look Out For*, CBC NEWS (Jan. 24, 2023, 5:00 AM), <https://www.cbc.ca/news/canada/london/child-luring-and-exploitation-through-snapchat-is-on-the-rise-here-s-what-you-should-look-out-for-1.6722978> [<https://perma.cc/C6B2-5G8G>] ("[A]dult offenders often connect with teens on one platform such as Instagram, and then move the conversation onto Snapchat.").

<sup>60</sup> Jimmy Sanderson & Melinda R. Weathers, *Snapchat and Child Sexual Abuse in Sport: Protecting Child Athletes in the Social Media Age*, 23 SPORT MGMT. REV. 81, 85 (2020).

<sup>61</sup> Christie Smythe, *Snapchat has a Child Porn Problem*, BLOOMBERG (Nov. 8, 2017, 7:00 AM), <https://www.bloomberg.com/news/articles/2017-11-08/snapchat-has-a-child-porn-problem> ("Across the U.S. there are at least six similar criminal cases against pedophiles who used Snapchat to exploit teens for sexual gratification or, in one case, to exploit her own children for money."); Press Release, U.S. Att'y's Office, S. Dist. of Ind., FBI and Partners Issue National Public Safety Alert on Sextortion Schemes (Jan. 19, 2023), <https://www.justice.gov/usao-sdin/pr/fbi-and-partners-issue-national-public-safety-alert-sextortion-schemes> [<https://perma.cc/E7GK-EG66>]. The New Mexico Attorney General has also filed a lawsuit against Snap that alleges "Snapchat is a breeding ground for predators to collect sexually explicit images of children and to find, groom and extort them." Plaintiff's Claim for Abatement and Civil Penalties and Demand for Jury Trial, New Mexico *ex rel.* Torrez v. Snap Inc., No. D-101-CV-2024-02208 (1st Jud. Dist. Ct. 2024). It further alleges that Snapchat's "design – especially its focus on ephemeral content – is uniquely situated to facilitate illegal and illicit conduct and conversations. Snap's algorithm serves up children to adult predators, and Snap Map lets them find them in the real world." *Id.* at 2-3.

*B. Social Media Companies Knowingly Harm Children*

Social media platforms are generally free for users because users “are the product.”<sup>62</sup> The economic value of social media comes not from users paying for services but from marketers purchasing access to users.<sup>63</sup> Social media platforms are therefore designed both to grow their user bases and maximize time that users spend on them.<sup>64</sup> Social media can be a healthy pastime and a useful tool for users of all ages.<sup>65</sup> However, available data suggest that it is unhealthy for users, particularly children, to spend excessive time engaged with social media.<sup>66</sup> There therefore exists a direct conflict between the best interests of social media operators and the overall well-being of their users.<sup>67</sup> Children are uniquely susceptible to advertising due to their immaturity.<sup>68</sup> This makes them a key demographic for social media

<sup>62</sup> Douglas Rushkoff, *You Are Not Facebook's Customer*, RUSHKOFF (Sept. 23, 2011), <https://rushkoff.com/you-are-not-facebooks-customer> [<https://perma.cc/HRG7-8CQU>] (“[O]n Facebook we’re not the customers. We are the product.”).

<sup>63</sup> Meta Inc., Annual Report (Form 10-K) (Feb. 2, 2024) at 7 (“Currently, we generate substantially all of our revenue from selling advertising placements on our family of apps [i.e. Facebook and Instagram] to marketers . . .”).

<sup>64</sup> See Ian A. Anderson & Wendy Wood, *Habits and the Electronic Herd: The Psychology Behind Social Media's Successes and Failures*, 4 CONSUMER PSYCH. REV. 83, 84 (2021) (Discussing the impact of repeat, daily users on the financial success of social media platforms); see also Brent Bihr, *Dark Patterns, Warcraft and Cybersex: the Addictive Face of Predatory Online Platforms and Pioneering Policies to Protect Consumers*, 60 JURIMETRICS J. 431, 435-36 (2020) (discussing the business incentives for internet platform operators to design addictive products). In a frank admission, a top Facebook executive wrote in a 2016 memo that “[t]he ugly truth is that we believe in connecting people so deeply that anything that allows us to connect more people more often is \*de facto\* good.” Ryan Mac, Charlie Warzel & Alex Kantrowitz, *Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo—And Warned That Facebook Could Get People Killed*, BUZZFEED NEWS (Mar. 29, 2018), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data> [<https://perma.cc/897C-G22U>].

<sup>65</sup> For instance, the American Psychological Association acknowledges that “[d]ata suggest that youths’ psychological development may benefit from [using social media], particularly during periods of social isolation, when experiencing stress, when seeking connection to peers with similar developmental and/or health conditions, and perhaps especially for youth who experience adversity or isolation in offline environments.” See AM. PYSCH. ASS’N, HEALTH ADVISORY ON SOCIAL MEDIA USE IN ADOLESCENCE, *supra* note 52, at 4.

<sup>66</sup> See, e.g., Yihong Zhao, Martin P. Paulus & Marc N. Potenza, *Brain Structural Co-Development is Associated with Internalizing Symptoms Two Years Later in the ABCD Cohort*, 12 J. BEHAV. ADDICTIONS 80, 87 (2023) (finding that excessive usage of digital devices by children “may impact brain development processes, leading to imbalanced brain development of specific cortical and subcortical regions”).

<sup>67</sup> See U.S. Surgeon Gen., *supra* note 38, at 25.

<sup>68</sup> See Jenny Radesky, Yolanda (Linda) Reid Chassiakos, Nusheen Ameenuddin & Dipesh Navasaria, *Digital Advertising to Children*, 146 PEDIATRICS, art. no. e20201681, 2020, at 1 (“Children are uniquely vulnerable to the persuasive effects advertising because of immature critical thinking skills and impulse inhibition. School-aged children and teenagers may be able to recognize advertising but often are not able to resist it when it is embedded within trusted social networks . . . or delivered next to personalized content.”). The fact that personal data from children is valuable to commercial enterprises is not a new development and was discussed during the COPPA hearings in the 1990s. S. HRG. No. 105-

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companies.<sup>69</sup> Lip service to user welfare aside, there is reason to think that social media companies are well aware of the noxious effects of their products.<sup>70</sup>

Former senior executives have expressed profound disillusionment with Facebook's products and mission. Chamath Palihapitiya, former Vice President of User Growth, has said of this work: "I think in the back, deep, deep recesses of our minds we kind of knew something bad could happen . . . . It literally is [at] a point now where I think we have created tools that are ripping apart the social fabric of how society works."<sup>71</sup> Tim Kendall, former Director of Monetization, has publicly stated that the company sought to make its product as addictive as possible, comparing them to cigarettes.<sup>72</sup> Sean Parker, founding President of Facebook, admitted that, "[t]he thought process that went into building these applications, Facebook being the first

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1069, pg. 5 (1998) ("[S]ome of this information [about children's online activities] would have great market value to legitimate commercial enterprises . . .").

<sup>69</sup> Although social media companies do not disclose advertising revenue broken down by age demographics, Harvard researchers were able to estimate that, in 2022, the top six social media companies, Facebook, Instagram, Snapchat, TikTok, Twitter, and YouTube, earned \$11 billion in advertising revenue from ads served to users under the age of eighteen. See Amanda Raffoul, Zachary J. Ward, Monique Santoso, Jill R. Kavanaugh & S. Bryn Austin, *Social Media Platforms Generate Billions of Dollars in Revenue from U.S. Youth: Findings from a Simulated Revenue Model*, 18 PLoS ONE, 2023, at 3. Snapchat is estimated to derive over 40% of its revenue from this demographic, while TikTok derives 35%, Youtube 25% and Instagram 15%. *Id.* Historically, Facebook was so desperate for data on their younger users that they were willing to pay thirteen- to fifteen-year-olds twenty dollars, plus referral fees, to download an app that secretly snooped on their non-Facebook internet activity. See Josh Constine, *Facebook Pays Teens to Install VPN That Spies on Them*, TECHCRUNCH (Jan. 29, 2019, 3:36 PM), <https://techcrunch.com/2019/01/29/facebook-project-atlas> [<https://perma.cc/ZX27-H54P>]. See also Georgia Wells & Jeff Horwitz, *Facebook's Effort to Attract Preteens Goes Beyond Instagram Kids, Documents Show*, WALL ST. J. (Sept. 28, 2021), <https://www.wsj.com/articles/facebook-instagram-kids-tweens-attract-11632849667>.

<sup>70</sup> Mark Zuckerberg's post responding to Francis Haugen's 2021 testimony is illustrative of this perspective. Zuckerberg claimed that "safety, well-being and mental health" were core concerns for his company, while suggesting that all economic incentives were for his company to give users a positive experience and challenging the conclusions drawn from the company's internal data. Mark Zuckerberg, FACEBOOK (Oct. 5, 2021), <https://www.facebook.com/zuck/posts/10113961365418581> [<https://perma.cc/NV33-NETV>] ("We care deeply about issues like safety, well-being and mental health."). Just three years later, he adopted a notably different tenor when he offered a public apology to the parents whose children had committed suicide due to the influence of, or had been sexually exploited on, Instagram. Yang, *supra* note 2.

<sup>71</sup> Stanford Graduate School of Business, *Chamath Palihapitiya, Founder and CEO Social Capital, on Money as an Instrument of Change*, YOUTUBE (Nov. 13, 2017), <https://www.youtube.com/watch?v=PMotkw0SIk> [<https://perma.cc/2WEC>].

<sup>72</sup> Juan Flores, *Ex-Facebook Executive Says Company Made its Product as Addictive as Cigarettes*, CBS NEWS (Oct. 2, 2020, 7:22 AM), <https://www.cbsnews.com/news/facebook-addictive-as-cigarettes-former-executive-says> [<https://perma.cc/9H9H-9ZFQ>].

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of them, . . . was all about: ‘How do we consume as much of your time and conscious attention as possible?’”<sup>73</sup>

Several former Meta employees have become whistleblowers after growing uncomfortable with the role they played in developing technology they came to regard as harmful.<sup>74</sup> Frances Haugen, a Meta product manager who worked on Instagram, testified before Congress that Facebook’s products harm children.<sup>75</sup> In her estimation, the harm was a direct result of intentional choices made by the company to put profits before the well-being of users.<sup>76</sup> Arturo Béjar, a former Product Leader in Facebook’s Protect & Care Group with responsibility for child safety features, testified before Congress that the company’s own data showed that one out of five children aged thirteen to fifteen had been bullied on social media, and over ten percent had received unwanted sexual advances.<sup>77</sup> His concerns were met with apathy from senior Facebook leadership, including from Mark Zuckerberg himself.<sup>78</sup> Lotte Rubæk, a psychologist who served for three years as a member of an advisory council to Meta, resigned after it became apparent to her that the company had little sincere interest in proactively removing images that could contribute to eating disorders and other self-harm behavior.<sup>79</sup>

Leaked documents provide further evidence that social media companies are aware of the harm they cause and intentionally engage in harmful conduct. Materials from Meta confirm that the company has studied

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<sup>73</sup> Mike Allen, *Sean Parker Unloads on Facebook: “God Only Knows What it’s Doing to Our Children’s Brains,”* Axios (Nov. 9, 2017) <https://www.axios.com/2017/12/15/sean-parker-unloads-on-facebook-god-only-knows-what-its-doing-to-our-childrens-brains-1513306792> [<https://perma.cc/795U-9D3S>].

<sup>74</sup> Reader, Peng, Paun & Schumaker, *supra* note 19.

<sup>75</sup> *Written Statement of Francis Haugen Before the U. S. Sen. Subcomm. On Consumer Prot., Prod. Safety, and Data Sec. of the S. Comm. on Comm., Sci. and Transp.*, 117<sup>th</sup> Cong. 1 (2021), <https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49> [<https://perma.cc/JEY4-9H27>].

<sup>76</sup> *Id.*

<sup>77</sup> *Written Statement of Arturo Béjar Before the S. Subcomm. on Priv., Tech. and the L. of the S. Comm. of Just. Of the U.S. S. Comm. on the Judiciary* at 3-4 (2023), [https://www.judiciary.senate.gov/imo/media/doc/2023-11-07\\_-\\_testimony\\_-\\_bejar.pdf](https://www.judiciary.senate.gov/imo/media/doc/2023-11-07_-_testimony_-_bejar.pdf) [<https://perma.cc/LA33-5DLL>].

<sup>78</sup> *Id.*

<sup>79</sup> Miranda Bryant, *Leading Adviser Quits over Instagram’s Failure to Remove Self-harm Content*, GUARDIAN (Mar. 16, 2024), <https://www.theguardian.com/technology/2024/mar/16/instagram-meta-lotte-rubaek-adviser-quits-failure-to-remove-self-harm-content-> (“On the surface it seems like [Meta] care[s], they have these expert groups and so on, but behind the scenes there’s another agenda that is a higher priority for them[, which is to ] keep their users’ interaction and earn their money by keeping them in this tight grip on the screen, collecting data from them, selling the data and so on.”).

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the effects of Instagram on users, going back as far as 2019.<sup>80</sup> Nearly a third of teenage girls reported that Instagram made them feel worse about their bodies, and six percent of all users with suicidal thoughts attributed them to Instagram.<sup>81</sup> Another internal study found that one in eight Facebook users engaged in compulsive behaviors that disrupted sleep and relationships.<sup>82</sup> In a document produced pursuant to a subpoena from the Senate Judiciary Committee, Meta President of Global Affairs Nick Clegg expressed concern that “[w]e are not on track to succeed for our core well-being topics (problematic use, bullying & harassment, connections, and [suicidal self-injury]” and implored Mark Zuckerberg to increase internal funding for teams to coordinate work on these projects.<sup>83</sup> It is yet unknown whether Zuckerberg acceded to this request.<sup>84</sup>

Although other social media operators have not yet been publicly exposed in the same way as Facebook and Instagram, they still acknowledge that there are serious concerns around mental health with respect to social media platforms.<sup>85</sup> For example, researchers discovered that TikTok consistently served videos about suicide and eating disorders to accounts ostensibly created by thirteen-year-old girls.<sup>86</sup> Leaks have revealed that the TikTok algorithm seeks to maximize user retention and time spent in order to keep users on the app “as long as possible,” by providing content that

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<sup>80</sup> Wells, Horwitz & Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL ST. J. (Sept. 14, 2021, 7:59 AM), <https://www.wsj.com/amp/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739>.

<sup>81</sup> *Id.*

<sup>82</sup> Georgia Wells, Deepa Seetharaman & Jeff Horwitz, *Is Facebook Bad for You? It Is for About 360 Million Users, Company Surveys Suggest*, WALL ST. J. (Nov. 5, 2021, 11:09 AM), <https://www.wsj.com/articles/facebook-bad-for-you-360-million-users-say-yes-company-documents-facebook-files-11636124681> [<https://perma.cc/XJ8G-NK64>].

<sup>83</sup> Email from Nick Clegg, President of Global Affairs, Meta, Inc., to Mark Zuckerberg, Founder, Chairman, and CEO of Meta, Inc. (Aug. 27, 2021, 5:30 PM), <https://www.blumenthal.senate.gov/imo/media/doc/13124metadocuments.pdf>.

<sup>84</sup> Yang, *supra* note 3 (Zuckerberg was not given an opportunity to respond after being read the email from Clegg).

<sup>85</sup> In an attempt to differentiate Snapchat from other social media applications, the co-founder and CEO of Snapchat admitted that growing up on social media made him “feel miserable” because it fostered a “public, permanent, popularity contest filled with constant judgment.” *Written Statement of Evan Spiegel, Co-Founder and CEO, Snap Inc., Hearing before the U. S. S. Comm. on the Judiciary* (Jan. 1, 2024), [https://www.judiciary.senate.gov/imo/media/doc/2024-01-31\\_-\\_testimony\\_-\\_spiegel.pdf](https://www.judiciary.senate.gov/imo/media/doc/2024-01-31_-_testimony_-_spiegel.pdf) [<https://perma.cc/N7VF-KRUQ>].

<sup>86</sup> DEADLY BY DESIGN, CTR. FOR COUNTERING DIGIT. HATE 5 (Dec. 2022) [https://counterhate.com/wp-content/uploads/2022/12/CCDH-Deadly-by-Design\\_120922.pdf](https://counterhate.com/wp-content/uploads/2022/12/CCDH-Deadly-by-Design_120922.pdf) [<https://perma.cc/VQ4B-63FV>]; *see also* WSJ Staff, *Inside TikTok’s Algorithm: A WSJ Video Investigation*, WALL ST. J. (July 21, 2021 at 10:26 AM), <https://www.wsj.com/articles/tiktok-algorithm-video-investigation-11626877477> (reporting on a similar experiment, which found that “over time, the video choices [recommended by the app] become less mainstream, less vetted by moderators and sometimes more disturbing”).



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matches the perceived preferences of users.<sup>87</sup> A former employee “warned his superiors the algorithm was sending Generation Z users endless streams of depressing and suicide-glorifying videos,” but no action was taken.<sup>88</sup>

### C. *What is Public Nuisance?*

Public nuisance is a common law tort that imposes liability for “an unreasonable interference with a right common to the general public.”<sup>89</sup> The Second Restatement of Torts provides that such an interference may be unreasonable when, among other things, it “involves a significant interference with the public health” or “is proscribed by a statute, ordinance or administrative regulation.”<sup>90</sup> Many states have general public nuisance statutes on the books that follow the form of the Restatement,<sup>91</sup> and many more jurisdictions have laws specifically naming certain acts public nuisances.<sup>92</sup> Public nuisance has two remedies: (1) injunctive relief for ongoing or threatened harm and (2) damages for past harm.<sup>93</sup> There are important limits on who may seek damages in a public nuisance suit,<sup>94</sup> but when a public entity seeks damages it can be a uniquely efficient way of forcing irresponsible actors to re-internalize costs they have passed on to a large population.<sup>95</sup>

<sup>87</sup> 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>.

<sup>88</sup> See, e.g., Olivia Carville, *TikTok’s Algorithm Keeps Pushing Suicide to Vulnerable Teens*, BUSINESSWEEK (April 20, 2023 at 10:27 PM), <https://www.bloomberg.com/news/features/2023-04-20/tiktok-effects-on-mental-health-in-focus-after-teen-suicide> [<https://perma.cc/H6G2-WXZ6>].

<sup>89</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1).

<sup>90</sup> *Id.* § 821B(2)(a)-(b).

<sup>91</sup> See, e.g., MINN. STAT. ANN. § 609.74(1) (West 2024) (describing that a person creates a public nuisance whenever she “maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public”); N.M. STAT. ANN. § 30-8-1 (2024) (“A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: injurious to public health, safety, morals or welfare; or interferes with the exercise and enjoyment of public rights, including the right to use public property.”). Some are also more capacious than the Restatement. See also CAL. CIV. CODE § 3479 (West 2024) (explicitly including the illegal sale of controlled substances within the scope of nuisance).

<sup>92</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. c.

<sup>93</sup> *Id.* § 821B cmt. i. Equitable relief may also include costs for remediation of the nuisance or its consequences while still maintaining its equitable character. See, e.g., *In re Nat’l Prescription Opiate Litig.*, \_\_\_ N.E.3d \_\_\_, 2024 WL 5049302 at \*8 (Ohio 2024) (Stewart, J. dissenting) (“Any award to abate a public nuisance like the opioid epidemic would certainly be substantial in size and scope, given that the claimed nuisance is both long-lasting and widespread. But just because an abatement award is of substantial size and scope does not mean it transforms it into a compensatory-damages award.”).

<sup>94</sup> *Id.* § 821C.

<sup>95</sup> Elizabeth M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. 431, 449 (2020).

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Plasticity has long been a feature of public nuisance.<sup>96</sup> In its original formulation under the English common law, public nuisance was a crime against the rights of the Crown.<sup>97</sup> It quickly expanded to a variety of offenses against public peace and tranquility where the Crown merely brought the action on behalf of the public.<sup>98</sup> By the mid-nineteenth century, civil public nuisance actions had largely supplanted criminal prosecutions.<sup>99</sup> Historically, a wide variety of conduct could constitute a public nuisance, from “making obscene telephone calls” to “selling unsound meat” all the way to “importing Irish cattle.”<sup>100</sup>

Public nuisance was exported to Britain’s colonies in the New World alongside the rest of the common law and has continued to develop independently in the United States.<sup>101</sup> In the modern era, the most significant public nuisance actions tend to be those filed by state actors targeting noisome corporate conduct that impinges on public health and targets ongoing conduct as well as seeking recoupment for past harms.<sup>102</sup> The tobacco litigation, for example, resulted not only in the recovery of billions of dollars, but also in permanent changes to the advertising of tobacco products.<sup>103</sup> Likewise, the prescription opiates litigation has already resulted in settlements totaling tens of billions of dollars and substantial changes to the business practices of many opioid manufacturers and distributors.<sup>104</sup> The public nuisance lawsuits against social media companies discussed in this Note are a part of this modern development of public nuisance law.

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<sup>96</sup> Kendrick, *supra* note 27, at 740-41. *See also* MDL Order Denying motion to dismiss, *supra* note 22, at 1-2 (“Public nuisance, like negligence, provides a flexible mechanism to redress evolving means for causing harm.”).

<sup>97</sup> *Id.* at 713.

<sup>98</sup> *Id.* at 714.

<sup>99</sup> *Id.* at 716.

<sup>100</sup> *Id.* at 705.

<sup>101</sup> *Id.* at 747.

<sup>102</sup> *Id.* at 723.

<sup>103</sup> *The Master Settlement Agreement*, NAT’L ASS’N ATT’YS GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement> [<https://perma.cc/9FQZ-KTWQ>] (last visited Feb. 25, 2024). In 2021, the vape manufacturer Juul entered into a settlement with the Minnesota Attorney General wherein it similarly agreed to wide-ranging changes to its marketing practices and the discontinuation of certain flavors of vape that were alleged to be enticing young people in the state to take up vaping. *See generally* Consent Judgement, *State v. Juul Labs*, No. 27-CV-19-19888 (Minn. Dist. Ct. May 16, 2023). Notably, although public nuisance claims were asserted, the parties settled before they could be evaluated by any courts. *See* Gifford, *supra* note 28, at 761-62.

<sup>104</sup> WEN W. SHEN, CONG. RSCH. SERV., OVERVIEW OF THE OPIOID LITIGATION AND RELATED SETTLEMENTS AND SETTLEMENT PROPOSALS 4 (Nov. 25, 2019), <https://crsreports.congress.gov/product/pdf/LSB/LSB10365> [<https://perma.cc/KFM6-5945>].

## PART: III ANALYSIS

## A. Navigating the New Public Nuisance

Novel applications of public nuisance law are controversial. Many novel applications of public nuisance, like the one discussed in this Note, focus on systemic harms traceable to the use or design of specific products.<sup>105</sup> Many courts consider public nuisance a formless doctrine whose boundaries must be vigorously policed.<sup>106</sup> The defense bar is also anxious about public nuisance.<sup>107</sup> These concerns may be overstated as the vast majority of novel public nuisance suits fail.<sup>108</sup> Nonetheless, a vigorous debate exists among academics as to the proper scope of public nuisance. Some accept the so-called “new” public nuisance as a reasonable, effective descendant of the historical doctrine.<sup>109</sup> Skeptics, however, argue that the new public nuisance, particularly suits aimed at “products,” is entirely beyond the scope of “classical” public nuisance, which they argue is typified by the use of tort law to enjoin harmful conduct.<sup>110</sup> The following sections address two of the key critiques of the new public nuisance and examine how courts have dealt with them.

<sup>105</sup> See, e.g., First Amended Complaint at 102, *State v. Juul Labs*, No. 27-CV-19-19888 (Minn. Dist. Ct. Dec. 10, 2020) (discussing how the design and marketing of defendant’s nicotine vapes created a public health crisis, and thus a public nuisance, among teenagers); First Amended Complaint at 4-5, *City of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936 (N.D. Cal. 2022) (No. 18-cv-07591), ECF No. 128 (discussing how defendant’s misleading marketing of opioid medications had created a public nuisance).

<sup>106</sup> “Public nuisance doctrine historically has been both a vast and vague area of law. Described 130 years ago as the ‘wilderness of law’ and a ‘legal garbage can full of vagueness, uncertainty and confusion’ by William Prosser; it led Justice Blackmun to proclaim that ‘one searches in vain . . . for anything resembling a principle in the common law of nuisance.’” *Alaska v. Walgreen Co.*, No. 3AN-22-06675, slip op. at 1 (Alaska Sup. Ct. 3d. Jud. Dist. Anchorage Mar. 1, 2024).

<sup>107</sup> See, e.g., Thomas E. Fennel & Deborah Storey Simmons, *The Rising Tide of Public Nuisance Claims*, JONES DAY (2011), <https://www.jonesday.com/en/insights/2012/01/the-rising-tide-of-public-nuisance-claims-ipractice-perspectives-product-liability—tort-litigation> [<https://perma.cc/4E9S-8Q7S>] (describing the “rising tide” of public nuisance lawsuits as a “specter”); David J. Feder, *Enforcing the Line Between Product Liability and Public Nuisance*, JONES DAY, (May 2022), <https://www.jonesday.com/en/insights/2022/05/enforcing-the-line-between-product-liability-and-public-nuisance> [<https://perma.cc/3YG8-RLEE>] (describing public nuisance suits as an “end-run” around traditional principles of tort); John Vaughn, *Guest Post: Is Social Media Really A Public Nuisance?*, DRUG & DEVICE L. (Dec. 5, 2024), <https://www.druganddevicelawblog.com/2024/12/guest-post-is-social-media-really-a-public-nuisance.html> (providing scathing commentary on the Social Media MDL judge’s decision to permit most public nuisance claims to proceed).

<sup>108</sup> See David A. Dana, *Public Nuisance Law When Politics Fails*, 83 OHIO ST. L.J. 61, 69 (2020).

<sup>109</sup> See generally, e.g., Sharkey *supra* note 95; Kendrick, *supra* note 27; Dana, *supra* note 108; Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489 (2020).

<sup>110</sup> See, e.g., Gifford, *supra* note 28, at 761-62 (“[T]he principle purpose of and focus of public nuisance law is to abate or terminate harmful *conduct* . . . .”) (emphasis added).

### 1. The Critiques: Democratic Legitimacy and Judicially Created Duties

Some argue that liability in public nuisance may not be based on a concrete duty.<sup>111</sup> Courts frequently balk at the imposition of liability in public nuisance actions where they are unable to locate a duty.<sup>112</sup> In the paradigmatic modern public nuisance case, courts wrongly “impos[e] . . . affirmative duties to protect the public from foreseeable harms.”<sup>113</sup> These critics would say that even public nuisance statutes that appear to give courts discretion to define new public nuisances, including those that track the language of the Restatement,<sup>114</sup> should not be read as broad grants of power to find new public nuisances.<sup>115</sup> At the most extreme, public nuisance and other equitable doctrines potentially permit the executive to rule by injunction through the judiciary.<sup>116</sup> Duty is central to the analysis because, in the absence of duty, a core assumption of rule-of-law falls away: people cannot know in advance whether their conduct complies with the law.<sup>117</sup>

This critique fails to recognize the nature of the equitable power that courts wield when they fashion and enforce injunctive remedies to public

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<sup>111</sup> Merrill, *supra* note 28, at 989. (“[T]hese nebulous descriptions of duty fail to provide any effective guidance about what is and is not permitted.”); Schwartz, Goldberg & Appel, *supra* note 28, at 952 (“The fundamental change externalization-of-risk-based [e.g. public nuisance] lawsuits require is the establishment of a new duty for liability absent wrongdoing.”); Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. TORT L., 2011, at 17 (“[P]ublic nuisance [does not] typically require [a] breach of some duty or standard of care.”).

<sup>112</sup> See, e.g., *In re Lead Paint Litigation*, 924 A.2d 484, 502 (N.J. 2005) (New Jersey Supreme Court unwilling to impose liability on “manufacturers of ordinary consumer products . . . legal when sold.”); *Johnson & Johnson*, 499 P.3d. at 728 (explaining that a manufacturer has no “duty to monitor how a consumer uses or misuses a product after it is sold.”).

<sup>113</sup> Merrill, *supra* note 28, at 993.

<sup>114</sup> See, e.g., statutes cited *supra* note 91.

<sup>115</sup> Merrill, *supra* note 28, at 998. Merrill is much more comfortable with legislative determinations of specific public nuisances. *Id.* at 991. This provides an interesting contrast with *Lucas v. S.C. Coastal Council*, where, in holding that the statute at issue was a Fourth Amendment taking, the Supreme Court rejected the State’s argument that it was merely regulating a nuisance in the form of coastal erosion by prohibiting development on beachfront lots, as determined by the legislature, by requiring the State to “identify background principles of nuisance and property law” rather than relying on legislative fiat. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1032 (1992). Even the dissent agreed that coastal erosion could not fall within the preserve of “the common law of nuisance.” *Id.* at 1035. This holding illustrates the anti-novelty bias of common law assumptions, even in the presence of explicit legislative commands, suggesting that for some courts, even legislatures are powerless to expand public nuisance too far beyond “background principles.”

<sup>116</sup> *Cf.* *New York Times Co. v. United States*, 403 U.S. 713, 742 (1971) (Marshall, J., concurring) (“[The Constitution] did not provide for government by injunction in which the courts and the Executive Branch can ‘make law’ without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law . . .”).

<sup>117</sup> Merrill, *supra* note 28, at 991.

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nuisances.<sup>118</sup> A court sitting in equity is called upon to apply broad moral principles to a fact-bound dispute to achieve justice.<sup>119</sup> This is particularly true with respect to injunctive relief.<sup>120</sup> The central question is what moral principles to apply, and from the very beginning courts were empowered to recognize public nuisances through the judicial process itself.<sup>121</sup> Therefore, public nuisance liability is not “the source of [the] duty, but an articulation of it.”<sup>122</sup> Even critics of public nuisance tend to acknowledge that public nuisance liability can nonetheless be appropriate when conduct “violates a highly consensual social norm that should be obvious to all.”<sup>123</sup> Even conservative jurists acknowledge that, on some level, courts are in the business of recognizing and giving force to social norms.<sup>124</sup> It is appropriate therefore to engage in a searching review of legal and social norms in order to determine whether a duty exists.

It is also important to evaluate the context in which the wrong is alleged. The doctrine of public nuisance arose long before the regulatory state and is itself “the progenitor of modern *mala prohibita*.”<sup>125</sup> Doubtless, a court declaring a new type of public nuisance liability acts with less democratic legitimacy than a legislature that passes a statute prohibiting the same conduct.<sup>126</sup> Nonetheless, courts faced with genuine regulatory paralysis should not resort to doctrinal formalism in order to dismiss public nuisance claims, but rather should attempt to balance the democratic legitimacy concerns with evidence of persistent “regulatory inaction and failure” and the broad “scope of and the severity of the resulting public harm.”<sup>127</sup>

In the most capacious articulation of nuisance, a court may find a condition to be a nuisance even when the defendant acts and great pains are

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<sup>118</sup> See, e.g., *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 300 (1955) (“Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.”) (footnotes omitted). In the public nuisance context specifically, see *State v. Juul Labs*, 2021 Minn. Dist. LEXIS 15319, at \*13-\*14 (Minn. Dist. Ct. June 21, 2021) (collecting cases from Minnesota and the rest of the country).

<sup>119</sup> William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery*, DEL. CTS. (1993), <https://courts.delaware.gov/chancery/history.aspx> [<https://perma.cc/L2VW-4VE4>].

<sup>120</sup> See, e.g., *State ex rel. Olson v. Guilford*, 219 N.W. 770, 771 (Minn. 1928) (“Equity has always had jurisdiction to enjoin and abate public nuisances.”).

<sup>121</sup> Kendrick, *supra* note 27, at 714.

<sup>122</sup> *Id.* at 787.

<sup>123</sup> Merrill, *supra* note 28, at 994.

<sup>124</sup> ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 4 (Princeton University Press, 1997) (“Perhaps in the very infancy of Anglo-Saxon law it could have been thought that the courts were mere expositors of generally accepted social practices; and certainly, even in the full maturity of the common law, a well established commercial or *social practice* could form the basis for a court’s decision.”) (emphasis added).

<sup>125</sup> John C.P. Goldberg, *On Being a Nuisance*, 99 N.Y.U. L. REV. 864, 900-01 (2024).

<sup>126</sup> Merrill, *supra* note 28, at 991-96.

<sup>127</sup> Dana, *supra* note 108, at 66.

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taken to prevent negative externalities.<sup>128</sup> In *Boomer v. Atlantic*, the trial court concluded that a cement plant was a nuisance to its neighbors, even though the defendant “took every available and possible precaution to protect the plaintiffs” and to that end “installed at great expense the most efficient devices available to prevent the discharge of dust and polluted air.”<sup>129</sup> Entirely absent from the opinion is any discussion of what the plant operators did *wrong*.<sup>130</sup> The New York Court of Appeals recognized that “adequate technical procedures [to ameliorate the dust problem] are yet to be developed,” but still affirmed the lower court’s holding that the defendant had created a nuisance.<sup>131</sup> Taken together, these decisions suggest that conduct can be a nuisance even when there is no fault in the conduct and even when the conduct is not unreasonable.<sup>132</sup>

## 2. Democratic Legitimacy and Public Policy: Firearms and Lead Paint Litigations

The courts of New Jersey engaged in public policy balancing in *In re Lead Paint*, where plaintiff municipalities sought to recover the costs of abating lead paint and the public health consequences of lead contamination directly from the manufacturers,<sup>133</sup> and *James v. Arms Technology, Inc.*, where public entities sought reimbursement for costs associated with gun violence from firearm manufacturers.<sup>134</sup> In *Lead Paint*, the New Jersey Supreme Court refused to impose liability on manufacturers of lead paint because it could not identify a duty they had breached,<sup>135</sup> while in *James*, the New Jersey Superior Court, Appellate Division, was willing to find a duty for manufacturers of handguns in order to address an important social problem.<sup>136</sup>

An important distinction in these two cases is the surrounding public policy milieu. In *Lead Paint*, injunctive relief was not at stake because lead paint has long since been outlawed and plaintiffs sought only damages related

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<sup>128</sup> *Boomer v. Atlantic Cement Co.*, 287 N.Y.S.2d 112 (N.Y. Sup. Ct. 1967). The more famous Court of Appeals decision upheld the trial court’s analysis, but nonetheless held that an injunction should issue, albeit one terminable on the payment of “permanent damages” to the affected landowners. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970).

<sup>129</sup> *Boomer*, 287 N.Y.S.2d at 113.

<sup>130</sup> *Id.* at 113.

<sup>131</sup> *Boomer*, 257 N.E.2d at 871.

<sup>132</sup> Although the second order claims of the schools are slightly different from the first order public nuisance claim to children discussed here, the MDL judge found that as a matter of public policy, imposing public nuisance liability on a social media operator was not an unprincipled expansion. See MDL Order Denying Motion to Dismiss I, *supra* note 22, at 31-34.

<sup>133</sup> *In re Lead Paint Litigation*, 924 A.2d 484, 486 (N.J. 2005).

<sup>134</sup> *James v. Arms Technology, Inc.*, 820 A.2d 27, 33 (N.J. Super. Ct. App. Div. 2003).

<sup>135</sup> *In re Lead Paint Litigation*, 924 A.2d at 501-02.

<sup>136</sup> *James*, 820 A.2d at 51-52.

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to costs of lead paint remediation.<sup>137</sup> Significant space in the decision is devoted to a recitation of the history of lead paint and of the overlapping federal and state responses to the interlocking crises of lead paint contamination and lead poisoning.<sup>138</sup> The court held that the New Jersey Legislature had already decided the core issue by passing legislation apportioning the costs of lead paint abatement and lead poisoning treatment among the state, municipalities, and owners of lead-contaminated housing.<sup>139</sup> It ultimately adopted the commitments made by the legislature before deciding whether there were any common law grounds to find lead paint a public nuisance.<sup>140</sup> The context in *James* was very different. Although the lawsuit was brought by public entities principally seeking damages for costs associated with gun violence, the gun sales alleged to contribute to violence were ongoing.<sup>141</sup> The municipal plaintiffs were also supported by outside counsel,<sup>142</sup> including the Brady Center to Prevent Gun Violence Legal Action Project<sup>143</sup> and the Castano Safe Gun Litigation Group.<sup>144</sup> In that case, the plaintiffs alleged an ongoing crisis of gun violence fueled by the defendant's reckless sales of guns.<sup>145</sup> The court considered the statutory framework regulating gun sales but ultimately concluded that the alleged misconduct existed in a "regulatory vacuum."<sup>146</sup> Although this case had the trappings of a standard tort claim for damages, the suit was clearly intended to change the firearms industry, an aim more common in impact litigation.<sup>147</sup> Having

<sup>137</sup> *In re Lead Paint Litigation*, 924 A.2d at 490 (citing 16 C.F.R. § 1303.1).

<sup>138</sup> *Id.* at 489-494.

<sup>139</sup> *Id.* at 505 ("Our Legislature, in recognizing the scope and seriousness of the adverse health effects caused by exposure to and ingestion of deteriorated lead paint, acted swiftly to address that public health crisis. . . . Nothing in its pronouncements suggests it intended . . . to create an ill-defined claim that would essentially take the place of its own enforcement, abatement, and public health funding scheme."). For the details of New Jersey's statutory lead abatement scheme, see N.J. STAT. ANN. §§ 26:2-130 (West 2024).

<sup>140</sup> *In re Lead Paint Litigation*, 924 A.2d at 505.

<sup>141</sup> *James*, 820 A.2d at 33.

<sup>142</sup> *Id.* at 27.

<sup>143</sup> The litigation wing of the organization Brady United Against Gun Violence. BRADY'S LEGAL ALL. (Aug. 21, 2024, 10:40 PM), <https://web.archive.org/web/20190719054620/https://www.bradyunited.org/program/brady-legal-alliance> (last visited Sept. 30, 2024). The "Legal Action Project" name is no longer in use.

<sup>144</sup> The Castano Group was a crusading coalition of plaintiffs' lawyers forged in the tobacco litigation. TIMOTHY LYTTON, *SUING THE GUN INDUSTRY* 156 (2006). Although plaintiffs' lawyers are often perceived as unscrupulous profit seekers, the lawyers at the core of the Castano Safe Gun Group shared a belief that guns were "dangerous products, causing widespread harm that imposed costs not only on individuals but also on society as a whole and manufactured by industries that were politically difficult to regulate." *Id.*

<sup>145</sup> *James*, 820 A.2d at 47.

<sup>146</sup> *Id.* at 52 (quoting David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1182 (2000)).

<sup>147</sup> CTR. FOR HUM. RTS. & HUMANITARIAN L., *IMPACT LITIGATION: AN INTRODUCTORY GUIDE* (2016).

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balanced the public policy concerns and found that they do not foreclose public nuisance liability, the court then considered the scope of the defendant's duty.<sup>148</sup>

Following the initial public policy balancing, *James* and *Lead Paint* diverge. In *Lead Paint*, the New Jersey Supreme Court held that the manufacture and sale of lead paint could not itself constitute a public nuisance, because, among other considerations, the court did not wish to allow the sale of a product to become the basis for a public nuisance claim.<sup>149</sup> Historically, lead paint was “an ordinary, unregulated consumer product” and therefore to apply public nuisance here would necessarily mean that “merely offering an everyday household product for sale” potentially interferes with a “common right.”<sup>150</sup> Allowing plaintiffs to proceed here, the court reasoned, would have imposed “strict liability . . . on manufacturers of ordinary consumer products which . . . have become dangerous through deterioration and poor maintenance by the purchasers.”<sup>151</sup>

In *James*, the Appellate Division took the opposite approach, allowing cities and towns to proceed with their public nuisance theory despite finding that defendants sold products within the context of a well-regulated market.<sup>152</sup> The defendants' argument that the court should not extend nuisance liability to conduct within a well-regulated market was unavailing because simply complying with the law does not insulate persons from liability in all instances, such as in the case of driving the speed limit during a snowstorm when a reasonable person would decrease speed.<sup>153</sup> The court nonetheless held that the *James* defendants took steps to “subvert” the purpose of the law and contribute to illegal markets.<sup>154</sup> The municipalities

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<sup>148</sup> *James*, 820 A.2d at 53.

<sup>149</sup> In re Lead Paint Litigation, 924 A.2d 484, 502 (N.J. 2005).

<sup>150</sup> *Id.* at 501-02.

<sup>151</sup> *Id.* at 502. Interestingly, even though *Lead Paint* was decided after *James*, and even cites to it, it does not explicitly overrule the earlier case. *Id.* at 502 n.10. However in *Grewal v. Janssen Pharms., Inc.* the trial court, after rejecting the State's public nuisance claim against opioid manufacturers on the grounds that the suit failed to identify an interference with a common right, suggested that *Lead Paint* was the controlling law, meaning that the suit would have failed independently because “actions authorized by law cannot constitute unreasonable interference.” *Grewal v. Janssen Pharms., Inc.*, No. C-80-18, 2019 N.J. Super. Unpub. LEXIS 5766, \*54-55 (N.J. Super. Ct. Ch. Div., Oct. 21, 2019). In weighing public nuisance claims in the Social Media MDL, the court accepted *Lead Paint* as the controlling law, but suggested that, rather than closing the door to public nuisance claims related to products, the New Jersey Supreme Court had offered a “nuanced analysis of a public nuisance claim implicating products liability,” although it had also “expressed reluctance at expanding public nuisance doctrine.” See MDL Order Denying Motion to Dismiss II, *supra* note 22, at 5. The court did however ultimately dismiss the public nuisance claims arising under New Jersey state law. See *Id.* at 27-28.

<sup>152</sup> *James*, 820 A.2d at 53.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 51-52.



would not be able to effectively exercise their police powers if they could only be brought to bear on conduct specifically violating statutory laws.<sup>155</sup>

### 3. Alternative Approaches to Duty: The Opioids Litigation

The complaint in *City of San Francisco v. Purdue Pharma, L.P.*, grounds public nuisance claims against the pharmaceutical industry defendants in violation of duties imposed by the Controlled Substances Act (“CSA”).<sup>156</sup> Plaintiffs argued that the CSA was crafted to minimize the risk of abuse and addiction that could result from careless distribution of certain kinds of drugs.<sup>157</sup> The CSA and its implementing regulations impose a “duty” on participants in the sale of opioids to report to the Drug Enforcement Administration (“DEA”) “orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.”<sup>158</sup> The complaint alleged that the defendants violated the CSA to the extent that they were “aware of suspicious orders of prescription opioids” but “failed to report this information to the DEA.”<sup>159</sup>

The court, applying the duty inferred from the CSA exactly as framed by the plaintiffs, found that the defendant had breached its duties to control the distribution of opioid medications.<sup>160</sup> In its factual findings, the court emphasized that Walgreens routinely shipped orders that its own system flagged as suspicious without any kind of investigation and that audits of its system for identifying suspicious orders were insufficient.<sup>161</sup> In one particularly flagrant incident, a manager at a Walgreens distribution center

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<sup>155</sup> *Id.* at 52. It is important to note that, after a lobbying offensive by the gun industry and the National Rifle Association, Congress sought to foreclose many kinds of lawsuits against firearm sellers and manufacturers by passing the Protection of Lawful Commerce in Arms Act, Pub L No. 109-92, 119 Stat 2095, codified at 15 USC §7901 et seq, which “broadly protects firearms manufacturers and dealers from liability to suit when crimes have been committed with their products.” See Linda S. Mullenix, *Outgunned No More?: Reviving a Firearms Industry Mass Tort Litigation*, 49 SW. L. REV. 390, 399-400 (2021). Many states have passed similar laws. See *id.* Other states have passed laws that explicitly make certain types of conduct by gun manufacturers and sellers a public nuisance and require them to establish controls to avoid misuse by consumers. See, e.g., N.Y. GEN. BUS. § 898-b (Consol. 2024); N.J. STAT. ANN. § 2C:58-3 (West 2024); DEL. CODE ANN. tit. 10 § 3930.

<sup>156</sup> First Amended Complaint at 176-203, *City of San Francisco v. Purdue Pharma L.P.*, 620 F. Supp. 3d 936 (N.D. Cal. 2022) (No. 18-cv-07591), ECF No. 128.

<sup>157</sup> *Id.* at 247.

<sup>158</sup> *Id.* at 248.

<sup>159</sup> *Id.* at 251. This framing was mimicked by plaintiffs suing opioid manufacturers and distributors in other cases. See, e.g., Fourth Amended Complaint at 34, *California v. Purdue Pharma LP*, No. 30-2014-00725287 (Cal. Super. Ct. July 7, 2017).

<sup>160</sup> *Purdue Pharma LP*, 620 F. Supp. 3d at 938. Note that all other defendants had settled before the conclusion of the trial. *Id.* (noting the plaintiff, “filed claims against dozens of defendants related to the opioid epidemic in San Francisco . . . [but b]y the close of trial, Walgreens Co . . . was the sole remaining defendant”).

<sup>161</sup> *Id.* at 953-58.

testified that he would send up to “600 bottles [of pills] a week” to certain stores.<sup>162</sup> Ultimately, the court concluded that, by proving that the defendant had violated its obligations under the CSA, the City had met its burden in showing that the defendant had “knowingly engaged in unreasonable conduct that was a substantial factor in contributing to the opioid epidemic.”<sup>163</sup>

### *B. Social Media in the Public Nuisance Framework*

There is substantial interest in addressing the harms caused by social media through the framework of public nuisance liability. This Part addresses the existing regulatory and political landscape with respect to social media regulation and then analyzes the special place that children hold in the American legal system.

#### 1. Social Media Companies Are Not Subject to Effective Regulation

The only major child safety law specific to the internet is the Children’s Online Privacy Protection Act (“COPPA”).<sup>164</sup> COPPA passed into law in 1998, well before social media was a prominent internet service.<sup>165</sup> COPPA prohibits website operators from collecting personal information from children, defined as persons under the age of thirteen,<sup>166</sup> without first obtaining verifiable parental consent if: (a) the operator of the social media platform has actual knowledge that it is collecting personal information from a child; or (b) the operator’s service is directed to children.<sup>167</sup> The judge in the Social Media MDL specifically found that social media was not subject to effective federal or state regulation of the conduct alleged in that lawsuit, which is very similar to that discussed in this Note.<sup>168</sup>

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<sup>162</sup> *Id.* at 957.

<sup>163</sup> *Id.* at 938.

<sup>164</sup> Rachel Reed, *Is It Time to Swipe Left on Social Media?* HARV. L. TODAY (Aug. 22, 2024, 10:32 PM), <https://hls.harvard.edu/today/is-it-time-to-swipe-left-on-social-media> [<https://perma.cc/B6NW-D7UY>] (“One of the things that this current situation is revealing is that Facebook can do a lot of things within the law that it knows are potentially harmful”).

<sup>165</sup> Children’s Online Privacy Protection Act, Pub. L. No. 105-277 (1998); *see also* Michael Stevenson, *From Hypertext to Hype and Back Again: Exploring the Roots of Social Media in Early Web Culture*, SAGE HANDBOOK OF SOC. MEDIA 69, 69 (2017).

<sup>166</sup> 15 U.S.C. § 6501.

<sup>167</sup> 15 U.S.C. § 6502.

<sup>168</sup> *See* MDL Order Denying Motion to Dismiss II, *supra* note 22, at 20 (“[C]ourts should be careful to consider whether the proposed theory of public nuisance would interfere with government regulation. Here, the Court is unaware, nor have defendants pointed to, government regulation as to this conduct specifically . . . . [T]he instant public nuisance action does not serve to enlarge the potential liability imposed on social media platform contrary to any apparent legislative determination.”).

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It is well known that many children who fall within the ambit of COPPA use social media sites.<sup>169</sup> Indeed, this problem has long been recognized.<sup>170</sup> In order to trigger the requirement of COPPA, however, an operator must have “actual knowledge” of underage users.<sup>171</sup> Although this term is undefined in the Act and in the Federal Trade Commission’s (“FTC”) implementing regulations,<sup>172</sup> the FTC has provided guidance that “actual knowledge” can only be obtained when an operator “asks for—and receives—information from the user that allows it to determine the person’s age.”<sup>173</sup> Most social media operators have a policy that formally prohibits users under the age of thirteen from signing up, some form of age verification, and a method for identifying and removing underage users.<sup>174</sup> In practice, children simply lie about their age to create accounts, and social media companies are happy to turn a blind eye.<sup>175</sup> Furthermore, it is difficult to police COPPA compliance without access to the very internal records that can only be obtained through litigation or FTC enforcement action.<sup>176</sup> Over

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<sup>169</sup> See, e.g., OFCOM, CHILDREN AND PARENTS: MEDIA USE AND ATTITUDES REPORT 2022 (2022), <https://www.ofcom.org.uk/media-use-and-attitudes/media-habits-children/children-and-parents-media-use-and-attitudes-report-2022> [<https://perma.cc/SV2R-A4Y8>] (finding that 60% of children between the ages of eight and eleven and 33% of children between the ages of five and seven have at least one social media profile); see also Rideout & Robb, *supra* note 34, at 39 (finding that 28% of children began using social media before thirteen years of age).

<sup>170</sup> Aaron Bailey, *Online Exposure: Social Networks, Mobile Phones, and Scams Can Threaten Your Security*, CONSUMER REPS. 29, 30 (June 2011).

<sup>171</sup> 15 U.S.C. § 6502.

<sup>172</sup> 16 C.F.R. § 312.1-13 (2024). In December of 2023, the FTC issued a Notice of Proposed Rulemaking proposing a number of amendments to 16 CFR § 312 but specifically declined to consider adopting a constructive knowledge standard for website operators. Children’s Online Privacy Protection Rule, 89 Fed. Reg. 2034, 2037 (Jan. 11, 2024). In light of the Supreme Court’s recent decision in *Loper Bright*, the FTC’s freedom to impose its own interpretation of COPPA may be significantly restricted. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). (“Chevron is overruled.”).

<sup>173</sup> *Children’s Online Privacy Protection Rule: Not Just for Kids’ Sites*, FED. TRADE COMM’N (Apr. 2, 2013), <https://www.ftc.gov/business-guidance/resources/childrens-online-privacy-protection-rule-not-just-kids-sites> [<https://perma.cc/49TS-M65K>].

<sup>174</sup> For a discussion of Meta’s policies and procedures surrounding age verification, see Pavni Diwanji, *How Do We Know Someone Is Old Enough to Use Our Apps?*, META (July 27, 2021), <https://about.fb.com/news/2021/07/age-verification> [<https://perma.cc/MX56-5PL7>]. For Snapchat, see *Snap Inc. Terms of Service*, SNAP INC. (Feb. 26, 2024), <https://snap.com/en-US/terms> [<https://perma.cc/32FN-KWL8>]. For YouTube, see *Age Requirements on Google Accounts*, GOOGLE (2024), <https://support.google.com/accounts/answer/1350409> [<https://perma.cc/F6PE-NRRZ>]. For TikTok, see *Terms of Service*, TIKTOK (Nov. 2023), <https://www.tiktok.com/legal/page/us/terms-of-service/en> [<https://perma.cc/Z65G-CGNE>]. Notably, TikTok’s terms of service do not specifically address children under the age of thirteen. See *id.*

<sup>175</sup> See, e.g., Shannon Finnegan, *How Facebook Beat the Children’s Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future*, 50 SETON HALL L. REV. 827 (2020).

<sup>176</sup> FED. TRADE COMM’N, PROTECTING CHILDREN’S PRIVACY UNDER COPPA: A SURVEY ON COMPLIANCE (Apr. 2002).

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the last decade, the FTC has experienced staffing cuts and has not had its budget increased commensurate with its rising workload.<sup>177</sup>

## 2. Children Have a Special Status in the Law

There are many sound reasons for the law to protect children. On a biological level, children lack the emotional and intellectual maturity of adults, as their brains are still developing.<sup>178</sup> It is well documented that children are more impulsive than adults which makes them more prone to risk-taking.<sup>179</sup> The Supreme Court embraced this scientific insight in holding mandatory life sentences for minors without the possibility of parole to be cruel and unusual punishments when applied to children.<sup>180</sup> Children exposed to traumatic experiences are likely to develop long-term emotional and cognitive impairment.<sup>181</sup> Children are also more vulnerable to physical harm than adults.<sup>182</sup> For all of these reasons, children require special care and protection.<sup>183</sup>

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<sup>177</sup> Rebecca Kelly Slaughter, Commissioner, *Fed. Trade Comm'n, Antitrust at a Precipice, Remarks at Global Competition Review, Women in Antitrust Conference* (Nov. 17, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1583714/slaughter\\_remarks\\_at\\_gcr\\_inter\\_active\\_women\\_in\\_antitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_inter_active_women_in_antitrust.pdf) [<https://perma.cc/9CX9-AJ5N>] (“It is indisputable that FTC funding has not kept pace with the market demands placed on our agency. . . . [Since 2010,] the FTC budget has increased only 13%, and its employee headcount has decreased. In fact, the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.”).

<sup>178</sup> Hardin, Hackell & Am. Acad. Pediatrics Comm., *supra* note 15, at 1-2.

<sup>179</sup> Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 263 (2010); *see also* Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) (“It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.”).

<sup>180</sup> *Miller v. Alabama*, 567 U.S. 460 (2012). The Court engaged with the science of maturity in its decision, noting that “‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds’—for example, ‘in parts of the brain involved in behavior control.’” *Id.* at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)). The Massachusetts Supreme Judicial Court recently went even further, applying the doctrine to “emerging adults” from the ages of eighteen to twenty because “scientific research [has] confirmed what many know well through experience: the brains of emerging adults are not fully mature.” *Commonwealth v. Mattis*, 493 Mass. 216 (2024).

<sup>181</sup> *See* Heather Dye, *The Impact and Long-Term Effects of Childhood Trauma*, 28 J. HUM. BEHAV. SOC. ENVT. 381, 381 (2018).

<sup>182</sup> *How Children are Different*, CDC (Sep. 2020), <https://www.cdc.gov/childrenindisasters/differences.html> [<https://perma.cc/VD67-JADU>].

<sup>183</sup> In deciding the Motion to Dismiss against plaintiffs with personal injury claims in the social media MDL, the court noted that the context of the alleged victims being children “informed” but did not “heighten” the duty of care owed by social media operators. Plaintiff Master Complaint at \*97, *In re Soc. Media Adolescent Addiction Pers. Inj. Prods. Liab. Litig.*, No. 22-md-03047 (N.D. Cal. 2023). Similarly, although the public nuisance claim was dismissed in the Alaska Juul litigation on other grounds, that court drew from the statutory prohibition on the sale of tobacco to minors to imply that selling tobacco to minors might constitute a public nuisance. Order Granting in Part Motions to Dismiss, *Alaska v. Juul Labs, Inc.*, Case No. 3AN-20-09477.

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Children are treated with deference throughout the common law.<sup>184</sup> In many jurisdictions, landowners have a duty to protect children from hazards on their land.<sup>185</sup> Although parents and guardians obviously have a duty to protect children in their care, courts have sometimes imposed a duty to protect children on adults with more attenuated relationships.<sup>186</sup> In contract law, children generally have a right to void contracts they enter and their adult counterparties have very limited rights against them.<sup>187</sup> Federal courts have granted immigrant children special protections greater than those required by federal statutes.<sup>188</sup>

Many positive laws also treat children with special care. The UN Convention on the Rights of the Child requires parties to “[e]ncourage . . . the protection of the child from . . . material injurious to his or her well-being,” and to “ensure the child such protection and care as is necessary for his or her well-being.”<sup>189</sup> In family law, the laws of virtually every state require courts to make custody decisions “in the best interest” of the child and even empower courts to set up special funds for children in divorce.<sup>190</sup> Children are afforded special protection by the criminal law.<sup>191</sup> In many

<sup>184</sup> Robert L. Geiser, *The Rights of Children*, 28 HASTINGS L.J. 1027 (1977).

<sup>185</sup> See, e.g., *Kahn v. James Burton Co.*, 126 N.E.2d 836, 839 (Ill. 1955) (the defendant owed a duty to children it “should have reasonably anticipated” would play near a pile of lumber it had delivered to worksite); *King v. Lennen*, 348 P.2d 98, 99-100 (Cal. 1959) (holding that the defendant’s unfenced pool was an “unreasonable risk” to children “because of their youth”).

<sup>186</sup> See, e.g., *Bjerke v. Johnson*, 742 N.W.2d 660, 665-67 (Minn. 2007) (holding an unrelated adult to be liable for sexual abuse of a child, in part because “children are largely dependent on parents or other custodial guardians for protection, and that such dependence is often the basis for a duty to protect”).

<sup>187</sup> See e.g., *Topheavy Studios, Inc. v. Doe*, Tex. App. LEXIS 6462, at \*10 (3rd Cir. Aug. 11, 2005) (“In Texas, a contract between an adult and a minor is voidable at the option of the minor.”); *Webster Street Partnership, Ltd. v. Sheridan*, 368 N.W.2d 439, 444 (1985) (minors entitled to return of rental payments on lease they repudiated).

<sup>188</sup> ACLU, *THE RIGHTS OF CHILDREN IN THE IMMIGRATION PROCESS* (2006) (discussing the impact of the *Perez-Funez v. District Director* injunction on rights of child migrants).

<sup>189</sup> Convention on the Rights of the Child, Art. III § 2, Art. XVIII Cl. 2(e). Although the United States is not a party to the Convention because it has not been presented to the Senate for ratification, the United States is nonetheless a signatory and made significant contributions to its drafting. See Jenni Gainsborough & Elisabeth Lean, *Convention on the Rights of the Child and Juvenile Justice*, 7 LINK 1 (2008). Indeed, a public nuisance filed against social media operators by a Canadian school district specifically cites the operators’ alleged interference with the right to education granted by the Convention as a basis for liability. See *Statement of Claim, Toronto Dist. Sch. Bd. v. Meta Platforms Inc.*, CV-24-00717353-0000 (Ontario Sup. Ct. of Just. Mar. 27, 2024).

ust. Mar. 27, 2024).

<sup>190</sup> See UNIF. MARRIAGE AND DIVORCE ACT §§ 307(b), 402 (1973).

<sup>191</sup> From the sentencing of a man convicted of trafficking a minor across state lines: “But at the end of the day, society – our society, our laws, make a special emphasis to protect children. And there’s a reason for that, right? We protect kids because they can’t protect themselves. And so we hold—crimes against children are held to a higher standard than maybe other crimes might be between an adult and another adult.” Transcript of Proceedings, Change of Plea/Sentencing Hearing at 95, *United States v. Castillo*, No. 1:22-cr-00124-MPB-MJD (S.D. Ind. May. 8, 2024) Dkt. No 67.

states, it is a special criminal offense to contribute to the delinquency of or to endanger a minor.<sup>192</sup> A variety of federal laws—including COPPA,<sup>193</sup> the Child Online Protection Act,<sup>194</sup> and the Protect our Children Act<sup>195</sup>—also provide specific protections for children.

#### PART IV: PROPOSAL

Courts hearing public nuisance claims should determine whether, as in *James*,<sup>196</sup> the litigation is actually aimed at a serious regulatory gap and then balance concerns about democratic legitimacy against the evidence of the ongoing crisis.<sup>197</sup> In evaluating the legal principles, courts should take an expansive view of duty and evaluate the broader social and legal context in order to determine whether social media companies have a duty to avoid harming children.

##### *A. Lack of Effective Regulation for Social Media and Political Gridlock Over Reform Outweighs Democratic Legitimacy Issues with Judicial Intervention*

The crisis of youth mental health and the damning leaks from social media companies have attracted attention from politicians and policymakers. President Biden personally called attention to the harmful effects of social media on children.<sup>198</sup> The U.S. Surgeon General, Vivek H. Murthy, issued an advisory on youth mental health and social media and called for warning labels on social media platforms.<sup>199</sup> Several bills containing proposed

<sup>192</sup> See, e.g., (“A person is guilty of endangering the welfare of a child when . . . [h]e or she knowingly acts in a manner likely to be injurious to the physical, *mental* or moral welfare of a child . . .”) (emphasis added).

<sup>193</sup> See *supra* Part III(B)(1).

<sup>194</sup> The Child Online Protection Act, which never took effect due to a permanent injunction, specifically aimed to prevent children from accessing pornographic materials online. *ACLU v. Mukasey*, 534 F.3d 181 (2008). Of note, Congress specifically found that “the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest,” and affirmed that “industry must continue efforts to protect children from dangers posed by the Internet.” H.R. REP. NO. 105-775 (1998).

<sup>195</sup> PROTECT Our Children Act of 2022, Pub. L. No. 117-262 (2022).

<sup>196</sup> *James v. Arms Technology, Inc.*, 820 A.2d 27, 52 (N.J. Super. Ct. App. Div. 2003) (quoting David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175, 1182 (2000)).

<sup>197</sup> Dana, *supra* note 108, at 66.

<sup>198</sup> *Fact Sheet: President Biden to Announce Strategy to Address Our National Mental Health Crisis*, WHITE HOUSE (Mar. 1, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/01/fact-sheet-president-biden-to-announce-strategy-to-address-our-national-mental-health-crisis-as-part-of-unity-agenda-in-his-first-state-of-the-union> [https://perma.cc/A8R5-C69J] [hereinafter *White House Fact Sheet*].

<sup>199</sup> U.S. SURGEON GEN., *supra* note 38, at 8; see also Vivek H. Murthy, *Surgeon General: Why I’m Calling for a Warning Label on Social Media Platforms*, N.Y. TIMES (June 17, 2024),

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regulations are circulating in Congress.<sup>200</sup> Some states have already passed reform measures and many others are considering legislation.<sup>201</sup> The immense public scrutiny has also led major social media operators to announce more stringent self-regulation programs.<sup>202</sup> Some other countries have also begun to institute dramatic regulations of social media for minors.<sup>203</sup>

There are strong reasons to doubt that the present furor will result in meaningful regulation of social media companies. Although a clear majority of American adults are concerned with the effects of social media on mental health, and a slim majority support some form of regulation,<sup>204</sup> sharp partisan divides remain over how social media operators should handle content moderation, with conservatives generally believing there is too much and

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<https://www.nytimes.com/2024/06/17/opinion/social-media-health-warning.html>

[<https://perma.cc/9PAE-FKPT>]. The New York City Commissioner of Health and Mental Hygiene issued an Advisory outlining the youth mental health crisis and encouraging healthy social media use. N.Y.C. MENTAL HEALTH & HYGIENE, SPECIAL REPORT ON SOCIAL MEDIA AND MENTAL HEALTH (2024).

<sup>200</sup> Senator Richard Blumenthal has introduced a bill that would, among other things, impose an affirmative duty on social media companies to protect the mental health and well-being of children using their products, including curbing addictive features. Kids Online Safety Act, S. 1409 118 Cong. §§ 3(1)-(2) (2023). As of this writing, the bill has a path to passage in the Senate but faces uncertainty in the House of Representatives and significant pushback from the industry. Cristiano Lima-Strong, *Senate Poised to Pass Biggest Piece of Tech Regulation in Decades*, WASH. POST (Feb. 15, 2024), <https://www.washingtonpost.com/technology/2024/02/15/kids-online-safety-act-kosa-senate>

[<https://perma.cc/9USK-UDNT>]. Senator Ed Markey has introduced a bill known as “COPPA 2.0” that would extend the protections of COPPA to children aged thirteen to sixteen and close several important loopholes. Children and Teens’ Online Privacy Protection Act, S. 1418 118th Cong. (2023).

<sup>201</sup> For New York’s proposal, see 2023 Legis. Bill Hist. NY S.B. 7694. For a discussion of the emerging patchwork of sometimes conflicting state regulations, see Kyooeun Jang, Lulia Pan, and Nicol Turner Lee, *The Fragmentation of Online Child Safety Regulations*, BROOKINGS INST. (Aug. 14, 2023), <https://www.brookings.edu/articles/patchwork-protection-of-minors> [<https://perma.cc/F244-JW24>].

<sup>202</sup> See, e.g., Julie Jargon, *Instagram and Facebook Will Stop Treating Teens Like Adults*, WALL ST. J. (Jan. 9, 2024) <https://www.wsj.com/tech/personal-tech/instagram-facebook-teen-content-restriction-meta-58e31d39> [<https://perma.cc/BE3H-5GRV>]. During the Senate Committee on the Judiciary hearing in January 2024, the CEOs of Meta, Snap, and TikTok all offered impressive-sounding testimony regarding the commitments of their respective firms to improve the safety of children using their products. See *Written Statement of Shou Chew, CEO, TikTok Inc., Before the S. Comm. on the Judiciary* (Jan. 31, 2024), [https://www.judiciary.senate.gov/imo/media/doc/2024-01-31\\_-\\_testimony\\_-\\_chew.pdf](https://www.judiciary.senate.gov/imo/media/doc/2024-01-31_-_testimony_-_chew.pdf) [<https://perma.cc/B6VE-QWR9>]; *Testimony of Mark Zuckerberg, Founder and CEO, Meta, Hearing Before the U.S. S. Comm. on the Judiciary* (Jan. 31, 2024), [https://www.judiciary.senate.gov/imo/media/doc/2024-01-31\\_-\\_testimony\\_-\\_zuckerberg.pdf](https://www.judiciary.senate.gov/imo/media/doc/2024-01-31_-_testimony_-_zuckerberg.pdf) [<https://perma.cc/G39Q-RNPN>]; *Written Statement of Evan Spiegel, supra* note 85.

<sup>203</sup> Australia for instance has enacted a total ban on social media for children under the age of sixteen. Hannah Ritchie, *Australia Approves Social Media Ban on Under-16s*, BBC (Nov. 28, 2024), <https://www.bbc.com/news/articles/c89vj0lxx9o>.

<sup>204</sup> MORNING CONSULT, NATIONAL TRACKING POLL 2110047, 50, 75 (Oct. 2021) [https://assets.morningconsult.com/wp-uploads/2021/10/18135638/2110047\\_crosstabs\\_MC\\_TECH\\_FACEBOOK\\_Adults\\_v1\\_CC.pdf](https://assets.morningconsult.com/wp-uploads/2021/10/18135638/2110047_crosstabs_MC_TECH_FACEBOOK_Adults_v1_CC.pdf) [<https://perma.cc/BC2E-2VHG>].

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liberals believing there is too little.<sup>205</sup> Social media companies have tremendous economic clout—Alphabet (the parent company of Google and YouTube) and Meta are the fourth and seventh largest companies by market capitalization in the world, respectively.<sup>206</sup> With this money comes the ability to wield significant influence in politics<sup>207</sup> and academia.<sup>208</sup> Although there appeared to be significant bipartisan momentum following the Francis Haugen hearings in 2021 and the social media safety hearings in 2024,<sup>209</sup> Congress has yet to actually pass any new laws regulating social media user safety.<sup>210</sup> The only notable exception is the bill to ban TikTok or force its sale to an American company, but this measure is motivated by national security concerns rather than concern for the well-being of children.<sup>211</sup> State legislatures are likewise subject to significant political headwinds, and any

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<sup>205</sup> E.g., Chris Teale, *Lawmakers See 2022 as the Year to Rein in Social Media. Others Worry Politics Will Get in the Way*, MORNING CONSULT (Dec. 15, 2021), <https://pro.morningconsult.com/articles/social-media-regulation-poll-2022>. In New York City, more than three-quarters of parents support some form of governmental regulation on what kinds of social media children can access. NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, SPECIAL REPORT ON SOCIAL MEDIA AND MENTAL HEALTH 39 (2024), <https://www.nyc.gov/assets/doh/downloads/pdf/mh/social-media-mental-health-report-2024.pdf> [<https://perma.cc/ULE6-J8JL>].

<sup>206</sup> *The 100 Largest Companies in the World by Market Capitalization in 2023*, STATISTA (June 2023), <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization> [<https://perma.cc/NE79-8BXV>].

<sup>207</sup> Cat Zakrzewski, *Tech Companies Spent Almost \$70 Million Lobbying Washington in 2021 as Congress Sought to Rein in Their Power*, WASH. POST (Jan. 21, 2022), <https://www.washingtonpost.com/technology/2022/01/21/tech-lobbying-in-washington> [<https://perma.cc/CP4F-5Z7K>] (reporting that Meta spent over \$20 million and Google over \$9.6 million on lobbying); Brian Schwartz & Lauren Finer, *How TikTok and Its Parent Company Spent Over \$13 Million on Struggling Lobbying Campaign*, CNBC (Mar. 31, 2023), <https://www.cnbc.com/2023/03/31/tiktok-bytedance-spent-millions-on-lobbying-congress.html> [<https://perma.cc/PYY6-AHSL>]. Senator Amy Klobuchar observed that in her view meaningful regulation of social media companies had stalled “because there are lobbyists around every single corner of this building that have been hired by the tech industry.” Julia Arciga, *Klobuchar: Flood of Tech Lobbyists Has Kept Lawmakers from Taking Action on Silicon Valley*, POLITICO (Oct. 5, 2021), <https://subscriber.politicopro.com/article/2021/10/klobuchar-flood-of-tech-lobbyists-has-kept-lawmakers-from-taking-action-on-silicon-valley-3991574> [<https://perma.cc/D6YN-9S2L>].

<sup>208</sup> Shannon Bond, *Disinformation Researcher Says Harvard Pushed Her Out to Protect Meta*, NPR (Dec. 4, 2023) <https://www.npr.org/2023/12/04/1217086770/disinformation-researcher-says-harvard-pushed-her-out-to-protect-met> [<https://perma.cc/6B8H-HTX5>] (reporting that a former Harvard researcher alleged that she was dismissed for her role in publishing Facebook whistleblower materials, which she attributes to a \$500 Million gift from Mark Zuckerberg’s philanthropic initiative).

<sup>209</sup> See *supra* Part II(B).

<sup>210</sup> See, e.g., Cristiano Lima-Strong, *House and Senate on Collision Course Over Child Privacy*, WASH. POST (July 28, 2022, 9:00 AM), <https://www.washingtonpost.com/politics/2022/07/28/house-senate-collision-course-over-childrens-privacy> [<https://perma.cc/7XXB-EBVK>]; see also Emily Field, *Social Media Is Now a ‘Product,’ But Forget New Regs in 2024*, LAW360 (Feb. 9, 2024, 6:17 PM) <https://www.law360.com/articles/1795909> [<https://perma.cc/TG47-G4N4>].

<sup>211</sup> See, e.g., Caitlin Yilek, *Why U.S. Officials Want to Ban TikTok*, CBS NEWS (April 24, 2024), <https://www.cbsnews.com/news/tiktok-ban-congress-reasons-why>.



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laws they do pass will be vigorously challenged in court by social media operators.<sup>212</sup>

It is also worth noting that the interests of children are inherently underrepresented in our democratic process because they cannot vote and their parents are unreliable proxies for their interests.<sup>213</sup> Although American society ostensibly values children, their safety and well-being is often sacrificed for the convenience of adults.<sup>214</sup> This is particularly true when market forces come into play and there is great value to be generated in activities that harm children, which in turn creates a powerful constituency to perpetuate the harmful conditions.<sup>215</sup> Therefore, in the context of harm to children, judicial intervention can be a powerfully democratic corrective.<sup>216</sup>

*B. COPPA and Other Domains of Law Provide a Basis to Find Social Media Operators Have a Duty to Protect Children*

COPPA has been derided as unnecessary by industry and ineffective by consumer advocacy groups.<sup>217</sup> Nonetheless, Congress had a clear sense of the potential dangers the then-nascent internet posed to children.<sup>218</sup> Many of

<sup>212</sup> See, e.g., *Netchoice, LLC v. Bonta*, No. 22-cv-08861, 2023 U.S. Dist. LEXIS 165500, \*4-5 (N.D. Cal. Sept. 18, 2023) (granting preliminary injunction to Netchoice, a trade organization whose members include Google, Meta, and TikTok, preventing the enforcement of the California Age-Appropriate Design Code Act), *injunction aff'd*, No. 23-2969, 2024 WL 3838423, at \*2 (9th Cir. Aug. 16, 2024); *Netchoice, LLC v. Griffin*, No. 23-CV-05105, 2023 U.S. Dist. LEXIS 154571, \*3-5 (W.D. Ark. Aug. 31, 2023) (granting preliminary injunction halting enforcement of Arkansas' Social Media Safety Act). This is not to suggest that states will not continue to try new regulations; since losing at the district court, California's attorney general has announced he will be sponsoring new legislation to require social media applications to carry warning labels. Trần Nguyễn, *California to Consider Requiring Mental Health Warnings on Social Media Site*, ASSOCIATED PRESS (Dec. 9, 2024) <https://apnews.com/article/california-social-media-warning-labels-b6d3f2218953418097834c609bdc632f>.

<sup>213</sup> See Lin, *supra* note 109, at 537.

<sup>214</sup> See Geiser, *supra* note 184, at 1050. See also Ashish P. Thakrar, Alexandra D. Forrest, Mitchell G. Maltenfort & Christopher B. Forrest, *Child Mortality in the US and 19 OECD Comparator Nations: A 50-Year Time-Trend Analysis*, 37 HEALTH AFFS. 140, 140 (2018) (finding rates of child mortality in the U.S. to be the highest among the nineteen wealthiest nations in the world).

<sup>215</sup> Cf., e.g., Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 456-58 (1999) (discussing the how politically underrepresented groups like racial minorities and the poor bear the brunt of environmental harms).

<sup>216</sup> See Lin, *supra* note 109, at 536-37.

<sup>217</sup> See Michal Lev-Ram, *Zuckerberg: Kids under 13 should be allowed on Facebook*, Fortune (May 20, 2011) <https://fortune.com/2011/05/20/zuckerberg-kids-under-13-should-be-allowed-on-facebook> (Zuckerburg is quoted as saying, "the fight against COPPA will be a fight we take on at some point . . . [m]y philosophy is that for education you need to start at a really, really young age"); Fresh Air, *Keeping Your Kids Safe Online: It's 'Common Sense,'* NPR (May 24, 2012) <https://www.npr.org/2012/05/24/153576212/keeping-your-kids-safe-online-its-common-sense> [<https://perma.cc/FX2P-6UX6>] (CEO of Common Sense Media claiming that "the COPPA laws are . . . riddled with holes that are easily gone through").

<sup>218</sup> See FED. TRADE COMM'N, *PRIVACY ONLINE: A REPORT TO CONGRESS* 6 (June 1998) <https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf>

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the recently filed complaints against the social media companies prominently discuss COPPA violations by Social Media companies,<sup>219</sup> even though COPPA does not contain a private right of action.<sup>220</sup> The MDL Master Complaint alleges COPPA violations as a basis to claim that social media companies violated their duty to children.<sup>221</sup> Much emphasis is placed on Meta's flagrant disregard for COPPA<sup>222</sup> as well as Bytedance and Google's FTC settlements for COPPA violations.<sup>223</sup>

COPPA is relevantly similar to the CSA invoked in the opioids litigation because it articulates an industry-wide duty.<sup>224</sup> Just as COPPA was enacted in recognition of the harmful potential of the internet,<sup>225</sup> the CSA was enacted in recognition of broad social problems caused by narcotics.<sup>226</sup> The specific duty imposed on manufacturers and distributors to account for legally produced narcotics all the way through the supply chain was intended to arrest the diversion of legally produced drugs into the illicit drug supply.<sup>227</sup>

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("[T]he immediacy and ease with which personal information can be collected from children online, combined with the limited capacity of children to understand fully the potentially *serious safety* and *privacy implications of providing that information*, have created deep concerns about current information practices involving children online."); U.S. NAT'L COMM'N ON LIBRS. & INFO. SCI., *KIDS AND THE INTERNET: THE PROMISE AND THE PERILS* viii (Nov. 1998) ("Individual privacy may be eroded when children provide personal information about themselves and their families in order to register for certain web sites."); Testimony of Deirdre Mulligan, Staff Counsel, Center for Democracy and Technology before the Senate Committee on Commerce, Science and Transportation (Sept. 23, 1998) <https://cdt.org/wp-content/uploads/testimony/980923mulligan.shtml> (discussing "the potential risk posed by the public posting of information that facilitates contact (both online and offline) with a child").

<sup>219</sup> See, e.g., Complaint at 105-41, *Arizona v. Meta Platforms, Inc.*, No. 23-cv-05448 (N.D. Cal. filed Oct. 24, 2023); Complaint at 21, *Bend-La Pine Admin. Sch. Dist. No. 1 v. Meta Platforms, Inc.*, No. 23STCV20531 (Cal. Sup. Ct. filed Aug. 24, 2023), ECF No. BL-9; Master Complaint at \*13-14, Plaintiff Master Complaint, *In re Soc. Media Adolescent Addiction Pers. Inj. Prods. Liab. Litig.*, No. 22-md-03047 (N.D. Cal. 2023).

<sup>220</sup> Finnegan, *supra* note 175, at 833.

<sup>221</sup> Plaintiff Master Complaint at 265-66, *In re Soc. Media Adolescent Addiction Pers. Inj. Prods. Liab. Litig.*, No. 22-md-03047.

<sup>222</sup> *Id.* at 112-13.

<sup>223</sup> *Id.* at 179, 229.

<sup>224</sup> 21 C.F.R. § 1301.74 (2019).

<sup>225</sup> See, e.g., S. HRG. No. 105-1069, at 6 (1998) (discussing survey data on websites collecting personally identifiable information from children: "This is unacceptable, and we believe this demonstrates a clear need for action.").

<sup>226</sup> See, e.g., H.R. REP. NO. 91-138, at 1 (1969) ("Within the last decade, the abuse of drugs has grown from essentially a local police problem into a serious national threat to the personal health and safety of millions of Americans."); H.R. REP. NO. 91-1444, pt. 1, at 6 (1970) ("Drug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions.").

<sup>227</sup> See, e.g., FINAL REPORT, PRESIDENT'S ADVISORY COMM'N ON NARCOTIC & DRUG ABUSE 44 (Nov. 1963) ("On the basis of current study, retail pharmacies and pharmacists appear to be a major source of the diversion of dangerous drugs to illicit channels in the United States."); H.R. REP. NO. 91-138, at 2 (1969) ("[The CSA] will tighten regulatory controls and protect the public against illicit diversion of many of these drugs from legitimate channels."); H.R. REP. NO. 91-1444, pt. 1, at 6 (1970) ("The [CSA] is designed to improve the administration and regulation of the manufacturing, distribution, and dispensing

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As the court recognized in *City of San Francisco*, this created not just criminal liability or statutory civil liability, but imposed a broader social duty that gave rise to public nuisance liability.<sup>228</sup> Likewise, courts should recognize that COPPA articulates a duty to protect the safety of children under thirteen years of age online.

But courts can and should go further. To permit social media companies to knowingly harm American children of any age would be a grave injustice. It would run counter to the longstanding tradition in American law of treating children with special protection, even if no legislature has enumerated a duty to protect children in this specific context.<sup>229</sup> Although there is no specific legislation akin to COPPA imposing a positive, protective legal duty with respect to children between the ages of thirteen and eighteen, a court could hold that social media companies had a duty to protect, or at least not to harm, children as an articulation of observable social values.<sup>230</sup> The fact that social media operators appear to have knowingly harmed children, only strengthens the fundamental justice of this conclusion.<sup>231</sup>

Finally, it is important to note that early intervention can have significant positive outcomes for children with mental health problems, so any mental health remediation projects begun now should be highly impactful.<sup>232</sup> Young adults from the first generation to grow up with social media indicate that greater maturity has led to rejection of social media.<sup>233</sup>

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of controlled substances by providing for a ‘closed’ system of drug distribution for legitimate handlers of such drugs. Such a closed system should significantly reduce the widespread diversion of these drugs out of legitimate channels into the illicit market . . .”).

<sup>228</sup> *Purdue Pharma LP*, 620 F. Supp. 3d at 938.

<sup>229</sup> Lord Denning, noted British jurist, once proclaimed: “My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule—or even to change it—so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case.” Quoted in ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 26-27 (2008).

<sup>230</sup> See John Tasioulas, *The Paradox of Equity*, 55 *CAMBRIDGE L.J.* 456, 464 (1996) (“[T]he equitable adjudicator decides the case as the legislator would have decided it were he aware of those particular circumstances.”).

<sup>231</sup> See *supra* Part II(B). Notably, the MDL court held that plaintiff’s allegations that social media operators had full knowledge of the harm they were allegedly inflicting on children bolstered the foreseeability element of their public nuisance claims. See MDL Order Denying Motion to Dismiss I, *supra* note 22, at 24.

<sup>232</sup> See, e.g., Marco Colizzi, Antonio Lasalvia & Mirella Ruggeri, *Prevention and Early Intervention in Youth Mental Health Is it Time for a Multidisciplinary and Trans-Diagnostic Model for Care*, 14 *INT. J. MENTAL HEALTH SYS.* 23 (2020).

<sup>233</sup> See AJ Skierra, *What Gen Z Thinks About its Social Media and Smartphone Usage*, HARRIS POLL (Sept. 10, 2024), <https://theharrispoll.com/briefs/gen-z-social-media-smart-phones> (finding that up to 40% of adults aged eighteen to twenty-seven wish social media had never been invented and that almost 70% support legislation around the safety of children on social media).

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This suggests that efforts to curtail the worst excesses of social media may be received positively even by its most deeply engaged users.

## PART V: CONCLUSION

Novel applications of public nuisance are contentious. They raise concerns about the rule of law and the role of courts in democracies.<sup>234</sup> They can be difficult to square with traditional doctrinal principles of duty in tort law.<sup>235</sup> Nonetheless, the ongoing crisis of youth mental health is a serious problem that deserves serious attention from the courts. There is ample evidence that social media operators have knowingly engaged in conduct that is harmful to children.<sup>236</sup> Accordingly, courts should not dodge the substantive, novel questions of public nuisance posed by the lawsuits but rather engage with the challenging legal issues raised.<sup>237</sup> On the question of democratic legitimacy, courts should consider that plaintiffs bringing public nuisance claims against social media companies do so in the context of an ineffective regulatory landscape that is unlikely to change.<sup>238</sup> On the question of duty, courts should consider the unique place that children have in the law.<sup>239</sup> Social media operators are in the process of damaging millions of children in this country and courts should recognize claims of public nuisance against them as defendants when such cases arise.

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<sup>234</sup> See *supra* Part III(1)(A).

<sup>235</sup> See *supra* Part III(1)(A).

<sup>236</sup> See *supra* Part II(B).

<sup>237</sup> See Lin, *supra*, note 109, at 491. The Social Media MDL judge took a careful approach to evaluating the motion to dismiss, electing to preserve all state law claims because “none [of the state high courts] has formally adopted a *per se* exclusion of a public nuisance claim involving products.” See MDL Order Denying Motion to Dismiss II, *supra* note 22, at 16-17.

<sup>238</sup> See *supra* Part IV(A).

<sup>239</sup> See *supra* Part IV(B).