

# Thinking in the Box in Legal Scholarship: The Good Samaritan and Internet Libel

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Like most academics, we law professors pride ourselves on being able to think *out of the box*—to escape established or conventional trains of thought, to provide deep and unusual insights, and to develop theoretical perspectives in powerful ways that end up transforming the law for the betterment of society. I would venture to say that many of those who seek academic positions or tenure at top law schools virtually take it for granted that they are expected to aspire to scholarship that exhibits some of these attributes. This professional success norm (for lack of a better term) may be one reason for complaints like those of Chief Justice Roberts, who bemoaned the irrelevance of much of what law professors write;<sup>1</sup> academics who compete with one another to be further out of the box are at risk of becoming completely superfluous.

This essay is a defense of *in-the-box* thinking in legal scholarship. A small but growing movement of private law scholars has put forward an approach variously called “pragmatic conceptualism,”<sup>2</sup> “new private law,”<sup>3</sup> or “the new doctrinalism.”<sup>4</sup> We advocate the importance of serious doctrinal analysis *within* the perspective occupied by the common law. The approach is, in important respects, *both* theoretical and doctrinal. It aims to absorb the work of multidisciplinary legal scholars rather than rejecting it. Nonetheless, new

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1. See *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACS BLOG (July 4, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99take-on-academic-scholarship> (quoting Chief Justice Roberts as saying “Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”).
2. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).
3. John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012).
4. Shyamkrishna Balganesh, *The Constraint of Legal Doctrine*, 163 U. PA. L. REV. 1843, 1857 (2015).

private law theorists—myself included—have often treated twentieth-century legal realists as their antagonists. It is worth saying a few words about why.

Legal realism has many strands, and it was of course first developed in part to make legal scholarship *more* useful by adding valuable knowledge from within the social sciences. At least one broad theme within legal realism, however, was far more negative and critical. Oliver Wendell Holmes, Jr., the grandfather of the jurisprudential movement, believed that the language of the common law needed to be washed with “cynical acid.”<sup>5</sup> Anticipating not only legal realism, but whole movements in the philosophy of language and the philosophy of science (which fall under the rubric “verificationism”<sup>6</sup>), Holmes insisted on a reductive approach to the statements about whether a given legal right or legal duty existed: “[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.”<sup>7</sup> On this view, statements about law are not only *illuminated* by empirical claims about human behavior, they are actually *constituted* by such empirical claims. Holmes was saying that—at least within the common law (which does not rely upon legislative commands)—to say that some legal duty exists is actually to make an empirical claim about how various legal actors (e.g., courts) are likely to behave.

The critical and reductive edge of legal realism was pushed much further in the 1970s, 1980s, and 1990s by the critical legal studies movement and law and economics alike.<sup>8</sup> The reason is straightforward: To the degree that the meaning of legal words and concepts is deemed indeterminate and manipulable, it appears both at best pointless and at worst fraudulent for professors to claim to have found answers to legal problems in the terms of the law itself. And to the degree that legal statements are really about human behavior, expertise in law should come from expertise in the sciences of human behavior—social science, including economics. In this way, those who want to make a worthwhile contribution to legal scholarship are moved to think outside of the terms of the law itself—outside of the box.

From my concededly armchair vantage point, what I called the “professional success norm” has combined with the ascent of a critical form of legal realism to form a legal academic culture in which doctrinal legal scholarship has been treated as intrinsically second rate. Like the professional success norm, the influx of Ph.D. economists, historians, philosophers (of which I am one), and political science professors over the past few decades has been both a product

5. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 458, 462 (1897).
6. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1733 (1998) (describing aspects of Holmes’s views that resemble verificationism). *See generally* Rudolf Carnap, *The Rejection of Metaphysics*, in PHILOSOPHY AND LOGICAL SYNTAX 9 (1935) (putting forward verificationist criterion of meaning, and rejecting metaphysics and ethics as meaningless).
7. Holmes, *supra* note 5, at 461.
8. *See* Goldberg, *supra* note 3 (displaying connection among American legal realism, critical legal studies, and law and economics).

and a cause of the move away from scholarly doctrinal analysis. Add to this the struggle of law schools for respect within the universities, and one begins to see how in-the-box legal analysis might have fallen from grace as a form of serious scholarship.

While there is much to be said for interdisciplinary legal scholarship and for out-of-the-box legal thinking—indeed, they are part of the legal academy’s critical role—this is hardly all there is for a law professor to write or to think about. Assertions of doctrinal indeterminacy by realists and their academic descendants tend to be wildly overinflated, and the foundation of such jurisprudential views has been subjected to unrelenting criticism.<sup>9</sup> I shall suggest below that doctrinal scholarship—in-the-box thinking in law by legal academics—also has a vital critical role to play.

I want to illustrate my point by focusing on an example of law professors failing to provide “in-the-box” analysis of an important legal issue.<sup>10</sup> In 1996, Congress included in its Communications Decency Act (“CDA”) a provision that protects some defendants from liability for defamatory statements on the Internet.<sup>11</sup> In my view, courts have almost uniformly misinterpreted the scope of the CDA as eliminating libel law’s *republication rule*<sup>12</sup> and thereby dramatically reducing liability for defamation that happens to occur through the Internet. This error, I believe, stems largely from a failure to take legal doctrine seriously. Despite a barrage of law review literature on CDA § 230,<sup>13</sup> no one seems to have pointed out that CDA § 230 actually has nothing to do with the republication rule.

*Jones v. Dirty World Entertainment Recordings LLC*<sup>14</sup> is representative of how Internet defamation law is now understood by a range of legal actors. The principal defendant in that case was Nik Richie, the owner and operator of the website thedirty.com.<sup>15</sup> Members of the public are invited and encouraged to send him nasty and pornographic statements and pictures about private

9. Most famously, in H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

10. I provide a more in-depth account of how courts have misunderstood the protection offered by the Communications Decency Act in Benjamin C. Zipursky, *The Monsanto Lecture: Online Defamation, Legal Concepts, and the Good Samaritan*, 50 VALPARAISO L. REV. \_\_\_\_ (2016) (forthcoming).

11. Communications Decency Act of 1996, Pub. L. 104-104, 110 Stat. 137 (codified as amended at 47 U.S.C. § 230 (2012)).

12. RESTATEMENT (SECOND) OF TORTS § 578 (AM. L. INST. 1977) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it”); *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (applying republication rule).

13. See sources cited at Center for Law and Information Policy at Fordham Law School, *Section 230 of the Communications Decency Act: A Survey of the Legal Literature and Reform Proposals* 22-35 (April 25 2012) (surveying scholarly literature critical of CDA 230).

14. *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).

15. *Id.* at 401.

individuals.<sup>16</sup> Richie selects among them and then posts some prominently on his website, typically adding some kind of commentary.<sup>17</sup> The website, like many others of this nature, has been very popular. The plaintiff was a major league football cheerleader who sued Richie and the LLC owner of the website because of statements that she had a venereal disease and that she had slept with every single member of the Cincinnati Bengals.<sup>18</sup> The District Court rejected Richie's argument that he was protected by the CDA, reasoning that Richie's soliciting of (and commenting upon) materials disqualified him from statutory immunity as a neutral republisher of the contributor's defamatory posting.<sup>19</sup>

Following the great majority of courts, the Sixth Circuit ruled that the key question was whether Richie's additions were themselves defamatory in an independent way; after answering this in the negative, the court ruled that Richie's CDA defense warranted summary judgment for the defendant.<sup>20</sup> Richie's website is but one example of a massive online industry that is profoundly misogynistic and invasive of women's ordinary lives—an industry that is now regarded as largely beyond regulation.<sup>21</sup>

A tacit premise of the Sixth Circuit's entire analysis was that—under the CDA—Richie could not be held liable for the simple reposting of his contributors' defamatory statements. In this, the Sixth Circuit followed the Ninth Circuit,<sup>22</sup> the California Supreme Court,<sup>23</sup> and the New York Court of Appeals.<sup>24</sup> All of them have derived this conclusion from the following statutory text in § 230(c): “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>25</sup> Richie was the user of an interactive computer service provider, and imposing liability on him for posting his anonymous submitter's posts would be treating him as the publisher of information provided by another content provider. Although a number of early commentators were undaunted by this statutory language,<sup>26</sup> courts have almost uniformly adhered to it over the past fifteen years. Even

16. *Id.* at 402-03.

17. *Id.* at 403.

18. *Id.*

19. *Id.* at 405; *Jones v. Dirty World Entm't Recordings, LLC*, 840 F. Supp.2d 1008, 1010-13 (E.D. Ky. 2012).

20. *Jones*, 755 F.3d at 1415.

21. DANIELLE CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

22. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003).

23. *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

24. *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011 (N.Y. 2011).

25. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2012).

26. *See, e.g., Susan Freiwald, Comparative Institutional Analysis in Cyberspace: the Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 591 (2001).

commentators hostile to the CDA today seem to acquiesce in this reading, and therefore call for amendment of the statute.<sup>27</sup>

Having taught libel law for more than twenty years, having read the case law, having seen how other legal systems treat Internet libel, and having closely examined the history of CDA § 230, I find it stunning that CDA § 230 has been so interpreted—often by widely admired judges. In my view, this is a blunder. The principal point of CDA § 230 was to protect online service providers like AOL from liability for being a passive conduit or for failure to remove defamatory postings by others.<sup>28</sup> The common law of libel contains a potentially aggressive edge that was rightly perceived, in the early 1990s, to have the potentiality to wreak havoc on Internet service providers by forcing upon them liability for failure to remove third parties' defamatory postings, or perhaps even liability for being a conduit of defamatory postings. Because the problem was not just limited to actual Internet service providers, but to bulletin board operators, website owners, and others, Congress inserted broader language “no provider *or user* of an interactive computer service.”<sup>29</sup>

In uncontroverted and explicit legislative history, Congress indicated that there was a particular case that triggered great concern—*Stratton Oakmont v. Prodigy*.<sup>30</sup> In a legal environment full of uncertainty over whether ISPs would face liability for serving as conduits of defamatory statements or for failure to remove them, a New York trial judge ruled that since the ISP Prodigy expressly undertook to engage in censorship and filtering, it should indeed be held responsible for defamatory postings that appeared through its service, even if it did not itself post them.<sup>31</sup> The online service industry went ballistic, and told Congress both that: (a) trying to monitor everything others posted at peril of liability was unreasonable, and risked a problem of overcensorship; and (b) selectively imposing liability on those ISPs that undertook to censor for families was doubly misguided, because it would remove the incentive to make good-faith efforts to monitor for obscenity.<sup>32</sup>

Congress expressly accepted both arguments,<sup>33</sup> and crafted CDA § 230 in response. Section 230(c)'s first subsection essentially says that what someone

27. See, e.g., CITRON, *supra* note 21.

28. I defend this claim at greater length below. See also Zipursky, *supra* note 10.

29. 47 U.S.C. § 230(c)(1).

30. See H.R. CONF. REP. 104-458, H.R. Conf. Rep. No. 458, 104TH Cong., 2ND Sess., 1996 WL 46795, 1996 U.S.C.C.A.N. 10 (Leg.Hist.) \*\*124, \*\* 207-08, P.L. 104-104 (stating that “one of the specific purposes of this section is to overrule” *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. Nassau Co. 1995)).

31. 1995 WL 323710, at \*6.

32. See 141 Cong. Rec. H8460-01 (1995) (testimony of Rep. Chris Cox).

33. See *supra* note 30; see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). (describing legislative history).

else posted about a plaintiff cannot be the basis for liability for an Internet service provider.<sup>34</sup> Its second section says that volunteering in good faith to censor or filter cannot be a basis for imposing liability, either.<sup>35</sup> The big picture is that no one is going to face liability for being a passive conduit or for failure to remove.

The CDA's title—it is literally labeled a “good Samaritan” statute<sup>36</sup>—clues us in to the fact that we should view it in terms of the good Samaritans we teach students about in first-year torts, and the “good Samaritan” statutes every state has passed to protect such persons.<sup>37</sup> Recall how such statutes work. Negligence law has broad nonfeasance doctrine that says there is no affirmative duty to protect or rescue others from potential harm generated by a third party (or nature). A qualification built into the common law of torts is that those who undertake to rescue or protect the plaintiff do have an affirmative duty and will face liability for failing to use reasonable care to comply with that duty. Concerned that physicians or medical personnel or laypersons will be discouraged by this legal structure from volunteering to help persons injured in emergencies on the road, states have passed “good Samaritan” statutes that alter the common law rule by saying that such undertakings will not trigger negligence liability, so long as the volunteer (good Samaritan) acted in good faith.

Congress was clearly aiming to fix what it saw as a parallel problem. Drawing from its experience with *Stratton Oakmont* and an earlier New York case from the Southern District of New York (*Cubby v. CompuServe*<sup>38</sup>), Congress envisioned a state whose tort law: (a) treated ISPs and ISP users as having no affirmative duties to protect others' reputations from the harmful postings of third parties; but (b) imposed an affirmative duty on those ISPs that undertook to protect third parties by censoring and filtering obscene or defamatory materials. The clearest point of the CDA is that a state *may not impose an affirmative duty* upon those who undertake to protect others' reputations in this manner. CDA § 230(c)(2) quite plainly says that those who undertake to censor and filter voluntarily shall be protected as good Samaritans:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

34. 47 U.S.C. § 230(c)(1).

35. 47 U.S.C. § 230(c)(2).

36. 47 U.S.C. § 230(c). The full title of this subsection is “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”

37. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 312 (2d ed. 2011).

38. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>39</sup>

As in first-year torts, that means that defendants shall not be treated as acquiring affirmative duties to remove defamatory postings merely by virtue of a good-faith effort to protect others.

Although § 230(c) interpretation is somewhat more difficult when we look at its first section, it is nevertheless fairly clear in context. Here is how it reads:

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.<sup>40</sup>

Think again of *Stratton Oakmont*. The New York court treated Stratton Oakmont as a publisher of the statements that a third party posted on a bulletin board through Prodigy: it held that Stratton Oakmont could be held liable as if it had published the statements (in the traditional sense), by virtue of the fact that Prodigy was the medium through which the statements appeared, and by virtue of the fact that Prodigy (and the individual whom Prodigy hired to monitor the website) had the capacity to remove it.<sup>41</sup> CDA § 230(c) (1) essentially forbids courts from doing this. It makes sense that this section precedes the one that plainly contains a version of a good Samaritan rule, for it lays down a basic rule stating that ISPs (and others) do not have responsibility for protecting persons against the publications by others through the ISP. This is analogous to laying down a basic rule in negligence law for emergencies, that there is no duty to protect others from outside harm. Then subsection (2) of § 230(c) says the rule is not altered by an undertaking to protect, so long as there is good faith.<sup>42</sup>

Appellate courts today have completely missed this reading.<sup>43</sup> Under the withering arguments of a talented First Amendment defense bar, they have read this section to eliminate a basic rule of defamation law—the republication rule.<sup>44</sup> This rule says that defendants who take something someone else told them and restate it in published words or disseminate it widely cannot take shelter in the fact that they were just quoting someone else or repeating what they said.<sup>45</sup> The reasons for the republication rule are obvious. Not only is republication a voluntary act itself, and not only does it amplify the damage

39. 47 U.S.C. § 230(c)(2).

40. 47 U.S.C. § 230(c)(1).

41. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at \*6 (N.Y. Sup. Ct. Nassau Co. 1995).

42. 47 U.S.C. § 230(c)(2)(A) (“any action voluntarily taken in good faith”).

43. *See, e.g., Barrett, supra* note 23, at 513-14 (overlooking any basis for active/passive distinction).

44. 1 RODNEY A SMOLLA, LAW OF DEFAMATION § 4:87 (2d ed. 2001).

45. *Id.*

to an extraordinary degree, it is also one of many “I wasn’t born yesterday” principles in our legal system—for we know that the world of defamers will typically find a way to make their damaging statements by putting the words in someone else’s mouth. Common law, statutory law, and constitutional law have all found ways of trimming the edges of the republication rule for certain important contexts (e.g., a newspaper reporting what town council members actually said at a public meeting).<sup>46</sup> But the core of the rule remains intact throughout American defamation law, except in the case of the Internet, where § 230(c) has been used to battle against it.

There is simply no evidence (other than this misreading of the text) that Congress intended to get rid of the republication rule, and doing so would have been quite bizarre. Imagine that a private detective maliciously emailed the board of directors of an ISP that the company’s CFO was a rapist, and the ISP chose to post the malicious email on its website, knowing it was false. Under the republication rule reading of CDA § 230(c)(1), there is no liability. Creating such a policy has nothing whatsoever to do with *Stratton Oakmont* or the monitoring fears that Congress expressly placed in the statute. The problem in that case was essentially the very opposite: ISPs and users were being held liable for failure to remove or censor something, as if they had actually posted it themselves. CDA § 230 prohibited courts from equating the passive-conduit or would-be censor role with the role of someone who actually published the statement.

My basic point about CDA § 230 is this: A distinction exists between eliminating affirmative duties to remove content and limiting conduit liability for ISPs and those working with them, on the one hand, and eliminating the republication rule for the Internet, on the other. Amazingly, I have not located a single legal commentator who has made this point.

CDA § 230 is but one example of cases in which courts have been left in the dark on challenging questions in the law of torts.<sup>47</sup> Getting real in all of these cases means coming to understand how the law works—*thinking well in the box*, not just out of the box. The box is not value-free and it is not impermeable, but there is nonetheless a lot to know about what is in it and how to use it. And—as I hope my Internet libel example illustrated—it makes a difference in the real world whether the law is or is not well-understood in these terms. Defamation law aims to protect people against a variety of wrongs, and a misreading of CDA § 230 has shorn away much of that protection, while simultaneously fostering a profoundly misogynistic medium in the Internet. Judges and lawyers are moving in the wrong direction on CDA interpretation *not (or not only) because they do not see the policy consequences or because they evaluate these*

46. RESTATEMENT (SECOND) OF TORTS § 611 (“Report of Official Proceedings or Public Meeting”).

47. Cf. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L. REV. 569, 579, 585-91(2013) (describing array of doctrinal problems to which pragmatic conceptualist methodology and civil recourse theory have been applied, and claiming more such analysis is necessary).

*consequences differently.* They are doing so at least in part because they do not have a big enough, deep enough, and well-considered enough picture of this area of the law. In my view, it is our job (the job of legal academics) to help to remedy that problem.

Finally, it must be admitted that there is an intrinsic appeal to what I have called “out-of-the-box” thinking, which “in-the-box” thinking appears to lack. Law is the product of establishment forces, for the most part, and the authority of the legal system tends to inflate not only the *efficacy* of norms that become enacted or adopted into formal, enforceable law, but also their *apparent legitimacy*. We law professors tend to be proud of our capacity to challenge authority and question legitimacy, and, as well-educated persons with secure jobs and plenty of legal sophistication, we are well-placed to do so. Sticking to the analysis of doctrine may seem to be squandering the opportunity to question authority, or, worse still, abdicating a form of responsibility.

The outside, critical perspective is motivated in part by the fear that courts will fall into a pattern of enforcing unjustifiable legal norms simply because they are there, without questioning whether they should be there or how they should be changed. This is *a* valid concern, but *it is not the only* valid concern. Another concern is that the words and concepts that supposedly constitute the law are mere window dressing—that there is no real substance or content in the law, but simply verbiage to be used one way or the other, covering a highly disjointed set of possible cases. We academics reinforce that concern when we ignore the value of doctrinal scholarship. If part of integrity as a legal scholar is coming to grips with the normative defensibility of the law (or its indefensibility), that is not the only part. Another part is coming to grips with the breadth and complexity of law’s content. Without taking seriously what the law says, when carefully and thoughtfully understood, we are giving up on the idea that the law can genuinely guide conduct and guide the resolution of disputes, and without this, we are giving up on law’s central aspiration.