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SECTION 230 OF THE COMMUNICATIONS DECENCY ACT AND THE FUTURE OF ONLINE SPEECH

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Executive Summary

Section 230 of the Communications Decency Act protects online intermediaries like social media platforms from being sued for transmitting problematic third-party content. It also lets them remove, label, or hide those messages without being sued for their choices. The law is thus simultaneously a shield from liability—encouraging platforms to transmit problematic content—and a sword—allowing platforms to manage that content as they like. Section 230 has been credited with creating a boisterous and wide-open Internet ecosystem. It has also been blamed for allowing platforms to profit from toxic speech.

Everyone can agree that the Internet is very different from what was imagined in 1996 when Section 230 was penned. Internet firms have concentrated power and business models that are nothing like what they had then. No one contemplated the velocity, reach, scale, nature, and influence of the speech now flowing over digital infrastructure. It is entirely reasonable to rethink how Internet liability is apportioned. But it is critical that we are clear about how changes to Section 230 might strengthen government control over speech, powerful platforms' control, and/or make the Internet even more lawless.

Section 230 has become a flashpoint in the “techlash” against the power of dominant technology firms. Critics of all political stripes want to reform or repeal the law. For example, House Speaker Nancy Pelosi and Representative Adam Schiff have said that Section 230 effectively functions as a grant of power without responsibility. They have suggested that platforms need to perform more moderation to reduce harmful speech. Lawmakers on the right, including Senators Josh Hawley and Ted Cruz, have argued that platforms should maintain neutrality and prove that any moderation is non-discriminatory and unbiased. Other proposals attempt to provide narrowly tailored and content-neutral reforms to encourage Internet platforms to adopt greater responsibility over content moderation.

Unfortunately, conversations about changing Section 230 have been marked by confusion about what the law actually does. Too often, they assume that Section 230 demands platform neutrality, when in fact it encourages content-moderation. Or they assume that Section 230 protects platforms from hate speech liability, when in fact it is the First Amendment that does that. Section 230 is too critical to the digital economy and expressive freedoms to gut it. But its form of intermediary liability should not be sacrosanct. Reforms should incentivize responsible and transparent platform governance. They should not dictate particular categories of content to be banned from the Internet, nor should they create publisher licensing schemes. Section 230 fostered uninhibited and robust speech platforms. If we now want more inhibition, we must take into account the power of concentrated speech platforms and the opacity of algorithmic content moderation. We must also recognize that if the law makes it too risky to moderate speech, platforms may walk away entirely from the job.

This paper explains how Section 230 arose, what it was meant to achieve, where it failed, and how proposals to fix it fare.

Section 230 of the Communications Decency Act and the Future of Online Speech

ELLEN P. GOODMAN, RYAN WHITTINGTON

“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.”¹ These twenty-six words from Section 230 of the Communications Decency Act of 1996 are said to have “created the Internet.”² From sites of niche online discussion to social networking behemoths, Section 230 lets Internet firms moderate their platforms as they see fit and carry third-party, user-generated content without fear of liability. Absent these protections, it is unlikely that the commercial Internet would have developed such robust forums for online expression.

Regardless of its importance at the time of the law’s adoption, Section 230 is now the subject of strong criticism and many would walk back its protections. It is caught up in the “techlash” against the power of dominant technology firms. Commentators and politicians of all stripes have set their sights on reforming or repealing Section 230.

This paper explains Section 230 within the context of current debates surrounding it. It outlines the law’s protections, discusses the history and intent behind its development, addresses a handful of stubborn myths surrounding its purpose and application, and provides a brief overview of prominent proposals to reform Section 230.

¹ 47 U.S.C. § 230(c)(1).

² Jeff Koseff, *The Twenty-Six Words That Created the Internet*, Cornell University Press, 2019.

Overview of Section 230

In the offline world, content originates with an author and is disseminated by publishers and distributors. Distributors, such as bookstores and newsstands, are not generally held liable for the content they distribute. By contrast, publishers can be held liable for content. This distinction can be explained by the fact that, unlike distributors, publishers exercise a high degree of editorial control. The upshot is that if the *New York Post* publishes an author’s defamatory article, it is legally responsible for the publication of that content, while the newsstand owner who sells and distributes copies of the paper is not.

The advent of the Internet challenged this distinction between distributor and publisher. Lawmakers understood that Internet services did not fit neatly into this distributor-publisher paradigm. These services often exercised more control over content than distributors but could not reasonably be considered publishers of the vast amount of material on their platforms. Motivated to protect the nascent commercial Internet and the rough-and-tumble speech environment it fostered, lawmakers introduced Section 230 of the Communications Decency Act of 1996.

Section 230 consists of two prongs. Senator Ron Wyden—its principal author when he was a member of the House of Representatives—likens them to a “shield” and a “sword.”³ The first prong—the one contained in the 26 words—protects Internet platforms from liability associated with content

³ Colin Lecher, “Sen. Ron Wyden on Breaking Up Facebook, Net Neutrality, and the Law That Built the Internet,” *The Verge*, July 24, 2018.

created and shared by third-party users.⁴ If a Facebook user, for example, defames another individual on the platform, the user that produced the defamatory content may be held liable—not Facebook.

“ *By mitigating the legal risk associated with platforming third-party content, Internet firms were able to create large and permissive forums for speech and expression online without fear of heavy liability.* ”

The second, often overlooked, prong empowers Internet firms to take action to moderate third-party content on their platforms without being treated as the publishers of content.⁵ Contrary to some misconceptions, even if Facebook curates content to some extent and moderates against hateful, explicit, and harmful content, under Section 230, the company is not treated as the publisher of the user-created content.

The protections codified in Section 230’s “sword” and “shield” provisions are subject to only a narrow set of statutory limitations. Section 230(e) catalogues the classes of content that platforms are not shielded from.⁶ Section 230 thus does not provide platforms a defense from liability associated with federal criminal law, intellectual property (which is governed by statutes like the Digital Millennium Copyright Act),

4 “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.” 47 U.S.C. § 230(c)(1).

5 “No provider or user of an interactive computer service shall be held liable on account of—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.” 47 U.S.C. § 230(c)(2)(A).

6 See, 47 U.S.C. § 230(e).

and digital communications law (which is governed by the Electronic Communications Protection Act).

Taken together, the two prongs of Section 230 have proven immensely powerful. By mitigating the legal risk associated with platforming third-party content, Internet firms were able to create large and permissive forums for speech and expression online without fear of heavy liability. While Section 230 remains a vital piece of legal infrastructure for many of the web’s biggest players—including Facebook, Amazon, Wikipedia, Google, and Apple—it has also been a boon to smaller Internet enterprises. Smaller firms like Yelp and Patreon, which do not have the capacity to screen the massive volume of user content generated on their platforms, also rely on Section 230’s protections. The same is true of small and issue-specific forums. Absent Section 230’s protections, it might be prohibitively difficult to run a forum focused on a specific topic (whether, say, knitting, childrearing, hunting, or Christianity) because moderation actions designed to keep message-board discussions on topic could subject the forum to liability for reasons explained below.

Combatting the Moderators’ Dilemma

Early legislative efforts aimed at regulating the Internet were largely focused on the prevalence of pornography and otherwise unsavory content. The Communications Decency Act of 1996 marked the first attempt by Congress to limit the spread of pornographic content online. As drafted, it “made it a crime, punishable by up to two years and/or a \$250,000 fine, for anyone to engage in online speech that is ‘indecent’ or ‘patently offensive’ if the speech could be viewed by a minor.”⁷ The Supreme Court ultimately ruled that the legislation was an unconstitutionally vague and overbroad violation of the First Amendment. Like the rest of the Communications Decency Act, Section 230 reflected Congress’ interest in limiting harmful speech online. But, unlike other provisions of the

7 ACLU, “Reno v. ACLU—Challenge to Censorship Provisions in the Communications Decency Act,” June 20, 2017.

Communications Decency Act that were struck down, Section 230 passed constitutional muster.

Representative Chris Cox and Wyden, drafted Section 230 in the shadow of two critical intermediary liability lower court cases from the 1990s. These early cases demonstrated the difficulties courts faced in assessing the liability of Internet platforms for user-generated content.

In *Cubby v. CompuServe*, the U.S. District Court for the Southern District of New York held that the Internet firm CompuServe was not liable for defamatory content on a discussion forum because it was passive in the chain of communications. There was no evidence demonstrating that it knew or should have known about the defamation.⁸ In other words, the firm was treated as a mere distributor of content, like a bookstore, library, or newsstand.

By contrast, in *Stratton Oakmont v. Prodigy Services*, the New York Supreme Court ruled that the firm Prodigy was liable for allegedly defamatory statements made by an anonymous individual who posted on a message board it hosted.⁹ Prodigy, which hosted many online bulletin boards, actively moderated content in an effort to make its platform fit for children and families. The court held that since it made efforts to moderate, Prodigy was effectively exercising editorial control and should, therefore, be held liable for unlawful content produced by users.

Together these two rulings created a dilemma for Internet platforms. If an Internet firm wanted to clean up and moderate its platform for the sake of improving user experience (or of mollifying politicians), it would open itself to enormous legal risk.¹⁰ Consequently, the safest course of action would be to forego moderation and act as a passive conduit for information. This, however, would leave platforms open to misinformation, sexually explicit

content, and harassment. Conservative lawmakers, including Representative Cox, were troubled by the fact that Prodigy was effectively punished for taking efforts to tamp down sexually explicit content. Other lawmakers, like Senator Wyden, were concerned that holding platforms liable for users' conduct would compel them to over-police user content, ultimately chilling online speech.

Broad Scope, Narrow Exceptions

Since Section 230 became law, courts have generally interpreted it broadly, arguably extending its protection beyond the scope of the lawmakers' original intent, which was primarily concerned with the speech of third-party users. Even in cases involving platforms that do not traffic primarily in speech, like Airbnb¹¹ and eBay,¹² courts have frequently ruled for defendants on Section 230 grounds. Although the law was initially created with the speech of web users in mind, courts have even relied on Section 230 to protect platforms from liability associated with physical harm.¹³

Though Section 230 has generally been interpreted broadly, it has been subject to some limitations. In addition to the explicit statutory exceptions described above, courts have modestly narrowed the application of Section 230. For instance, they have declined to extend Section 230 protections where platforms have been found to participate in the "development" of content. In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit Court of Appeals held that platforms that engage in the creation or development of unlawful material will not get Section 230

⁸ *Cubby, Inc. v. CompuServe, Inc.*, 7767 F.Supp.135 (S.D.N.Y. 1991).

⁹ *Stratton Oakmont v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995).

¹⁰ Eric Goldman, "An Overview of the United States' Section 230 Internet Immunity, The Oxford Handbook of Online Intermediary Liability," December 1, 2018.

¹¹ *Airbnb, Inc. v. San Francisco*, 217 F. Supp. 3d 1066, 1072-73 (N.D. Cal. 2016).

¹² *Hinton v. Amazon*, 72 F. Supp. 3d 685 687 (S.D. Miss. 2014).

¹³ In one such case, a plaintiff contracted mercury poisoning after purchasing vacuum tubes from a third-party seller on eBay. In this case, eBay was found to be immune from liability under Section 230. See, *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024 (W.D. Pa. 2011). In another case, an individual assaulted a minor that he met on the MySpace social media platform. Following the incident, the victim brought a negligence suit against MySpace. The Fifth Circuit ultimately ruled that the platform was, indeed, protected from liability associated with the physical harm under Section 230. See, *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008).

protection.¹⁴ In a similar ruling, the Tenth Circuit Court of Appeals held that a “service provider is ‘responsible’ for the development of offensive content if it specifically encourages development of what is offensive about the content.”¹⁵ So, while Section 230 offers broad protection to Internet platforms, courts have recognized that there are limits to this in cases in which platforms engage in or proactively facilitate the creation of unlawful content.

“ Since Section 230 became law, courts have generally interpreted it broadly, arguably extending its protection beyond the scope of the lawmakers’ original intent.

For those worried about Internet content harms, these modest limits on the power of Section 230 are insufficient. In the face of frustration with the broad scope of Section 230, Congress has begun to narrow it. In April 2018, President Donald Trump signed into law a new statutory exception to Section 230’s protection called the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA). FOSTA, along with the Stop Enabling Sex Trafficking Act, expanded federal criminal liability for sex trafficking. FOSTA also contracted Section 230 protections to allow civil actions and state criminal prosecutions to go forward against Internet services for violating federal sex trafficking laws.¹⁶

FOSTA attracted large bipartisan support in Congress, passing 97–2 in the Senate and 388–25 in the House, but it has been criticized by digital rights and civil liberties groups. Critics like the Electronic Frontier Foundation have claimed that the legislation

14 Fair Hous. Council v. Roommates, 521 F.3 1157 (9th Cir. 2008).

15 FTC v. Accusearch, 570 F.3d 1187 (10th Cir. 2009).

16 47 U.S.C. § 230(e)(5). In addition, it created a Section 230 exemption for state law criminal sex-trafficking prosecution charges.

will incentivize platforms to “become much more restrictive in what sorts of discussion—and what sorts of users—they allow, censoring innocent people in the process.”¹⁷ Following the law’s implementation, critics say, it has “caused numerous Internet services to eliminate some offerings or exit the market entirely.”¹⁸

Common Section 230 Myths

As lawmakers, civil society organizations, and journalists focus more of their attention on Section 230, confusion about it abounds. Two particular common myths harbored by its critics are unpacked below.

Myth: To qualify for Section 230’s liability shield, platforms must operate as neutral platforms.

Many commentators have stated that Internet firms must act as “neutral” platforms to qualify for Section 230’s liability protections. For instance, Senator Ted Cruz characterized Section 230 in this manner during his questioning of Facebook CEO Mark Zuckerberg in a Senate hearing. He said that “the predicate for Section 230 immunity under the CDA [Communications Decency Act] is that you’re a neutral public forum.”¹⁹ Journalists have also misinterpreted Section 230 in this manner. A since-corrected article in Vox, for instance, asserted that only publishers have “carte blanche to monitor, edit, and even delete content (and users).”²⁰ Even technology publications have misinterpreted Section 230 as requiring some degree of neutrality. A cover story in *Wired* claimed that if “Facebook were

17 Elliot Harmon, How Congress Censored the Internet, Electronic Frontier Foundation, March 21, 2018.

18 Eric Goldman, “Why Section 230 Is Better Than the First Amendment,” Notre Dame Law Review, March 12, 2019.

19 Catherine Padhi, “Ted Cruz vs. Section 230: Misrepresenting the Communications Decency Act,” Lawfare, April 20, 2018.

20 Jane Coaston, “The Facebook Free Speech Battle, Explained,” Recode, May 14, 2019.

to start creating or editing content on its platform, it would risk losing [Section 230] immunity.”²¹

This is not accurate. As Section 230 is written and enforced, platforms are under no obligation to act as neutral conduits in exchange for safe harbor protections. Section 230 explicitly gives platforms liability protection and the ability to moderate at the same time. If platforms were required to act as neutral conduits, they would inevitably be caught in the “moderator’s dilemma” at issue in *Stratton Oakmont* prior to the creation of Section 230.

Myth: Without Section 230, Internet firms would have more incentive to responsibly police their platforms.

Some argue that platforms allow harmful speech because they are protected and that doing away with Section 230’s liability shield would force them to dramatically reduce harmful speech. However, both parts of this supposition are problematic.

First, platforms already moderate speech even though they are immune from liability. Even in the absence of legal pressures, there are political and consumer pressures on them to conduct content moderation. Section 230 actually encourages content moderation by giving platforms the express authority to do so without being treated as publishers.

Second, platforms would not necessarily address most of the objectionable forms of content even in the absence of Section 230. Much of the “offensive” or “harmful” content that has raised concerns is entirely legal, rendering a shield from liability superfluous. This content includes non-defamatory fake news, hate speech, and non-criminal harassment, as these examples fall into classes of protected speech. Absent Section 230, platforms would not be obligated to remove such speech. Indeed, absent the “sword” provisions of Section 230, platforms might be less willing to remove objectionable content, lest they be held liable as publishers.

21 Nicholas Thompson & Fred Vogelstein, “Inside the Two Years That Shook Facebook—And the World,” *Wired*, February 12, 2018.

Proposals for Change

Section 230 has been criticized from all sides. Many Republican lawmakers, including some with seats on critical congressional committees, allege that platforms have demonstrated anti-conservative bias (a claim for which there is scant evidence).²² Many Democrats have expressed concern that Section 230’s protections have prevented platforms from taking meaningful action against misinformation and harassment online. House Speaker Nancy Pelosi, for example, has claimed that platforms have abused the protections of Section 230, adding that “there has to be a bigger sense of responsibility” for the privilege of its protections.²³

While it is true that Section 230 is increasingly a bipartisan issue, proposals to reform it are often attempting to achieve irreconcilable goals. Many recent ones are designed to encourage firms to adopt greater responsibility for policing their platforms, either through the creation of additional exceptions to Section 230’s immunity, or through the establishment of preconditions for immunity. Other proposals aim to limit the amount of moderation platforms can employ. There are also important differences in whether the proposals seek to shape platform content *ex ante* with new content-based Section 230 exceptions or to condition immunity after the fact based on platform reasonableness or processes.

Some of the most prominent Section 230 reform proposals recently suggested by lawmakers, legal scholars, and civil society organizations are reviewed below.

Creating Genre-Based Limitations

Some commentators have suggested that Section 230 be scaled back to strip “safe harbor” protections for certain categories of communication. Recent

22 James Pethokoukis, “Even the Anecdotal Evidence of Big Tech’s Anti-Conservative Bias Isn’t Super Compelling,” *American Enterprise Institute*, April 11, 2019.

23 Eric Johnson, “Silicon Valley’s Self-Regulating Days ‘Probably Should Be’ Over, Nancy Pelosi Says,” *Recode*, April 11, 2019.

proposals take this approach, for example, with respect to deep fakes (sophisticated machine-learning technology that can fabricate realistic audio and video depictions) and platform-hosted advertising.

In a 2018 white paper on information platform regulation, Senator Mark Warner claimed that the development of deep fakes will “usher in an unprecedented wave of false and defamatory content.”²⁴ The white paper posits that platforms

“ Some commentators have suggested that Section 230 be scaled back to strip “safe harbor” protections for certain categories of communication.

“represent ‘least-cost avoiders’ of these harms” and that they “are in the best place to identify and prevent this kind of content from being propagated on their platforms.”²⁵ Senator Warner proposes to revise Section 230 to make platforms liable “for state-law torts...for failure to take down deep fake or other manipulated audio/video content.”²⁶ His proposal would create a notice and takedown system, in which the victim of a tortious deep fake can request that a platform remove unlawful (usually defamatory) content. If issued a takedown notice, platforms would be liable in instances “where they did not prevent the content in question from being re-uploaded in the future.” While notice and takedown regimes, like those embedded in the Digital Millennium Copyright Act, are often abused,²⁷ Senator Warner’s proposal would, he argues, mitigate the risk of frivolous takedown requests by requiring victims to successfully prove in

24 David McCabe, “Scoop: 20 Ways Democrats Could Crack Down on Big Tech,” Axios, July 30, 2018.

25 Ibid.

26 Ibid.

27 Daphne Keller, “Empirical Evidence of ‘Over-Removal’ By Internet Companies Under Intermediary Liability Laws,” Stanford Center for Internet & Society, October 12, 2015.

court that the synthetic content is tortious in nature prior to issuing a takedown request.

John Bergmayer of the tech policy non-profit Public Knowledge has suggested exempting an entire class of communications from Section 230 protections, arguing that it may be beneficial to impose greater liability on platforms for “ads they run, even when those ads are provided by a third party.”²⁸ According to him, the advertising marketplace is so confusing and complicated that Internet firms often have no way of knowing what types of advertisements their users see. Additionally, many online advertisements fed to users are “fraudulent, misleading, or even vectors for malware.”²⁹ The existing structure of advertising markets fails to meaningfully align incentives in a way that promotes quality advertisements. For Bergmayer, exposing platforms to greater liability for the advertisements they run could potentially reorient the marketplace in a way that improves advertising quality. Internet firms could “force the ad tech and online publishing industries to adopt technologies that give them more control and oversight of the ads they run.”³⁰

What the Warner and Bergmayer proposals have in common is that they identify potentially risky classes of content to exempt from Section 230 protections in order to realign platform incentives to reduce the amplification of harmful content.

Creating Narrow Content-Based Carve-outs

A related effort is closer to the FOSTA approach and consists of targeting specific messages. In a Senate Intelligence Committee hearing last year on foreign influence on tech platforms, Senator Joe Manchin floated a proposal to carve out drug-trafficking content from Section 230 protections.³¹ Other carve-outs might involve lifting immunity

28 John Bergmayer, “How to Go Beyond Section 230 Without Crashing the Internet,” Public Knowledge, May 21, 2019.

29 Ibid.

30 Ibid.

31 Samantha Cole, “Senator Suggests the Internet Needs a FOSTA/SESTA for Drug Trafficking,” Motherboard, September 5, 2018.

Figure 1. Categorization of Recent Section 230 Reform Proposals.

Regulation of Speech	Limiting Liability Protection for “Deep Fakes” <i>Senator Mark Warner</i>
	Ex Post Enforcement of Reasonable Platform Conduct <i>Danielle Citron and Benjamin Wittes</i>
	FOSTA-Inspired Carve-outs—Liability for Drug Trafficking <i>Senator Joe Manchin</i>
	FTC Certification and Compelled Platform “Neutrality” <i>Senator Josh Hawley</i>
Regulation of Process	Quid Pro Quo Amendments: Section 230 as Conditional Privilege <i>Ellen P. Goodman and Karen Kornbluh</i>
	Establishment of Reasonable User-Identification Standards <i>Gus Hurwitz</i>
Regulation of Business Practice	Limiting Liability Protections for Platform-Hosted Advertisements <i>John Bergmayer</i>
	Distributor Liability for Revenue-Sharing Arrangements <i>John Bergmayer</i>

for online harassment, conspiracy to incite violence, cyber-stalking, or consumer fraud.³²

FOSTA-like efforts have the benefit of targeting narrow classes of content, but they risk re-creating the moderator’s dilemma and chilling platform speech. FOSTA made it unlawful to knowingly assist, facilitate, or support sex trafficking. As one commentator puts it, if liability is created on the basis of what platforms “know” about user-generated content, they may

“rationally choose to do less policing work as a way of reducing liability-creating knowledge.”³³

Expanding the Definition of Content “Development”

While Section 230 insulates platforms from liability associated with user-generated content, it does not protect platforms from liability associated with

³² Karen Kornbluh and Ellen P. Goodman, “Bringing Truth to the Internet,” *Democracy*, Summer 2019.

³³ Eric Goldman, “New House Bill (Substitute FOSTA) Has More Promising Approach to Regulating Online Sex Trafficking,” *Technology and Marketing Law Blog*, December 11, 2017.

the “creation or development” of unlawful content. Courts have generally interpreted “development” very narrowly. Though platforms take actions to promote or curate content, courts have held that these practices do not constitute content “development.” In many cases, platforms pay users to create content. This is a common arrangement on the likes of YouTube, where the platform enters into revenue sharing arrangements with content creators. Courts have declined to abrogate Section 230 protections for this level of involvement. In the 1998 case of *Blumenthal v. Drudge*, a federal court held that AOL, which paid money to promote a defamatory article published by

“ While Section 230 insulates platforms from liability associated with user-generated content, it does not protect platforms from liability associated with the “creation or development” of unlawful content.

the *Drudge Report*, was insulated from liability under Section 230 even though the company financially contributed to the promotion of defamatory content.³⁴ This was because AOL had played no direct role in creating the defamatory statements.

John Bergmayer has suggested (though not necessarily endorsed) that, given financial incentives often determine which types of content get created, platforms could be subjected to distributor liability where the platform financially incentivizes the creation and distribution of content.³⁵ In other words, if a company like YouTube enters into a revenue-sharing arrangement with a content creator producing unlawful content, it could be made liable for aiding

34 *Blumenthal v. Drudge*, 992 F. Supp 44 (D.D.C. 1998).

35 Bergmayer, “How to Go Beyond Section 230 Without Crashing the Internet.”

in the content’s creation. The idea behind a Section 230 reform aimed at creating broader liability for developing and propagating unlawful content is to encourage platforms to “figure out just who it is doing business with.”³⁶

While this change might encourage platforms to scrutinize more heavily their financial relationships with content creators, it would not touch a lot of the most harmful content simply because there is no underlying liability in the absence of Section 230. This is true, for example, of disturbing content aimed at children. Because such content is not necessarily unlawful, making a platform liable for monetized content might not result in any additional liability and therefore no additional legal incentive to combat such content.

Ex Post Assessment of “Reasonableness”

Boston University law professor Danielle Citron has proposed introducing a “reasonable care” standard into Section 230. A paper she co-authored with Benjamin Wittes argues that conditioning its liability shield on “reasonable efforts to address unlawful activity would not end innovation or free expression as we know it.”³⁷ While “reasonable” is a vague term, Citron has pointed to the fact that much judicial interpretation, particularly in tort law contexts, hinges upon the judicial determination of whether a party’s conduct is reasonable. Such a change would take a more negligence-centered approach to intermediary liability. This would empower courts to determine whether a platform’s actions regarding specific content was reasonable by considering the context of the content and the platform’s efforts to combat such content.

According to Citron and Wittes, this proposal would ultimately require Internet firms to take steps towards addressing unlawful content on their platforms. It would also provide plaintiffs with recourse against platforms that encourage the

36 *Ibid.*

37 Danielle Keats Citron and Benjamin Wittes, “The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity,” *Fordham Law Review*, 2017.

propagation of unlawful content while hiding behind Section 230's liability shield. Citron and Wittes cite Dirty.com, a website "devoted to spreading gossip, often about college students," as an example of an Internet firm that is afforded undue protection from Section 230.³⁸ Dirty.com was designed specifically to traffic in objectionable and often defamatory gossip, but through a combination of blanket immunity

“ A requirement of political neutrality, even if it survived a vagueness challenge, would dramatically curtail the speech rights of online intermediaries. ”

and anonymous online conduct, plaintiffs have been effectively robbed of recourse in the face of defamation or invasion of privacy. Creating a reasonable care standard could give plaintiffs a way to go after bad actors that have taken insufficient action against unlawful content.

While the Citron-Wittes proposal would expand the legal options available to those who have suffered tortious harm, it would also open the door to extensive and potentially frivolous litigation. One of the benefits of Section 230's protections is that it provides firms, including nascent startups and small-scale forums, with legal certainty. According to Engine, an organization that advocates on behalf of smaller firms, the cost of defending a Section 230 case through the entire discovery process can range from \$100,000 to more than \$500,000.³⁹ Stripping blanket immunity from platforms in exchange for a negligence standard would enable plaintiffs to engage in extensive litigation aimed at determining whether a platform's conduct was, indeed, reasonable.

“Political Neutrality” Mandates

³⁸ Ibid.

³⁹ Engine, Section 230: Cost Report.

Senator Josh Hawley recently introduced the Ending Support for Internet Censorship Act, which would treat Section 230 protections as a privilege rather than a right.⁴⁰ The act would require Internet firms above a certain size to apply for an “immunity certification” from the Federal Trade Commission (FTC). To receive such a certification, a firm would be required to show, to the satisfaction of at least four commissioners, that the “company does not moderate information provided by other information content providers in a manner that is biased against a political party, political candidate, or political viewpoint.”⁴¹

Commentators on both sides of the aisle have been highly critical of Hawley's proposal, claiming that the bill is poorly drafted, imprecise, and fatally vague. Legal scholar Blake Reid criticized its lack of clarity in defining what exactly constitutes “politically biased moderation.”⁴² Legal scholar Daphne Keller finds the bill flawed at a fundamental level because “it assumes there is a such a thing as political neutrality and that the FTC can define and enforce what that is.”⁴³

A requirement of political neutrality, even if it survived a vagueness challenge, would dramatically curtail the speech rights of online intermediaries. By being required to abide by a standard of political neutrality, platforms would lose broad discretion to moderate. The price of “neutrality” would likely be more garbage content. Commentators like former FTC Commissioner Joshua Wright and Berin Szóka of Tech Freedom observe that, because the bill “injects a board of bureaucrats into millions of decisions about internet content,” it effectively applies the Fairness Doctrine to online discourse.⁴⁴

⁴⁰ Ending Support for Internet Censorship Act, S.____, 116th Cong. (2019).

⁴¹ Ibid.

⁴² @blakereid, Twitter (June 19, 2019), <https://twitter.com/blakereid/status/1141391542319345665>.

⁴³ @daphnek, Twitter (June 19, 2019), <https://twitter.com/daphnehk/status/1141395273895174144>.

⁴⁴ @ProfWrightGMU, Twitter (June 19, 2019), <https://twitter.com/ProfWrightGMU/status/1141397887487741956>; Berin Szóka, Platform Responsibility & Section 230 Filtering Practices of Social Media Platforms, Hearing Before the House Committee on the Judiciary, 116 Cong. 21 (2019).

Senator Hawley’s proposal currently has no co-sponsors in the Senate and is unlikely to move forward. However, it may foreshadow efforts to curtail the abilities of Internet firms to meaningfully police their platforms for all manner of potentially harmful content.

Section 230 as Regulatory Leverage

According to legal scholar Rebecca Tushnet, Section 230 protections ultimately amount to a grant of “power without responsibility.”⁴⁵ While some have quibbled with the idea that Section 230 acts as a subsidy or a “gift,”⁴⁶ others have argued that the law asks for little in return from the Internet firms that reap benefits from it.⁴⁷ While Section 230 expressly

“ One of the appeals of reforming Section 230 through quid pro quo amendments is that it effectively makes regulation optional. ”

grants these firms the ability to make moderation decisions, the extent to which they do so is largely discretionary. In the future, lawmakers could use Section 230 as leverage to encourage platforms to adopt a broader set of responsibilities.⁴⁸ Proposals to make its protections contingent upon satisfying a set of pre-conditions can be classified as “quid pro quo” amendments.

One of the appeals of reforming Section 230 through quid pro quo amendments is that it effectively makes regulation optional. It provides lawmakers with the ability to “regulate” technology

45 Rebecca Tushnet, “Power Without Responsibility: Intermediaries and the First Amendment,” *George Washington Law Review*, 2008

46 Mike Masnick, “Section 230 is Not Exceptional, it is Not Unique, it is Not a Gift: It’s the Codification of Common Law Liability Principles,” *TechDirt*, July 16, 2019.

47 Stigler Center Media Subcommittee, “Protecting Journalism in the Age of Democracy,” 2019.

48 *Ibid.* at 53.

firms consistent with the First Amendment. A quid pro quo structure for Section 230 protections would present platforms with a choice: Do they want to adopt an additional and transparent set of duties and responsibilities regarding content moderation or are they willing to forego some of the protections afforded by Section 230?

Quid pro quo amendments could take many forms. A forthcoming report from the Stigler Center at the University of Chicago Booth School of Business, co-authored by one of us (Goodman) outlines a few possibilities.⁴⁹ For example, to qualify for immunity, platforms could be required to publish data on their curation practices and moderation procedures. Another possibility is that platforms above a certain size could be required to pay a portion of their gross revenue into a fund dedicated to support the accountability journalism necessary for a healthy information ecosystem.

One of us (Goodman) and Karen Kornbluh have proposed making Section 230’s safe harbor conditional upon the adoption of greater platform responsibility. The idea is to require large platforms to develop “detailed, transparent, appealable practices specifically for disrupting coordinated campaigns” that engage in activities that “threaten or intentionally incite physical violence, ... that clearly constitute online harassment, or that constitute commercial fraud.”⁵⁰ While treating Section 230 protections as a privilege would be a substantial change, such proposals do not discriminate on the basis of viewpoint and require adjudication on an ex post basis. They encourage platforms to be more responsible and accountable while also enabling them to operate with a meaningful degree of certainty and self-determination.

Requiring User-Identification Procedures

Legal scholar Gus Hurwitz has floated a process-oriented reform to Section 230. He has suggested making its “immunity for platforms proportional

49 *Ibid.*

50 Kornbluh and Goodman, *Bringing Truth to the Internet*.

to their ability to reasonably identify speakers that use the platform to engage in harmful speech or conduct.”⁵¹ This proposal came on the heels of a recent decision by the Third Circuit Court of Appeals in the case of *Oberdorf v. Amazon.com*, in which the court held that Amazon could be held liable for the actions of a third-party user on the Amazon Marketplace under a products liability theory.⁵² The Third Circuit concluded that, because it had sufficient involvement in facilitating the sale of a defective product whose seller was unknown, Amazon could be treated as the “seller” of the product, and therefore would not be protected under Section 230.

Hurwitz’s approach deals with the common problem of anonymity in online spaces. Platforms that safeguard speaker anonymity can functionally pass Section 230 protections onto “masked” speakers who create unlawful content. If the identity of a content creator is unknown and the platform is indemnified, victims of tortious or criminal conduct will often be left without meaningful legal recourse. Though Hurwitz recognizes that anonymous speech is often a critical tool, his proposal would have platforms take reasonable care in ensuring that users engaging in potentially unlawful speech can be identified. In other words, this approach would go after “platforms that use Section 230 as a shield to protect those engaging in [unlawful] speech or conduct from litigation.”⁵³

Structuring the Platform Economy and Circumventing Section 230

Harold Feld of Public Knowledge proposes to modify intermediary liability standards without specifically altering Section 230’s language.⁵⁴ He acknowledges, as we do above, that much objectionable content is simply not actionable even without the protection of Section 230. As Feld states, “any news publisher could run the video of the New Zealand mosque shooting

51 Gus Hurwitz, “The Third Circuit’s *Oberdorf v. Amazon* Opinion Offers a Good Approach to Reining in the Worst Abuses of Section 230,” *Truth on the Market*, July 15, 2019.

52 *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496 (3d Cir. 2019).

53 *Ibid.*

54 Harold Feld, “The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms,” *Roosevelt Institute*, May 8, 2019.

countless times without incurring any liability,” and “book publishers routinely publish books glorifying white supremacy.”⁵⁵ Because so much content is protected under the First Amendment, he argues, the debates surrounding Section 230 are an “enormously destructive distraction.”⁵⁶ Rather than amend Section 230, Feld recommends that Congress “should decide what content regulation regime we need” and then “simply add at the beginning of the statute the following introductory words: ‘Without regard to Section 230’”⁵⁷

This categorization of some of the recent Section 230 reform proposals highlights three general approaches: regulation of speech, regulation of process, and regulation of business practice.

Conclusion

Commentators of all political stripes have demanded that Section 230 of the Communications Decency Act be dramatically reformed or outright repealed. But, because of how critical Section 230 is to the continued functioning of the digital economy, it would be misguided and destructive to gut it. This does not mean that the existing intermediary liability landscape is sacrosanct. Many thoughtful commentators have proposed narrowly tailored reforms that may have the potential to encourage Internet platforms to adopt greater responsibility while balancing the public and commercial benefits of the law. Other proposals, however, have been less thoughtful and have demonstrated a lack of concern regarding the collateral impacts of aggressive reform. It is imperative that any proposed legislation aimed at reforming Section 230 recognize how vital it is and work to ensure that the values it promotes—such as speech, innovation, and good platform governance—are not imperiled by overbroad and imprecise language.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

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