Having It Both Ways:
Social Media's Private Rights and Federal Immunity Under the CDA

Introduction

In 1996, Congress passed Section 230 of the Communications Decency Act ("CDA") in order to curb pornographic content on the internet and create an open forum welcome to everyone.[1] Since then, the law has been the subject of much contention and debate. By granting immunity to the online platforms that host third party content, Section 230 attempts to incentivize areas of open communication—free from government regulation.[2] Many of its supporters argue that its purpose is necessary in order to promote the deregulation of the internet and encourage open debate and freedom of expression.[3] Its staunchest critics believe that the law gives social media companies too much power and affords its users little recourse in the face of hateful and defamatory speech.[4] While this paper briefly discusses some of those issues, the primary goal of this essay is to suggest that without proper interpretation and more restrictive application of Section 230 by the courts, the government has granted civil immunity to these platforms while encouraging them to freely hinder political expression without consequence—having all of the civil benefits of government granted immunity and all of the rights of a private citizen. This, in turn, has effectively made these multibillion dollar companies rulers of the

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[1] *See* Protection for private blocking and screening of offensive material, 47 U.S.C. § 230 (2018)*; see also CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Aug. 7, 2019).

[2] *See* 47 U.S.C. § 230 (2018); *see also* Zeran v. America Online, 129 F.3d 327, 330 (4th Cir. 1997) (discussing Congress' intent on creating an internet conducive to free speech).

[3] *See, e.g., Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027 (2018) (arguing that without the inception of the CDA during the years of the internet's infancy, the principles of free speech on the internet would be non-existent today).

[4] *See, e.g.* Ann Bartow, *Section* 230 *Keeps Platforms for Defamation and Threats Highly Profitable*, LAW.COM: THE RECORDER (Nov. 13, 2017, 12:19 PM), https://www.law.com/therecorder/sites/therecorder/2017/11/10/section-230-keeps-platforms-for-defamation-and-threats-highly-profitable/.

internet, giving them more power than the collective citizens who use these platforms in order to exercise their freedom of speech.[5]

Legislative History and Intent

In an attempt to curb the spread of obscenity and pornographic content online, Senator James Exon introduced the Communications Decency Act in 1995.[6] The Senate determined that 83.5 percent of photographs that were available on the internet were pornographic, and that in order to facilitate the growth and pleasant nature of the internet, something needed to be done.[7] Congress feared that the laws in place at the time which prohibited obscenity and graphic content in telecommunications were outdated, and needed to be geared specifically to the internet.[8] As they stood, they could not achieve the necessary goals in regulating a variety of different media that the internet housed.[9] In turn, Section 223 (not to be confused with Section 230) of the CDA made it illegal to knowingly send or show minors obscene or indecent content over the internet.[10] Originally the CDA's main goal was to curb the spread of pornographic content on the internet, and provide a system of organization and technology which would allow parents to filter and monitor that content— thus limit children to unwanted exposure.[11]

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[5] *See* Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, BROOKINGS: THE FUTURE OF THE CONSTITUTION SERIES (May 2, 2011), https://www.brookings.edu/research/the-deciders-facebook-google-and-the-future-of-privacy-and-free-speech/.

[6] *See* Communications Decency Act of 1996, 47 U.S.C. § 223(a), (d)-(h) (1994 ed., Supp. II); *see generally* Jim Exon, *The Communication Decency Act*, 49 FED. COMM. L.J. 95 (1996).

[7] *See* 141 CONG. REC. S9017-02 (daily ed. June 26, 1995) (statement of Sen. Grassley) (stating that, "83.5 percent of all computerized photographs available on the Internet are pornographic").

[8] *See* TELECOM-LH 70, 1995 WL 17207536 (A.&P.L.H.).

[9] *Id.*

[10] 47 U.S.C. § 223(a), (d)-(h) (1994 ed., Supp. II); *see generally* Jim Exon, *The Communication Decency Act*, 49 FED. COMM. L.J. 95 (1996).

[11] *See* 141 CONG. REC. S9017-02 (daily ed. June 26, 1995).

As concerns arose that excess government regulation over the internet would limit free speech on specific platforms, the CDA was amended by Representatives Chris Cox and Ron Wyden to include what is known today as Section 230, Protection for private blocking and screening of offensive material.[12] Section 230(c) states in pertinent part:

> **(c) Protection for "Good Samaritan" blocking and screening of offensive material**
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> > **(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.
> >
> > **(2) Civil liability**
> > 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
> > >
> > > **(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 [A].[13]

Section 230's main goals were to (1) allow private companies to restrict pornographic content more easily, (2) create a burgeoning community where people could gather to freely share content and express their views, and (3) to limit government regulation on the internet.[14] Congress began to understand that a growing internet, with millions of users, would eventually

[12] *See* 47 U.S.C. § 230 (2018)*; see also CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Aug. 7, 2019).

[13] 47 U.S.C. § 230(c).

[14] *See* 47 U.S.C. § 230(a)-(b) (findings and policy); *see also Zeran*, 129 F.3d at 329 (discussing congress' intent for minimal government regulation on respective platforms).

become more and more impossible to police by any one government entity.[15] The act was passed by congress February 8, 1996 under the authority of the commerce clause to regulate parts of the internet.[16]

Another reason for Section 230 of the CDA was to delegate some of these filtering responsibilities to the very companies that would house the internet's primary information.[17] In return for these companies sharing the burden for policing the spread of pornographic material on the internet, Section 230 of the CDA grants these corporations with a form of quasi-civil immunity—freeing them from any liability for content posted on their websites by a third-party user.[18]

However, while the act intended to promote an internet conducive to the free expression of ideas, congress did not **explicitly** provide any limitations or conditions to Section 230's immunity.[19] The only exception being that Section 230 has no effect on Federal Criminal law, Intellectual property law, and Communications privacy law.[20] As a result of the vagueness and scope of the terms listed in Section 230(c)(2)(A), these platforms retained their rights of association as free private citizens, and acquired newly granted immunity from civil

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[15] *Id.*

[16] *See* 47 U.S.C.A. § 230; *see generally* Hillsborough City. v. Automated Med. Labs., Inc*.,* 471 U.S. 707 (1985) (granting congress the power to regulate the internet under the Commerce Clause).

[17] *See* 47 U.S.C. § 230(b)(5).

[18] *See* 47 U.S.C. § 230(c)(1)-(2) (many argue that relevant portion of the act only defines who is considered a publisher or speaker of content and grants no immunity, but there is no evidence that the difference between these two principles has created any alternative results in decisions by the courts).

[19] *See Zeran*, 129 F.3d at 328 (noting congress felt that without an immunity, companies would heavily filter content and censor speech in an attempt to avoid liability as a publisher of such content).

[20] *See* 47 U.S.C. § 230(e); *see also* Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX, https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom, (last updated July 2, 2018, 1:08 PM EDT) (discussing the new amendments in sex trafficking law to the CDA).

accountability vis-à-vis user conduct on their platforms— according to the first courts to interpret this issue, these immunities applied regardless of whether platforms comported with the statute by policing pornographic content or not.[21] In other words, these internet platforms got to have their cake and eat it too.

Early Opposition

As news of the Communications Decency Act of 1996 began to spread, it received much criticism from many First Amendment advocates who felt that any attempts to restrict indecent photography and sexual expression would inevitably chill vast areas of speech.[22] Section 223 of the Communications Decency Act made it illegal to knowingly distribute obscene or pornographic materials to minors.[23] Many people believed that in successfully enforcing the law, the government would restrict artistic, literary, and scientific material protected by the First Amendment.[24]

After the law was put into place, the first lawsuit challenging its constitutionality was brought through the courts.[25] In *Reno v. American Civil Liberties Union*, the ACLU challenged Section 223 by alleging that its broad language would limit several forms of protected free speech—particularly through the statute's use of "patently offensive" language.[26] Before making its way up to the Supreme Court, Representative Jim Exxon, disappointed by the District Court

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[21] *See* Bennett v. Google, LLC, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (noting that Section 230 does not force social media companies to "restrict content or bury their heads in the sand" in order to avoid liability).

[22] *See* TELECOM-LH 70, 1995 WL 17207536 (A.&P.L.H.).

[23] Communications Decency Act of 1996, 47 U.S.C. § 223(a), (d)-(h) (1994 ed., Supp. II).

[24] *See* Jim Exon, *The Communication Decency Act*, 49 FED. COMM. L.J. 95 (1996) (Senator Jim Exon commenting on the lawsuits brought against the constitutionality of the act).

[25] *See generally* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[26] *Id.* at 849.

for Eastern District of Pennsylvania's decision in the matter, argued that the law was never intended to ban or restrict any constitutionally protected material from adults.[27] He further iterated that the language "patently offensive" was intended only to apply to material that was in context, both patently offensive AND sexually explicit—not applicable to scientific, literary, or artistic forms of expression.[28] Representative Jim Exon remained confident that the Supreme Court would support his contentions and rule in his favor—The Supreme Court did not.[29]

In an opinion quoted heavily when referencing free speech principles on the internet, the Supreme Court in *Reno* found that the language of Section 223 was overly broad and nevertheless, would result in the suppression of constitutionally protected speech.[30] Specifically, the Supreme Court understood with amazing foresight, that broad and poorly defined content referenced as "patently offensive" and "indecent" (similar to language used in Section 230) would inevitably chill literary, scientific, artistic, and political expression.[31] As The Court stated in its opinion, "the statute sweeps more broadly than necessary" in order to avoid the dangers of curbing protected speech.[32] Additionally, The Court found no basis for the Government's argument that those terms would only be used to regulate sexually explicit and gory material, the restriction of which embodied the main purpose of the CDA.[33] One of the most concerning

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[27] Jim Exon, *The Communication Decency Act*, 49 FED. COMM. L.J. 95 (1996) (Senator Jim Exon commenting on the lawsuits brought against the constitutionality of the act).

[28] *Id.* at 96.

[29] *See generally id.*

[30] *See generally Reno*, 521 U.S. 844 (Finding that 47 U.S.C. § 223 was unconstitutional).

[31] *Id.* at 862 ("indecency has not been defined to exclude works of serious literary, artistic, political or scientific value.").

[32] *Id*.

[33] *Id*. at 881.

matters to the court was that the language of the CDA required the government to engage in content-based regulation.[34] This, The Court felt, left too much deference to any one entity when it came to deciding what is "patently offensive" speech and what is not.[35]

The Court acknowledged that sexually explicit material isn't always protected under the First Amendment.[36] In order to be considered unprotected speech, sexually explicit content must meet the two-prong analysis set forth in *Miller v. California*: (1) it must appeal, as a whole, to the prurient interest, and (2) the content lacks serious literary, artistic, political, or scientific value.[37] The Court considered the second prong most important. [38] Unlike the first prong, what is considered literary, artistic, political, or scientific is not a test that could be judged by contemporary community standards.[39]

Thus, The Court concluded that the burden placed on the free speech of adults was unacceptable when less restrictive alternatives were present.[40] The Court also found that the vague language of Section 223 would not necessarily serve the purpose of the statute, either—Section 223 would particularly affect noncommercial speakers, and yet commercial pornographers would still remain largely unaffected.[41] Even with the intent to protect minors, such a well-intended interest would still not justify the possibility of free speech concerns that

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[34] *Id*. at 871-872.

[35] *Id*.

[36] *Id*. at 873.

[37] *Id*. (citing Miller v. California, 413 U.S. 15 (1973)).

[38] *Id*.

[39] *Id*.

[40] *Id*. at 874.

[41] *Id*. at 863.

would inevitably affect adults.[42] The Court suggested that the danger of such vague language could be avoided by a more carefully drafted statute.[43]

Remanence of Unconstitutionality

Section 230 aims to promote free speech principles by discouraging the filtering of what could possibly be considered defamatory content online.[44] Congress was afraid that by leaving these internet platforms exposed to vast amounts of liability arising from speech, collateral censorship would occur.[45] Collateral censorship arises when an individual limits the speech of others instead of their own, in fear that the government will hold them liable for the actions of that third person.[46] However, in an effort to restrict some of the same material Section 223 sought to rid, Section 230(c)(2)(A) contains similar language granting civil immunity to providers who restrict such content that is "otherwise objectionable…whether or not the material is constitutionally protected."[47]

As such, Section 230(c)(2)(A) is constitutionally concerning for two reasons: (1) it uses similar, vague language that The Supreme Court in *Reno* considered unconstitutional for purposes of free speech restrictions, and (2) congress is providing an incentive and, as such, a directive for private companies to restrict content in a matter in which congress itself does not

[42] *Id*. at 875.

[43] *Id.* at 874.

[44] *See* 47 U.S.C. § 230(c)(2)(A).

[45] *See* Fair House Council of San Fernando Valley v. Roomates.com, LLC, 521 F.3d at 1175.

[46] *See* J.M. Balkin, Essay, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2296 (1999).

[47] *See* 47 U.S.C. § 230(c)(2)(A).

have the power to do—through the use of the language "whether or not the material is constitutionally protected."[48]

The relevant portion of the statute, identifies content as "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[49] This Section 230 language on its face would seem to many even more broad than the unconstitutional language of Section 223.[50] There is no indication, as The Court stated in Reno, that such language is specific enough to ensure that constitutionally protected speech such as artistic, literary, scientific, religious, or political subject matters will not be restricted.[51] As discussed more below, the language of Section 230(c)(2)(A) is at least partially responsible for some of the content restrictions that social media companies have put in place in more recent years, and the banning of content that has restricted many unpopular viewpoints on the internet. The intent and purpose of Section 230(c)(2)(A) to encourage the banning of sexually explicit content unsuitable for minors has been lost and ignored. Instead, the language has been used to eliminate any form of speech which the social media companies find offensive. The only indication of congress' intent behind the meaning of "otherwise objectionable" was in its conference report discussing the Section 230 amendment.[52] In the conference agreement, Congress stated its intent to overrule *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[53] In *Stratton-Oakmont*, a website was held liable as a

[48] *See* 47 U.S.C. § 230(c)(2)(A); *see generally Reno*, 521 U.S. 844.

[49] *See* 47 U.S.C. § 230(c)(2)(A).

[50] Compare 47 U.S.C. § 230(c)(2)(A) which includes the catch-all "otherwise objectionable" content with 47 U.S.C.A. § 223 which includes the catch-all "patently offensive" material.

[51] *See Reno,* 521 U.S. at 862.

[52] *See* S. CONF. REP. 104-230, at 194 (1996).

[53] *Id*.

speaker or content provider because of its heavy involvement in monitoring posts on the website—removing content it considered to be harassing and sexually explicit.[54] While this case was brought for the libelous comments that were made on the platform— and a majority consider it only for its libel aspect[55]— I believe that congress was paying more attention to the fact that the website owned by Prodigy heavily monitored its content boards for nudity and other sexually explicit material *in addition* to the libel in the case.[56] This is evidenced by Congress' proceeding statement, iterating that *Stratton-Oakmont* and other similar cases make it more difficult for parents to monitor the content their children receive over the internet[57] — surely Congress wasn't referencing parents' concerns to shield their children from libelous statements made against a financial organization.[58] Even so, no evidence was presented that Prodigy was attempting to remove any content other than material it felt, in good faith, was either explicit or directly attacking other users through unprotected speech.[59]

Even without the overbroad and vague portions of this provision which have been the cause of the most recent issues pertaining to free speech, what is almost just as concerning is the

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[54] *See generally* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

[55] *See, e.g.,* Eric Goldman, *Online User Account Termination and 47 U.S.C. S 230(c)(2*), 2 UC IRVINE L. REV. 659, 669 (2012) (discussing congress' intent to protect the removal of libelous content).

[56] *See Stratton Oakmont,* 1995 WL 323710 at *2.

[57] *See* S. CONF. REP. 104-230, at 194 (1996).

[58] *Id.* (Interestingly enough, the conference report mentions that Section 230(2)(A) immunity does not apply to the practice of "cancelbotting". A "cancelbot" was a semi-automated/automated program that was sent out to send cancel messages in order to remove spam or other unwanted content. Many consider this tool the precursor to content to moderation algorithms. It is very possible that congress never intended to immunize platforms that engaged in automated widespread censorship, knowing that such a practice would be counter to the purpose of the statute. As such, companies that use these types of algorithms (basically everyone now) would open themselves up to liability, but this argument would take up an entire paper and is best left for another day).

[59] *Id*.

subsection's intent to bypass constitutionality. By encouraging the removal of the objectionable material "whether or not such material is constitutionally protected," the provision is, on its face, unconstitutional—yet it seems that those against the statute have never made an argument as to this issue.[60] Congress must pass laws which are consistent with the letter and spirit of the constitution.[61] This rule cannot be bypassed simply by encouraging others to do what would be considered unconstitutional if done by Congress itself. Providers as for-profit companies are not required to provide free speech guarantees.[62] It seems counter-intuitive for Congress to encourage private companies, who enjoy their rights as private entities to disassociate themselves from certain viewpoints, to engage in viewpoint discrimination when Congress cannot do so directly. When Congress writes a statute into law, "it must do so without creating great restrictions on speech," whether or not those restrictions are directly of consequence or not.[63] In other words, if congress can't legally ban or remove constitutionally protected speech from the internet, then it shouldn't be able to direct and intentionally incentivize private companies to do so in its place.

An Overbroad Interpretation of Immunity

While sometimes courts (to the peril of free speech) do not differentiate between the two section parts, Sections 230(c)(1) and 230(c)(2) are functionally different. Section 230(c)(1) seeks to define who is and is not considered a publisher or content provider, while Section 230(c)(2) seeks to allow interactive computer services to become more involved in policing certain specific

[60] *See* 47 U.S.C. § 230(c)(2)(A).

[61] *See, e.g.,* M'Culloch v. State, 17 U.S. 316, 421 (1819).

[62] *See, e.g.,* Green v. America Online, 318 F.3d 465 (3d Cir. 2003).

[63] *See Reno*, 521 U.S. at 876.

types of content without crossing over into the common law definition of "publisher" for purposes of liability—so long as it is done in good faith.[64]

When interpreting how much censorship and control a platform can exert before it becomes liable for the content it encourages, most courts broadly define "otherwise objectionable" as any material that the platform deems subjectively inappropriate or contrary to its community standards. Beginning with *Doe v. GTE Corp*, the Seventh Circuit found that 230(c)(2) gives the company the right to filter out offensive material and not be held liable.[65] It is unclear whether the court was intending to limit the definition to nudity, the actual subject of the case.[66] Nonetheless, *Doe's* interpretation of Section 230 finds no avenue in which an interactive service provider can be held liable, so long as it does not post any content itself.[67]

The Third Circuit in *Green v. AOL* held that interactive content provider has the right to monitor any content on their website that is not in line with the website's community guidelines, though they reserve their right to not monitor either.[68] This interpretation of Section 230(c)(2) presupposes that "otherwise objectionable" content is anything the Platform has chosen to include in its community guidelines. As I discuss below, looking to the community guidelines provides no such clarity for users as the court in *Green* suggested.

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[64] *See* 47 U.S.C. § 230(c); *see generally* M.C. Dransfield, *Liability of publisher of defamatory statement for its repetition or republication by others*, 96 A.L.R.2d 373 (1964) (discussing the traditional liability of publishers' statements made by third parties).

[65] Doe v. GTE Corp., 347 F.3d 655, 659-660 (7th Cir. 2003).

[66] *See Id*.

[67] *Id*.

[68] *See Green,* 318 F.3d at 471.

In *Langdon v. Google*, the Delaware Court broadened the interpretation of Section 230(c)(2) screening to include any action taken in order to restrict material which the platform deemed necessary to achieve its editorial function.[69] Such an interpretation ignores the plain letter of the statute almost entirely.

Putting aside the relevant history of the CDA and the purpose of the statute outlined by the sponsors themselves, at the very least, one should interpret the list of adjectives in Section 230(c)(2)(A) as a form of *ejusdem generis*— doing so would limit censorship of platforms to violent, sexual, and harassing content, before the platform crosses the threshold of control and is considered a publisher or speaker itself.[70] Even more surprising is that courts have ignored almost entirely the requirement of good faith in this portion of the statute.

The current interpretation of Section 230(c)(2) is inconsistent with the plain letter of the law and other previous portions of the CDA—like Section 223.[71] This overly-broad and subjective interpretation of the "otherwise objectionable" catch-all seeks to undermine the very purpose of the statute itself—protect the principles of limited censorship and free speech online.[72] Congress wanted to encourage the free exchange of ideas and political discourse over the internet, but it also wanted to balance the interest of removing explicit content for families.[73]

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[69] *See* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 630 (D. Del. 2007).

[70] *See* Eric Goldman, *Online User Account Termination and 47 U.S.C. S 230(c)(2)*, 2 UC IRVINE L. REV. 659, 667 (2012) (noting that there are several logical legal methods to analyze the statute that can be to arrive at an interpretation that is in line with the original intent).

[71] *See* 47 U.S.C. § 223(a), (d)-(h) (1994 ed., Supp. II).

[72] *See Zeran,* 129 F.3d at 329.

[73] *See* S. CONF. REP. 104-230, at 194 (1996).

By allowing companies to remove—without consequence— any material it subjectively considers necessary, the courts are choosing to protect the rights of private platforms over the rights of the American public. It is important to remember that Congress intended to protect the users, not the companies who host them. What the jurisprudence has created, is a statute that grants immunity to social media companies for content it doesn't post, whether or not it actively chooses to keep or remove such content.[74] Do or don't, it makes no difference as to the effect of Section 230. A platform receives unequivocal benefits, without any conditions to act in accordance with the purpose of the statutes. These undefined terms have actually limited constitutionally protected rights.[75]

Ultimately the meaning of Section 230(c)(2)(A) affects the application of Section 230 in its entirety. The courts must begin to interpret Section 230(c)(2)(A) in accordance with the legislature's intent— so that it benefits both the users of the internet and the companies that empower those user's rights. The proper interpretation of Section 230 is this: in order to limit collateral censorship on the internet, no website will be held liable for material they do not post— in the event that censorship is conducted in good faith in order to limit pornographic, gory, or other repulsive conduct for children, the website will not be considered a publisher or speaker even as it exerts control over such content. Under this interpretation, internet platforms do not fall under good faith censorship when they hinder access or communication of material which is not gory, pornographic, or obscene in nature— therefore crossing into publisher territory. Compare this to the faulty interpretation that the jurisprudence has created: a website is not liable as a publisher or speaker for content posted by a third party whether or not they censor

[74] *See, e.g., Doe,* 347 F.3d at 659.
[75] *See Reno*, 521 U.S. at 877.

the objectionable content referenced in 230(c)(2)(A) or whether these platforms censor any or all content they disagree with. If free speech is going to survive the digital age, the only viable interpretation of the statute is the former.[76] The latter interpretation is wholly unsustainable, and has given internet platforms the power to regulate the internet untouched, in accordance with their own views, free from liability or accountability.

First Amendment Issues

It is unquestionable that the internet today would be a much different place without the CDA in its infancy.[77] In the internet's early years, it was nearly impossible to police the content that was rushing onto the world-wide web.[78] One can only imagine that without the limit of liability for content posted on a website, users or as Section 230 calls them, "content creators", would have been met with long waiting times pending approval of posted information, as well as rejected submissions. The possibility of this kind of hindrance paired with the CDA's generous immunity, encouraged platforms to limit the amount of censorship and create communities unfettered by speech restrictions. Back then, the internet was not even close to being as busy as it is now—today, about seven in every ten Americans are active on social media.[79] Now,

[76] If the interpretation under the second option was really the intent of congress, then Section 230(c)(2) is wholly redundant. Such an interpretation could have been achieved simply by revising Section (c)(1) to include: "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, whether or not the interactive computer service is engaged in filtering or monitoring such content."

[77] *See, e.g., Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027 (2018) (arguing that without the inception of the CDA during the years of the internet's infancy, the principles of free speech on the internet would be non-existent today).

[78] *See Reno*, 521 U.S. 844, 877

[79] *See Social Media Fact Sheet*, PEW RESEARCH CTR. (June 12,2019), http://www.pewinternet.org/fact-sheet/social-media/.

algorithms have given social media platforms the best of both worlds, the ability to police millions of posts with little relative cost, while still keeping their CDA immunity.[80]

Since the 2016 election, and with the discovery of the Russian Troll farms that attempted to alter the perceptions of groups on the internet, the state of social media has been entirely different.[81] In February 2018, the Justice Department determined that Russia had used both Facebook and Twitter more than any other tool in attempts to influence the election.[82] Facebook presented congress with over 3,000 documents evidencing the use of advertising by Russian Troll farms in attempt to grow America's divide.[83] Facebook's Mark Zuckerberg was asked to appear before Congress in order to discuss measures that would be put in place in order to avoid such occurrences in the future.[84]

After the rallies that lead to the events in Charlottesville, Virginia, several website hosting companies canceled the web registrations for neo-Nazi websites.[85] Recently companies have begun a movement to ban all types of speech that it considers to be "hate speech", this

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[80] *See* Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters,* 39 PACE L. REV. 111, 118 (2018) (discussing a more in-depth analysis of the two types of content filtering algorithms and their effects).

[81] *See* Donnie O'Sullivan & David Shortell, *Facebook takes down fake accounts over Russian troll farm concerns,* CNN (Nov. 7, 2018, 12:46 PM), https://www.cnn.com/2018/11/07/politics/russia-trolls-fbi/index.html.

[82] *See* Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html.

[83] *See Facebook Turns Over Thousands of Russia-Linked Ads to Congress*, ABC NEWS (Oct 2, 2017, 5:04 PM), https://abcnews.go.com/Politics/facebook-turns-thousands-russia-linked-ads-congress/story?id=50226525.

[84] *See Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the U.S. S. Comm. on the Judiciary and the U.S. S. Comm. on Commerce, Sci. and Transp.,* 115th Cong. 5 (2018) (testimony of Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook), https://www.judiciary.senate.gov/imo/media/doc/04-10-18%20Zuckerberg%20Testimony.pdf.

[85] *See* Yoree Koh & Jack Nicas, *Google, GoDaddy Crack Down on Neo-Nazi Site Daily Stormer*, WALL ST. J. (Aug. 14, 2017, 9:18 PM), https://www.wsj.com/articles/google-cancels-neo-nazi-site-daily-stormers-registration-1502740126.

content has included more obvious groups (like neo-Nazis), but has also been broadened to encompass certain viewpoints which many have labeled as conspiracy theories.[86] Companies are no longer afraid to voice their opinion and enforce the removal of certain viewpoints, banning content, groups, and parties that it considers "otherwise objectionable", even when such speech is not widely considered "hate speech"—like YouTube's banning of several gun demos and reviews.[87] This, along with the use of widespread sorting and banning algorithms, has created areas of contention amongst many parties. Even the Supreme Court has iterated that the internet is the most important place for the exercise of free speech.[88]

Because many of the same companies own a variety of different platforms, there is a consensus of viewpoints and general consistency of opinion, amongst a vast majority of the platforms themselves, that pose a serious danger to varying opinions.[89] The Supreme Court in *Reno* noted that "no single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web," such a statement is hardly true today with the consolidation in ownership of many social media platforms.[90] Many of these internet-wide content restrictions have gone unnoticed. While these viewpoints may be considered objectionable and sometimes outright hateful, silencing

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[86] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *see also* Brandenburg v. Ohio, 395 U.S. 444 (1969) (While speech that propagates violence is not protected under the First Amendment and should be condemned by all parties, "hate speech" by itself without the propagation of violence is considered protected speech according to the Supreme Court).

[87] *See* Polly Mosendz and Mark Bergen, *Youtube Bans Firearms Demo Videos, Entering the Gun Control Debate,* BLOOMBERG TECH. (March 21, 2018, 3:39 PM), https://www.bloomberg.com/news/articles/2018-03-21/youtube-bans-firearm-sales-and-how-to-videos-prompting-backlash.

[88] *See* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[89] *See* Colby M. Everett, *Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media*, KAN. J.L. & PUB. POL'Y, Fall 2018, at 113, 120-122.

[90] *See Reno*, 521 U.S. at 853.

these more contentious viewpoints creates a precedent that many on both sides would consider ill-advised. Such actions create a gateway for the banning and removal of more commonly held, though sometimes disagreeable, viewpoints.[91] What is even more concerning to many, is that Facebook, like some other Social Media Platforms do not allow the appeal of posts, only pages and profiles.[92] Many First Amendment advocates warn that one should not wait until personal free speech rights have been abridged before starting to protect them[93]—even if you disagree with the viewpoints that are being banned, the majority is quick to become the minority.

Guidelines and Terms or Service provide no better road map for people to understand how these companies choose to police speech. Facebook bans speech that it considers attacks against "race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability" and even "immigration status".[94] Instagram, which is owned by Facebook, shares similar policies.[95] Twitter includes almost identical language, but also prohibits content that incites fear.[96] Google which owns YouTube, bans all of the above including speech geared toward "people of a certain age."[97] Aside from the

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[91] *See* Katie Herzog, *Social Media Companies Are Banning Extremists. Others Are Getting Caught in the Crossfire*, THE STRANGER (May 17, 2019, 3:15 PM), https://www.thestranger.com/slog/2019/05/17/40234886/social-media-companies-are-banning-extremists-others-are-getting-caught-in-the-crossfire.

[92] *See Facebook*, ONLINECENSORSHIP.ORG (Nov. 8, 2017), https://onlinecensorship.org/resources/how-to-appeal.

[93] *See* Lee Roland, *Free Speech Can Be Messy, but We Need It*, ACLU BLOG (March 9, 2018, 3:15 PM), https://www.aclu.org/blog/free-speech/free-speech-can-be-messy-we-need-it.

[94] *See Community Standards III.12: Hate Speech,* FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Aug. 7, 2019) (providing a vague explanation of what is considered acceptable speech).

[95] *See Community Guidelines*, INSTAGRAM, https://help.instagram.com/477434105621119/?helpref=hc_fnav&bc[0]=368390626577968&bc[1]=285881641526716 (last visited Aug. 7, 2019).

[96] *See Hateful Conduct Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy (last visited Aug. 7, 2019).

[97] *See Hate Speech Policy*, GOOGLE, https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436 (last visited Aug. 7, 2019).

economy, these topics encompass almost every single modern day political viewpoint, not to mention these companies have banned other speech not included within their guidelines, which it considers to be a conspiracy or otherwise untruthful, at their discretion.[98]

There are two primary ways in which social media companies filter content with and without human review and oversight.[99] The first, is the outright banning of content, this one is the most obvious and sometimes considered the most egregious.[100] Companies review whether the content comports with the community standards and decide whether to keep or remove it.[101] The second, less noticeable, and some would argue even more effective, is the sorting of wanted and unwanted content.[102] Instead of disallowing content, platforms decide which specific items will be prioritized for the user's attention, and which ones will be lost in the clutter of information.[103]

The first of these generally garners more media attention. In early 2019, Facebook, Twitter, and other social media companies banned Alex Jones, Louis Farrakhan, Milo

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[98] *See* Matt Binder, Y*ouTube promises to stop recommending flat Earth and 9/11 truther videos*, MASHABLE TECH. (Jan 25, 2019), https://mashable.com/article/youtube-to-stop-recommending-conspiracy-theories/.

[99] *See* Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 118 (2018).

[100] *Id*.

[101] *Id*.

[102] *Id*.

[103] *Id*.

Yiannopoulos and other related individuals that these social media companies considered hateful.[104] Many within the ACLU have cautioned this move by Social Media companies.[105]

Soon after, James Woods, a right-wing actor and Trump supporter, was banned for a satirical tweet, which he alleged was a directive from Democrats, that men were encouraged not to vote.[106] He argues that in the tweet itself, he pointed out the message was a joke and not real. Nevertheless, Twitter maintained the ban after accusing him of affecting the political process.[107] While he was eventually allowed back, he was banned again from quoting a line from the show *The Wire*: "If you try to kill the King, you better not miss. #HangThemAll."[108]

Advocates from both sides have been caught in the crossfire. Recently, well-known feminist Meghan Murphy was banned for misgendering a female and arguing that men cannot shed their oppressive nature simply by identifying as female.[109] This opinion and others like it caused her and other gender critical trans-women to be banned.[110] Oren Amitay, a clinical psychologist and sex researcher was also banned, for referring to a Twitter troll as he/she.[111]

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[104] Matthew S. Schwartz, *Facebook Bans Alex Jones, Louis Farrakhan And Other 'Dangerous' Individuals*, NPR TECH. (May 3, 2019, 8:12 AM), https://www.npr.org/2019/05/03/719897599/facebook-bans-alex-jones-louis-farrakhan-and-other-dangerous-individuals.

[105] *Id*.

[106] *See* Amy Forliti, *Actor James Woods banned from Twitter over a tweet that encouraged men not to vote*, THE STAR ENTERTAINMENT (Sept. 24, 2018), https://www.thestar.com/entertainment/2018/09/24/actor-james-woods-banned-from-twitter.html.

[107] *Id*.

[108] *See* John F. Trent, *James Woods Responds to Twitter Ban*, BOUNDING INTO COMICS (May 10, 2019), https://boundingintocomics.com/2019/05/10/james-woods-responds-to-twitter-ban/.

[109] *See* Katie Herzog, *Social Media Companies Are Banning Extremists. Others Are Getting Caught in the Crossfire*, THE STRANGER (May 17, 2019, 3:15 PM), https://www.thestranger.com/slog/2019/05/17/40234886/social-media-companies-are-banning-extremists-others-are-getting-caught-in-the-crossfire.

[110] *Id*.

[111] *Id*.

In using the second form of filtering, sorting the order and appearance of content through preferential treatment and algorithms, Facebook and Google have openly begun to hide content from users which it considers propagating unfounded conspiracies.[112] The content of these include Flat earth conspiracies, anti-vaccination groups, and 9/11-Truther videos[113]— this new change has been rolled out even after Facebook's Vice President made a press statement addressing free speech concerns online saying, "[Facebook] cannot become arbiters of truth."[114] While some companies have not outright banned these types of posts, they have limited their viewership through these means.

Twitter has even announced that it was in the process of rolling out a policy which would hide and limit the reach of tweets by political figures, if the tweets were found to be in violation of the community standards.[115] Most recently, twitter banned the official campaign account of Senator Mitch McConnell for posting a video of protestors outside of his home.[116] McConnell's campaign argued that the protesters were the ones inciting violence against McConnell, but nonetheless Twitter maintained that the post violated its terms against inciting violence.[117] Twitter has since unlocked McConnell's account after the Senator argued that the censorship was

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[112] *See* Matt Binder, *YouTube promises to stop recommending flat Earth and 9/11 truther videos*, MASHABLE TECH. (Jan 25, 2019), https://mashable.com/article/youtube-to-stop-recommending-conspiracy-theories/.

[113] *Id.*; *see also* Barbara Ortutay, *How social media is trying to contain misinformation over vaccines*, PBS NEWS (Apr. 5, 2019, 11:06 AM), https://www.pbs.org/newshour/health/how-social-media-is-trying-to-contain-the-spread-of-misinformation-over-vaccines.

[114] *See* Sarah Roberts, *Social Media's Silent Filter*, ATLANTIC (Mar. 8, 2017), https://www.theatlantic.com/technology/archive/2017/03/commercial-content-moderation/518796/.

[115] *See* Makena Kelly, *Twitter will now hide — but not remove — harmful tweets from public figures*, VERGE (Jun. 27, 2019, 12:00 PM), https://www.theverge.com/2019/6/27/18761132/twitter-donald-trump-rules-violation-tweet-hide-remove-political-figures.

[116] *See* Matt Stevens, *Twitter Locks Out Mitch McConnell's Campaign for Posting Video of Protest*, NEW YORK TIMES (Aug. 8, 2019), https://www.nytimes.com/2019/08/08/us/politics/twitter-mitch-mcconnell.html.

[117] *Id.*

nefarious especially since the platform had allowed the hash-tag #MassacreMitch to trend on the site.[118]

World-Wide Free Speech Issues

In order to fully understand the impact of social media's attempt to curtail what it considers hate speech, it is important to understand other motivating factors in this endeavor— like the laws which govern speech in many countries in the European Union.

It is relevant to understand that many of the same pressures and reasons for stricter governing of speech on the internet are present in the European Union as they are in the United States— like the spread of what is widely referred to as "fake news" and the fear of foreign meddling in elections.[119] After the 2015 terror attacks and the Charlie Hebdo attack, the French government even sought to make social media companies at least partially responsible, in an attempt to quickly solve what it considered a national threat.[120]

For the most part, the European Union has generally adopted Article 19 of the International Covenant on Civil and Political Rights ("ICCPR")[121]. However, the law specifically allows for the regulation of speech that is targeted against another person's dignity.[122] The *ICCPR* is implemented individually by the countries that choose to enforce it.[123] This carve-out

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[118] *Id.*; *see also* Nancy Scola, *Twitter reverses course, unlocks McConnell campaign account*, POLITICO TECH. (Aug. 9, 2019, 1:17 PM), https://www.politico.com/story/2019/08/09/twitter-unlocks-mcconnell-campaign-1456012.

[119] German Government response to the Special Rapporteur (Aug. 9, 2017), https://www.ohchr.org/Documents/Issues/Opinion/Legislation/GermanyReply9Aug2017.pdf

[120] Lizzie Plaugic, *France Wants to Make Google and Facebook Accountable for Hate Speech*, VERGE (Jan. 27, 2015), https://www.theverge.com/2015/1/27/7921463/google-facebook-accountable-for-hate-speech-france.

[121] *See* International Covenant on Civil and Political Rights ("ICCPR"), art. 19, G.A. Res. 2200A, at 49, U.N. Doc A/6316 (Dec. 16, 1966).

[122] *Id.*

[123] *See ICCPR,* art. 2(2).

has allowed these countries in the European Union to enact laws which curtail speech on the broad interpretation that it "affects another person's dignity."[124] These are essentially exclusions for speech that is considered defamatory and unprotected, although the United States has a Strict Scrutiny test in deciding whether the rights of a citizen can be abridged, which the rest of the world does not. Article 20 of the *ICCPR* attempts to limit speech that incites discrimination or violence.[125] Again, this article has given courts and countries the power to enact laws which limit speech on the broad interpretation of this premise.

For example, Germany has enacted measures such as the Netzwerkdurchsetzungsgesetz, more commonly known as the "NetzDG"[126], a law that requires social media platforms to remove content posted by its users which is deemed to be unlawful under "hate speech" within one week from posting.[127] In some more serious circumstances the law enforces removal of unwanted content within 24 hours, with a criminal penalty of up to €5 million.[128] Since the passing of the NetzDG, many critics argue that the law is responsible for excessive censorship which has resulted in the removal of content which is objectively not unlawful.[129] This is largely

[124] *See* Case C-507/17, CNIL v. Google ¶. 20.

[125] *See ICCPR*, art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law ....").

[126]*See* Rebecca Zipursky, *Nuts About Netz: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT'L L.J. 1325 (2019) (for an in-depth analysis of how the NetzDG is encroaching on vast areas of open and free debate in Europe).

[127] Netzwerkdurchsetzungsgesetz § 3 no. 2.2-2.3 (also known as "Network Enforcement Act" or "NetzDG"), July 12, 2017, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.

[128]*Id.*

[129] Reporters Without Borders, *The Network Enforcement Act Apparently Leads to Excessive Blocking of Content*, REPORTERS WITHOUT BORDERS (Aug. 3, 2018), https://rsf.org/en/news/network-enforcement-act-apparently-leads-excessive-blocking-content.

because of collateral censorship— in fear of being held liable under the act, these companies are playing it safe and banning more than is actually necessary.[130] This is the very result that Congress sought to avoid when it passed Section 230 of the CDA.

One major difference in American jurisprudence and the courts' analyses in Germany regarding free speech is that German courts freely tie in moral decision making into their analyses.[131] Particularly, courts in Europe will look at the disagreeableness of a viewpoint when deciding to inforce the law or not.[132] To many outside the United States this may seem like a logical conclusion for the court to make, but this principle cuts against the very grain of over two-hundred years of American jurisprudence— The Supreme Court should not rule based on policy or personal considerations, and specifically with regards to free speech, The Court must not decide what is protected on the basis of ideology or perspective.[133] This allows for more predictable outcomes by The Supreme Court— in theory, it creates law based on the application and intent of Congress, and not one centered around the partisan or political beliefs of the Justices.

In addition to laws like the NetzGD, the European Union has heavily based many of its restrictions on speech on the "right to be forgotten."[134] Following such individual interests, the European Union passed the General Data Protection Regulation ("GDPR") act.[135] This law

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[130] *Id.*

[131] *See* Rebecca Zipursky, *Nuts About Netz: The Network Enforcement Act and Freedom of Expression*, 42 FORDHAM INT'L L.J. 1325, 1348-49 (2019).

[132] *Id.*

[133] *See, e.g. M'Culloch,* 17 U.S. at 355-56; Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

[134] *See* Jake Swearingen, *Europe's 'Right to Be Forgotten' Will Be Staying in Europe*, NEW YORK MAG.: INTELLIGENCER (Jan. 10, 2019), http://nymag.com/intelligencer/2019/01/europes-right-to-be-forgotten-will-be-staying-in-europe.html.

[135] Commission Regulation 2016/679, 2016 O.J. (L119), art. 17.

forces millions of companies to delete the unwanted posts and information of many European citizens.[136] It encourages and most of the time requires social media companies to remove third-party posts at the request of an affected user. Once again, reiterating a concept specifically discouraged by courts in the United States.[137]

Most recently, the European Commission met with several internet platforms in order to create a new resolution that would counter speech made illegal by the European Union and its countries.[138] This is known as the "Code of Conduct Countering Illegal Hate Speech Online".[139] In the agreement, several internet companies acknowledged that they would prohibit what the European Union considered "hateful conduct"— and that such compliance would be frequently monitored and reviewed on a periodical basis.[140]

Many argue that this agreement and continuing change was almost entirely coerced.[141] Internet Platforms understood that such an "agreement" reached by the European Commission was the only alternative to rigorous laws that would have been passed in its place had an agreement not been reached.[142] Companies created stark changes to their speech policies within the span of a year in order to comply with the European pressure.[143]

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[136] *Id.*

[137] *See* Caraccioli v. Facebook, Inc., 700 F. App'x 588, 589-90 (9th Cir. 2017).

[138] European Commission Press Release IP/16/1937, *European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech* (May 31, 2016), http://europa.eu/rapid/press-release_IP-16-1937_en.htm.

[139] *Id.*

[140] *Id.*

[141] Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1046–47 (2018).

[142] *Id.*

[143] *Id.* at 1048.

Unfortunately for the platforms, European leaders have only created more pressures and restrictions, demands which only grew louder after the most recent terror attacks in the last few years.[144] Unlike many advocates for regulation in the United States, the United Kingdom even encouraged the use of automated banning, versus human regulation which it felt was too inefficient to combat the hate speech the European Union sought to curb.[145]

Slowly but surely such measures that were originally intended to combat terrorism have made their way into regulating all illegal hate speech defined by the European Union and individual state laws.[146] The agreement makes it to where the terms outlined in most platforms' terms of service are not only encouraged, but will be met with serious fines if not enforced.[147]

The European Union and its country states are inarguably attempting to influence American based social media companies and internet platforms to act in accordance with its policies on hate speech—with the threat criminal enforcement.[148] Such a measure to restrict protected speech through criminal enforcement is unconstitutional in the United States— the only way for United States to encourage the American principles of free speech is for courts to interpret Section 230 to achieve its proper function under those principles. Ultimately this will force internet platforms to make a choice.

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[144] Amanda Paulson & Eva Botkin-Kowacki, *In Terror Fight, Tech Companies Caught Between US and European Ideals*, CHRISTIAN SCI. MONITOR (June 23, 2017), https://www.csmonitor.com/Technology/2017/0623/In-terror-fight-tech-companies-caught-between-US-and-European-ideals.

[145] Cabinet Office and Home Office, *French-British Action Plan: Internet Security*, 2017 (UK), https://www.gov.uk/government/publications/french-british-action-plan-internet-security.

[146] Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1052 (2018).

[147] European Commission Press Release IP/16/1937, *European Commission and IT Companies Announce Code of Conduct on Illegal Online Hate Speech* (May 31, 2016), http://europa.eu/rapid/press-release_IP-16-1937_en.htm.

[148] *See generally,* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018).

Making A Choice

While the European Union has created some pressure for social media companies to act in accordance with Europe's laws, American jurisprudence has ensured that social media companies are no longer afraid to propagate certain content and openly restrict others, even when such content is not obscene or lewd, and objectively protected under the First Amendment. With the recent court decisions that have found Section 230(2)(c) to be subjective test and not an objective test, it is nearly impossible to see a situation where a court would consider a Social Media platform to be defined as "content provider", regardless of the amount of control that the company exerts over the information being posted. In the last couple of years, Social Media companies have begun to use Section 230(2)(c) to freely to block political content at their discretion and without limitation— this unrestricted immunity has created a dangerous precedent for the future of the First Amendment, and more specifically open debate. As we have seen very recently, a growing divide has become much more contentious for Americans everywhere. [149] Over fifty percent of Americans see opposing viewpoints as a threat to their future and society.[150] Something must be done, specifically with social media. Banning and sorting creates echo chambers, and statistically, echo chambers create even more polarization.[151]

[149] *See Political Polarization in the American Public*, PEW RESEARCH CTR. (Jun. 12, 2014), https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.

[150] *Id*.

[151] *See id*.; *see also* Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 118 (2018).

My proposition, only a step in solving a much bigger issue at hand, is that courts apply an interpretation of Section 230 which is in line with Congress' original intent and language. An interpretation benefits the people by limiting censorship, and protects companies that allow free speech to flourish—the actual goal of Section 230 of the CDA.

I agree that, originally, the CDA was integral with our first amendment rights on the internet, but that has changed since the development of sophisticated algorithm technology geared towards censorship. Now, internet platforms can get the best of both worlds—cheap alternatives to monitoring their websites, and immunity that was put in place so that they wouldn't have to. This cannot continue, those who misuse Section 230's power without achieving its purpose do not deserve its protection. The CDA has given internet companies no reason to fear when removing defamatory or explicit content, but these companies cannot become supreme rulers of the internet, deciding what is acceptable speech and what is not, especially when internet speech is becoming the most important speech—"[anyone] can become a town crier with a voice that resonates farther than it could from any soapbox."[152]

The Supreme Court iterated and reiterated that banning someone from social media altogether is to prevent them from exercising their first amendment rights. But the internet will not continue to be the most important place for free public debate, unless these Platforms are incentivized to remain neutral third-parties. Even when a platform is not attempting to align information with its own political views, it must not be encouraged in its attempt to make no one offended—after all, "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[153] Congress intended that the growth of

[152] *See Reno*, 521 U.S. at 870.

[153] *See, e.g.*, Street v. New York, 394 U.S. 576, 592 (1969).

the internet benefit all of society, it sought to encourage interactive computer services to provide *neutral* tools when monitoring and removing content.[154]

Some would suggest that because a majority of the public uses Social Media platforms as an avenue to exercise their freedom of expression and other public rights, that social media companies have now forfeited their rights of freedom of association as juridical persons, and should be considered quasi-public entities or public forums;[155] with a proper interpretation of Section 230, this drastic change is unnecessary. The solution is that these companies, and in turn the courts, have to make a choice: (1) Social Media companies can exercise their private rights of association freely and without discretion, or (2) they can receive CDA immunity for limiting censorship and promoting protected speech— but they cannot have both. Such an interpretation has no bearing on Social Media's *good faith* attempts to filter unprotected speech in line with the language of Section 230(c)(2)(A) (even if such speech is later found to be constitutionally protected). This will prevent the spread of the gory and violent content that frankly has no place anywhere in debate.[156]

While I agree with the court in *Caraccioli v. Facebook*, that a Platform does not become a content provider simply by virtue of deciding not to remove information,[157] a platform can become an information content provider, by choosing to remove too much information. As

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[154] *See Fair House Council of San Fernando Valley*, 521 F.3d at 1175.

[155] *See* Colby M. Everett, *Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media*, KAN. J.L. & PUB. POL'Y, Fall 2018 (arguing that despite private ownership social media companies sufficiently thrust themselves into the public light that they discard their private rights); *see also* Marsh v. Alabama, 326 U.S. 501, 507 (1946) (noting that when a public forum is controlled by a private corporation it is more important to protect the First Amendment rights of the people than the rights of the company).

[156] *See Brandenburg*, 395 U.S. at 447.

[157] *See* Caraccioli v. Facebook, Inc., 700 F. App'x 588, 589-90 (9th Cir. 2017).

platforms gain more control over the content that is posted on their websites, they must do so at their own risk of becoming a content provider. It must be so, that a coordination of millions of voices through the use of sophisticated filtering and sorting (and mob psychology)[158], is considered acting as a "content creator". Removing all unwanted speech is a negative form of promulgation, especially when those restrictions are aligned to a message consistent with the personal and political beliefs of those people within the higher echelon of the Social Media Platforms. The conductor of an orchestra makes no noise, but they are still responsible for the collective sound.

Companies that engage in restraint will always be rewarded with immunity—as they always have under Section 230—but companies which engage *en masse* in filtering and sorting practices on the basis of political viewpoint discrimination, simply cannot be considered to have acted in "good faith" in accordance with the subsection.

Furthermore, the CDA's immunity is an *Affirmative* defense (a principal erroneously overlooked by the courts addressing the issue).[159] In order to comport with the common law principles of an affirmative defense, **the burden of proving immunity must be on the Defendant.**[160] Such immunity should not be given freely as courts have been quick to do whenever a defendant calls themselves an "interactive computer service". An actual objective analysis of whether the company has systematically engaged in viewpoint discrimination should be required—whether or not they qualify under the purpose of an "interactive computer service"

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[158] *See* Edward Morrissey, *How Twitter and Facebook are weaponizing mob mentality*, THE WEEK (Jul. 31, 2018), https://theweek.com/articles/787650/how-twitter-facebook-are-weaponizing-mob-mentality.

[159] *See Zeran,* 129 F.3d at 329.

[160] *See* Perry v. U.S. Dep't of State, 669 F. Supp. 2d 60, 65 (D.D.C. 2009); *see also* Patterson v. New York, 432 U.S. 197, 210 (1977).

or whether the amount of control and influence they have exercised over the content qualifies them as an "information content provider." Courts must begin to balance the interest of free speech rights of internet users with the rights of immunity of the company itself.

With that in mind, users have always been, and should always be able to filter their own content as they see fit. Such user controlled filters were explicitly encouraged by congress when it passed the CDA.[161]

Some might argue that such a policy would be unable to curb defamatory speech. Despite this argument, a remedy for defamation has always existed against the party who directly posts the content. [162] Unfortunately, this does not always comport with the deep pockets rule that is generally desired by attorneys. Parties injured by defamatory statements are not without legal recourse, as we have seen recently with Alex Jones and his remarks against a victim of the Sandy Hook school shooting[163]— but a person blocked by a consortium of social media companies, has effectively been banned from having a voice on the internet.[164]

One might also argue that being blocked from social media should not be considered as "being silenced" because a person can easily find another avenue or place to exercise their speech. To that I would say, as the Supreme Court has said, "one is not to have the exercise of [their] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[165]

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[161] *See* S. CONF. REP. 104-230, at 194 (1996).

[162] *See Zeran,* 129 F.3d at 329.

[163] *See* Vanessa Romo, *Sandy Hook Victim's Father Wins Defamation Suit; Alex Jones Sanctioned*, NPR LAW (Jun. 18, 2019, 10:04 PM), https://www.npr.org/2019/06/18/733880866/sandy-hook-victims-father-wins-defamation-suit-alex-jones-sanctioned.

[164] *See Packingham*, 137 S. Ct. at 1737.

[165] *See* Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 163.

It is inevitable that such choices will have international speech implications. After all, social media companies are susceptible to the laws of other countries. Such restrictions can be partially solved by the ability to restrict and limit content based on location, a form of technology which has existed for the last decade.[166] Moreover, it is understood that congress wanted the CDA's effects to be felt internationally, hoping that an open internet would spread truth and democratic ideals.[167] The European Union's disagreement with the fundamentals of American free speech principles cannot be the primary reason to defer on what many Americans consider their most important right.

In January 2019, a congressman intended to revise the statute to provide that a platform which engages in the manipulation and blocking of material, or alters the order in which material is presented to users, would be considered a publisher of such content and not subject to the immunity afforded under the section.[168] While attempting to solve the issue, it seems that such language would make it difficult for people to sort through the expanse of information that is present on the internet. An organization of content based on popularity would be a violation of the statute— such a violation would ultimately be contrary to the way in which people prefer to view their content.

Such a revision is not necessary in order fix the problem that has been created by Social Media content policies and the widespread use of sorting and banning algorithms. Nor is action by the courts to enforce Section 230 in accordance with its history and intent a form of Judicial legislation. It is simply interpreting the statute in a manner in which it achieves its intended

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[166] *See Geo-Blocking,* WIKIPEDIA, https://en.wikipedia.org/wiki/Geo-blocking (last visited July 23, 2019).

[167] *See Zeran,* 129 F.3d at 334.

[168] *See* H.R. 492, 116th Cong. (2019).

results— to promote and protect open debate on the internet, while giving each user the tools and means to filter out such content themselves.

Conclusion

Social Media is changing the way people have relationships. There is a whole generation of kids that would rather scroll through their newsfeed than go outside.[169] With the recent developments in politics and social media, it is important that congress and the courts incentivize the protection of civil liberties of the individual, not the corporations that control the internet.

Section 230 is an avenue, created by congress, in which both the users and the internet providers can flourish, neither taking precedent over the other—but such a result requires the proper interpretation. Moreover, this interpretation can incentivize a solution for a larger free speech issue on the internet.

Because a majority will always determine what is considered acceptable speech, the first amendment was intended to protect the minority of viewpoints.[170] Even when a viewpoint is considered offensive, annoying, or wholly untruthful by many, most of the time it can be blocked and or ignored by the person receiving the information. And a viewpoint which is defamatory or damaging can almost always be met with legal recourse. Social Media Platforms should not be incentivized to become the arbiters of speech.

In trying to ban all offensive and potentially damaging content, social media companies have inevitably encroached in areas of speech that are necessary for public discourse, and as such a healthy democracy. They are "[b]urning the house to roast the pig."[171]

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[169] *See* Jean M. Twenge, *Why Teens Aren't Partying Anymore*, WIRED (Dec. 27, 2017, 7:00 AM), https://www.wired.com/story/why-teens-arent-partying-anymore/.

[170] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

[171] *See Reno*, 521 U.S. at 882.

While most would hope for pleasant and peaceful discussion, the resulting echo chambers created from such endeavors have created more damage than much of the content itself— echo chambers let the fake, unfounded claims exist freely without contestation.

Moreover, freedom to hear the truth includes the freedom to hear the lies. Eventually the internet will break the fourth wall of our "screens" (to the extent that it hasn't already). Its roots will become inseparable from the real world. In order to preserve the principles and foundations of our civil liberties, they must be integrated within the internet now, before the virtual becomes synonymous with our reality.