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Section 230 is Not Broken: Why Most Proposed Section 230 Reforms Will Do More Harm Than Good, and How the Ninth Circuit Got it Right

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SECTION 230 IS NOT BROKEN: WHY MOST PROPOSED SECTION 230 REFORMS WILL DO MORE HARM THAN GOOD, AND HOW THE NINTH CIRCUIT GOT IT RIGHT

Christian Sarceño Robles

I. INTRODUCTION

In 1996, Congress enacted 47 U.S.C. § 230 ("Section 230") as part of the Communications Decency Act ("CDA"), essentially protecting online services from any liability for content produced by third parties.[1] With the hope to encourage internet service providers ("ISPs") to moderate the content on their platforms so that minors would be less often exposed to indecent material online, the CDA authorized ISPs and users of interactive computer services to restrict access to inappropriate materials without risking liability from being classified as publishers.[2] Section 230 quickly grew to become so

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1 47 U.S.C.S. § 230 (LEXIS through Pub. L. No. 117-36).

2 H.R. REP. NO. 104-458, at 81–91 (1996); S. REP. NO. 104-230, at 187–93 (1996); S. REP. NO. 104-23, at 9 (1995) (all noting statutory purpose of protecting minors from exposure to online pornographic materials).

central to US internet law that it has been cited as one of the "most important laws supporting the internet, e-commerce and the online economy" and also "the most important law protecting internet speech."[3] The legal scholar Jeff Kosseff more concisely described it as "the twenty-six words that created the internet."[4] Although traditionally hailed as one of the most important governmental actions for the development of the internet, the idea of reforming Section 230 has now been increasingly gathering support from government officials. Lately, many politicians on both sides of the aisle have argued that the CDA has been stretched far beyond its original intent and have criticized Section 230 for the role it has allegedly played in "protecting purveyors of hate speech, revenge porn, defamation, disinformation, and other objectionable content."[5] This comment will address why these latest efforts to reform Section 230 are fundamentally misguided by: (1) analyzing the history and some of the most relevant court decisions surrounding Section 230; (2) summarizing some of the most common elements in proposed Section 230 reform, discussing its policy goals, and arguing that such reforms would either run contrary to the purpose of Section 230, be largely ineffective in achieving their policy goals, or have major economic and free speech consequences that would outweigh any of their potential benefits; and (3) proposing that the best balance between the interests of consumers and interactive computer services is served by courts following the legal framework already articulated by the Ninth Circuit, whereby Section 230 immunity is conditioned on a website not encouraging illegal content or requiring users to input illegal content in its design.

II. BACKGROUND

Before Section 230 was enacted, two landmark court cases addressed ISP third-party liability: *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*[6] and *Cubby, Inc. v. CompuServe Inc.*[7] Whereas the court in *Prodigy* found Prodigy, an online operator of bulletin boards and forums, liable for a subscriber's defamatory message board posts because Prodigy regularly took

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3 Jeffrey Neuburger, *The Communication Decency Act and the DOJ's Proposed Solution: No Easy Answers*, PROSKAUER (June 19, 2020), https://newmedialaw.proskauer.com/2020/06/19/the-communication-decency-act-and-the-dojs-proposed-solution-no-easy-answers/; *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230.

4 JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (Cornell Univ. Press 2019).

5 Neuburger, *supra* note 3.

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

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

steps to remove objectionable content,[8] the court in *CompuServe* dismissed the case because CompuServe, although similarly an operator of online forums, did not screen any of the content uploaded to its servers and could not be liable for defamatory content it did not know of or had reason to know of.[9] Prodigy, a "publisher" due to its efforts to screen content, was liable,[10] but CompuServe, a mere "distributor" of online content, was not.[11] This created what is known as the moderator's dilemma, wherein socially responsible online intermediaries would be faced with the tough choice between screening content—potentially facing liability—or taking a hands-off approach.[12] Congress, having expected online platforms to screen out objectionable content (such as pornography easily viewable by children), was troubled by the deterrence to internet moderation promulgated by these judicial rulings and sought to rectify it through legislative action.[13] It stood to reason that platforms who endeavored to remove objectionable content, even if they did the job imperfectly, should not be exposed to potentially business-ending legal action any more than those that refuse to undertake these socially valuable moderating practices.[14] Congress eventually enacted Section 230 of the CDA as its proposed solution.[15] Since then, Congress, through legislation, and the courts, by interpreting its scope, have continued to shape the contours of Section 230.

A. *Section 230's Text*

Section 230(c) of the CDA, entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," is divided in two key provisions.[16] The first, Section 230(c)(1), specifies that providers or users of interactive computer services will not "be treated as the publisher or speaker of any information provided by another information content provider."[17] This provision immunizes platforms when it comes to user generated content and seeks to shield defendants such as the one in *Prodigy* from publisher or

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8 *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5.

9 *Cubby, Inc.*, 776 F. Supp. at 139–40.

10 *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.

11 *Cubby, Inc.*, 776 F. Supp. at 144.

12 Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, *in* OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIAB. 155, 157 (Giancarlo Frosio ed., 2018).

13 *Id.* at 157–58.

14 *Id.*

15 47 U.S.C.S. § 230 (LEXIS through Pub. L. No. 117-36).

16 47 U.S.C.S. § 230(c) (LEXIS through Pub. L. No. 117-36).

17 47 U.S.C.S. § 230(c)(1) (LEXIS through Pub. L. No. 117-36).

speaker based liability.[18] In other words, after Section 230(c)(1) was enacted, if a user of any social media app, review site, online marketplace, blog, forum, or any other "interactive computer service" posts something for which that user may be liable, liability ends with that user and does not extend to a platform simply for hosting that user's speech.[19]

The second provision, Section 230(c)(2), states that online service providers should not be held liable for good-faith filtering or blocking of user generated content.[20] Section 230(c)(2) allows platforms to moderate user generated content without exposing themselves to liability for doing so.[21] By removing the potentially business-ending financial risk known as civil liability, this provision sought to encourage ISPs to moderate content rather than remain passive observers like CompuServe.[22]

Taking both provisions together, Section 230 created an internet where online platforms are not liable for user generated content but remain free to moderate as much or as little of that content without exposing themselves to liability. Section 230 recognizes that while it is impractical to require that platforms moderate all user generated content, it is desirable for platforms to moderate objectionable content to the best of their ability; as such, Section 230 states that they will not be punished (through exposure to liability) if they choose to moderate user content, even if their efforts are lukewarm.[23]

Section 230 does also carve out limitations for its immunity provisions.[24] For example, Section 230 specifically states it has no effect on federal criminal law, intellectual property law, and the Electronic Privacy Communications Act.[25] In 2018, Congress amended Section 230's safe harbor provisions to also include a carveout for the knowing facilitation of sex trafficking in what became known as the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA-SESTA).[26] FOSTA-SESTA was enacted at least in part as a response to Backpage.com, which was a website that tried to maximize its

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

19 47 U.S.C.S. § 230(c)(1) (LEXIS through Pub. L. No. 117-36).

20 47 U.S.C.S. § 230(c)(2) (LEXIS through Pub. L. No. 117-36).

21 *Id.*

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

23 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 MKT. (July 15, 2019), https://truthonthemarket.com/2019/07/15/the-third-circuits-oberdorf-v-amazon-opinion-offers-a-good-approach-to-reining-in-the-worst-abuses-of-section-230/.

24 47 U.S.C.S. § 230(e) (LEXIS through Pub. L. No. 117-36).

25 *Id.*

26 *See* 18 U.S.C.S. §§ 1591, 1595, 2421A (LEXIS through Pub. L. No. 117-36) [hereinafter FOSTA-SESTA].

profits from online commercial sex advertising, some of which advertised victims of sex trafficking.[27] The First Circuit Court of Appeals had held that Backpage.com was immunized by Section 230(c)(1), prompting the legislative action.[28]

B. *How Courts Have Interpreted Section 230*

After Congress enacted Section 230, the ball was thrown back to the courts to determine how broadly to interpret its scope. *Zeran v. AOL* quickly became the leading Section 230 opinion, holding that Section 230 granted ISPs protection from liability based on third-party content even when notice was given to the ISP of the illegality.[29] Activities that would ordinarily dictate a publisher's liability in the offline world, such as editing or filtering of content, would no longer trigger liability in the online world.[30]

However, the Ninth Circuit Court of Appeals, in its decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, later tried to carve an exception to the *Zeran* ruling.[31] The opinion stated that "[i]f you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[32] Therefore, the Ninth Circuit decided to limit Section 230 protections to illegal conduct that is merely incidental to the functions of the online platform, and not part of its design or goals.[33] In other words, the Ninth Circuit decided on a more purposive approach. Interactive computer services that "passively display content that is created entirely by third parties" were held to be different from those that are "'responsible, in whole or in part'" for the illegal conduct.[34] The court concluded that it is only the former that Section 230 immunizes.[35] A website that induces a user to commit an illegal act would not be immune from

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27 *See* Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 280–82 (2019).

28 Doe v. Backpage.com, LLC, 817 F.3d 12, 23 (1st Cir. 2016).

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

30 Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH & INTELL. PROP. 1, 3 (2017).

31 *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

32 *Id.*

33 *Id.*

34 *Id.* at 1163.

35 *Id.* at 1172–73.

liability.[36] Some courts, but not all,[37] have followed the lead of the Ninth Circuit and also found an exception to the liability shield afforded to websites by Section 230 in cases where the defendant induces the illegality, and have declined to extend protections to these so-called "bad Samaritans."[38] The Tenth Circuit, for example, seemed to embrace this line of reasoning when it held in *FTC v. Accusearch, Inc*. that "a service provider is 'responsible' for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content."[39] The First Circuit, however, stated that "a website operator's decisions in structuring its website and posting requirements are publisher functions entitled to section 230(c)(1) protection" in one of the infamous cases against Backpage.com that prompted congressional action in the form of FOSTA-SESTA.[40] The First Circuit's rationale comes in apparent conflict with the Ninth Circuit as the courts reached opposite conclusions when it comes to whether website design decisions are immunized by Section 230.[41]

Courts have continued to define the contours of Section 230 in many other landmark decisions over the years. The holding in *Doe v. MySpace, Inc.*, for example, illustrates how internet platforms are not liable for issues that occur offline following some online action.[42] In that case, a young girl was sexually assaulted by a man she met online and eventually agreed to meet.[43] The court held that MySpace, which provided the communication tools between the two individuals, was precluded from liability because of Section 230.[44] Similarly, cases against social media service providers alleging material support to terrorists after allowing the terrorists to disseminate content on their platforms have been dismissed on Section 230 grounds.[45]

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36 *Id.* at 1175.

37 *See, e.g.,* Doe v. Backpage.com, LLC, 817 F.3d 12, 22 (1st Cir. 2016); Jones v. Dirty World Ent. Recordings, LLC, 755 F.3d 398, 413–14 (6th Cir. 2014). *But see* Fed. Trade Comm'n v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016).

38 *See, e.g.,* Fed. Trade Comm'n v. Accusearch, Inc., 570 F.3d 1187, 1199 (10th Cir. 2009).

39 *Id.*

40 *Backpage.com, LLC*, 817 F.3d at 22.

41 *Compare Backpage.com, LLC*, 817 F.3d at 22, *with* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

42 Goldman, *supra* note 30, at 4–5.

43 Doe v. MySpace, Inc., 528 F.3d 413, 416 (5th Cir. 2008).

44 *Id.* at 422.

45 *See, e.g*., Cohen v. Facebook, Inc., F. Supp. 3d 140, 145 (E.D.N.Y. 2017); Fields v. Twitter, Inc., 200 F. Supp. 3d 964, 971–72 (N.D. Cal. 2016).

C. *Recent Criticisms Surrounding Section 230*

In the past few years, Section 230 has been the subject of much debate, and lawmakers from both major parties have submitted various proposals for reforms in Congress,[46] some of which have passed both chambers in a bipartisan manner, such as FOSTA-SESTA.[47] At the time when FCC Chairman Ajit Pai tried to move forward with rulemaking to interpret Section 230 (an endeavor which he quickly gave up on[48]), he noted that "'[m]embers of all three branches of government have expressed serious concern about the prevailing interpretation of Section 230.'"[49] Even the Department of Justice submitted a twenty-eight-page outline during the Trump Administration outlining several proposals of its own,[50] and President Donald Trump himself signed an executive order dealing with the subject.[51] President Trump went as far as to veto the National Defense Authorization Act in late 2020 because it did not include language to repeal Section 230, although this veto was later overridden by Congress in a bipartisan vote.[52] Similarly, President Joe Biden has called for Section 230 to be "revoked, immediately."[53] In the current political climate, there is a growing call to amend or even repeal the protections afforded to ISPs by Section 230,[54] even if the policy justifications for doing so remain very diverse across the political spectrum.[55]

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46 *See* Zoe Bedell & John Major, *What's Next for Section 230? A Roundup of Proposals*, LAWFARE (July 29, 2020, 9:01 AM), https://www.lawfareblog.com/whats-next-section-230-roundup-proposals.

47 *See* FOSTA-SESTA, *supra* note 26.

48 Sean Hollister, *FCC Chairman Ajit Pai Gave Up on His Legally Dicey Attempt to 'Clarify' Internet Law*, THE VEERGE (Jan. 7, 2021, 8:42 PM), https://www.theverge.com/2021/1/7/22219677/fcc-ajit-pai-section-230-its-over.

49 Thomas Johnson Jr., *The FCC's Authority to Interpret Section 230 of the Communications Act*, FED. COMMC'NS COMM'N (Oct. 21, 2020, 10:30 AM), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

50 U.S. DEP'T OF JUST., SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY? 1 (2020), https://www.justice.gov/file/1286331/download.

51 Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020).

52 Matthew Daly, *In a First, Congress Overrides Trump Veto of Defense Bill*, THE ASSOCIATED PRESS (Jan. 1, 2021), https://apnews.com/article/election-2020-donald-trump-defense-policy-bills-85656704ad9ae1f9cf202ee76d7a14fd.

53 Makena Kelly, *Joe Biden Wants to Revoke Section* 230, THE VERGE (Jan. 17, 2020, 10:29 AM), https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke.

54 *See, e.g.*, Danielle K. Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017); Zoe Bedell & John Major, *What's Next for Section 230? A Roundup of Proposals*, LAWFARE (July 29, 2020, 9:01 AM), https://www.lawfareblog.com/whats-next-section-230-roundup-proposals.

55 *See* Bedell & Major, *supra* note 54.

III. ANALYSIS

The most prominent Section 230 reform proposals fall under one of the following categories: (1) those aimed at curbing perceived political censorship,[56] (2) those advocating carveouts for certain "heinous" crimes (such as sex trafficking, child abuse, and terrorism),[57] (3) those seeking to condition immunity on "reasonable" moderation practices,[58] (4) those advocating carveouts for platforms with actual knowledge or notice that the third-party content at issue was illegal,[59] or (5) those seeking to make explicit that Section 230 does not protect so-called "Bad Samaritans."[60]

A. *Proposals Aimed at Curbing Perceived Political Censorship*

These types of proposals garnered vast Republican support during Trump's presidency, and President Trump's own executive order, though largely symbolic, is perhaps the best example.[61] The executive order stated that Section 230

> immunity should not . . . provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.[62]

These proposals usually target what many Republican politicians perceive as anti-conservative bias of major online platforms, and focus on removing immunity for those platforms who engage in political censorship.[63] Senator Ted Cruz, for example, argued: "[B]ig tech enjoys an immunity from liability on the assumption they would be neutral and fair. If they're not going to be neutral and fair, if they're going to be biased, we should repeal the immunity from liability so they should be liable like the rest of us."[64]

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56 *See, e.g.*, Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020).

57 *See, e.g.*, FOSTA-SESTA, *supra* note 26.

58 *See, e.g.*, Citron & Wittes, *supra* note 54, at 403.

59 *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 50, at 3.

60 *Id.*

61 *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020).

62 *Id.*

63 Bedell & Major, *supra* note 46.

64 Danielle K. Citron & Mary A. Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 62 (2020).

The idea is that tech companies should receive Section 230 immunity only if they refrain from viewpoint discrimination, which is reminiscent of First Amendment constitutional requirements.[65] The proposals liken the times when a platforms removes, blocks, or mutes user generated content based on political beliefs to prohibited state actor censorship under the First Amendment that should deprive the platform of its Section 230 immunity.[66] One example of these proposals is Senator Josh Hawley's proposal, which would require internet platforms to pass a political neutrality audit from the Federal Trade Commission to obtain Section 230 protections,[67] and another is U.S. Representative Louie Gohmert's proposal, which would require platforms to sort user generated content in chronological order rather than moderating content's prominence and visibility based on their own criteria.[68]

Leaving aside whether political bias in online platforms is as prevalent or problematic as proponents of political neutrality reforms to Section 230 claim, a thorough reading of Section 230 or its legislative history simply does not suggest that political neutrality had anything to do with the law.[69] Section 230 was intended "to remove disincentives for the development and utilization of blocking and filtering technologies."[70] As such, Section 230 was meant to promote, not dissuade, the use of censors, such that websites could filter objectionable content without triggering liability. Furthermore, parallels between the social media platforms and public forums or other such attempts to tie Section 230 and the First Amendment are disingenuous or at least inaccurate. First Amendment obligations fall entirely on government actors, not private actors.[71] The First Amendment protects, not prohibits, the rights of private actors against compelled speech.[72] If there are any First Amendment factors to be considered in website filtering or blocking of user generated content, they would be in favor, not against, the rights of private actors to decide which content they wish to promote.[73] It is therefore no surprise that Florida's Stop Social Media Censoring Act, which would have fined social media platforms for banning some political candidates, and was largely a legislative response to Trump's Twitter ban, was blocked by a

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65 *Id.* at 61.

66 *Id.*

67 *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.

68 Citron & Franks, *supra* note 64, at 63.

69 *Id.* at 62.

70 47 U.S.C.S. § 230(b)(4) (LexisNexis 2021).

71 Citron & Franks, *supra* note 64.

72 *Id.*

73 *Id.*

federal judge before it could take effect, partially due to First Amendment issues.[74]At least inasmuch as it concerns Section 230's original policy goals, political neutrality was not and should not be relevant.

B. *Proposals Advocating Carveouts for Certain "Heinous" Crimes*

Proposals advocating carveouts for certain "heinous" crimes focus on particular categories of objectionable content, such as sex trafficking, child abuse, or terrorism, and either remove Section 230 immunity for such content or incentivize more aggressive efforts to police it.[75] FOSTA-SESTA is the best example of this type of proposal, and also highlights many of the problems these proposals would likely also encounter.[76] For example, within days of FOSTA-SESTA's passage, Craigslist felt forced to take down its personals section, judging that it could not take the risk of liability due to the actions of third parties in that section without jeopardizing its other services.[77] As the Center for Democracy and Technology stated:

> Without limits on liability for hosting user speech, such intermediaries are likely to react by significantly limiting what their users can say, including a potentially wide range of lawful speech, from discussions on dating forums about consensual adult sex, to resources for promoting safety among sex workers. Indeed . . . that has already started to happen, with platforms restricting access to information that promotes public health and safety, political discourse, and economic growth.[78]

Reddit, Techdirt.com, and Engine Advocacy also collectively filed an amicus brief discussing the burden FOSTA-SESTA imposes on websites that host user comments.[79] In the brief, Reddit claimed it felt the need to eliminate

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74 NetChoice, LLC v. Moody, No. 4:21cv220-RH-MAF, 2021 U.S. Dist. LEXIS 121951, at *4, *19, *33 (N.D. Fla. June 30, 2021).

75 Bedell & Major, *supra* note 46.

76 *See* FOSTA-SESTA, *supra* note 26.

77 Karen Gullo & David Greene, *With FOSTA Already Leading to Censorship, Plaintiffs Are Seeking Reinstatement of Their Lawsuit Challenging the Law's Constitutionality*, EFF (Mar. 1, 2019), https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit.

78 Corrected Brief of Amicus Curiae Center for Democracy & Technology in Support of Plaintiffs-Appellants at 26, Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (No. 18-5298), https://www.eff.org/document/orrected-brief-amicus-curiae-center-democracy-technology-support-plaintiffs-appellants.

79 Gullo & Greene, *supra* note 77.

a forum about harm reduction and safety for sex workers to shelter itself from potential future liability after the passage of FOSTA-SESTA.[80] Regrettably, doing so may have increased the actual threat to sex workers that FOSTA-SESTA was enacted to reduce. Reddit argued: "[b]roadly written rules almost necessarily result in lawful content being removed because there is no way for Reddit to weigh all the voluminous expression it reviews in a sufficiently nuanced and contextualized way to eliminate the risk of content targeted by FOSTA slipping through."[81]

Before President Trump signed FOSTA-SESTA, Backpage, the website that started it all, was already gone and its CEO was already convicted, victim restitution was guaranteed, and multiple courts had held that Section 230 did not prevent victims' civil claims from going forward.[82] In other words, the problem FOSTA-SESTA was designed to solve was already nonexistent by the time it became law. And yet, as a result of Congress enacting FOSTA-SESTA anyway, as Professor Eric Goldman put it, "the internet shrank."[83]

By attaching Section 230 immunity to an internet platform's lack of knowledge of sex trafficking, FOSTA-SESTA revives the dilemma that led Congress to pass Section 230 in the first place.[84] To shield themselves from liability, some online platforms have wavered between filtering everything even remotely related to sex or figuratively covering their eyes and ears by turning off all moderation so that they cannot be held responsible for "knowingly facilitat[ing] sex trafficking."[85] Others, like Craigslist, simply have exited or turned off that part of their operations.[86]

As seen by the successful passage of FOSTA-SESTA, carveouts can easily earn bipartisan favor.[87] It is therefore no surprise that proposals centering around carveouts have become increasingly numerous.[88] In June 2020, for example, the Department of Justice released a report identifying areas for Section 230 reform, and among their proposals were carveouts for terrorism, child sex abuse, and cyber stalking.[89] Others have suggested

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80 *Id.*

81 Brief of Amici Curiae Floor64, Inc. d/b/a The Copia Institute, Engine Advocacy & Reddit, Inc. in Support of Plaintiffs-Appellants at 17, Woodhull Freedom Found. v. United States, 948 F.3d 363 (D.C. Cir. 2020) (No. 18-5298), https://www.eff.org/document/amicus-brief-floor64-dba-copia-institute-engine-advocacy-reddit.

82 Goldman, *supra* note 27, at 288.

83 *Id.*

84 *Id.*

85 Citron & Franks, *supra* note 64, at 69.

86 Gullo & Greene, *supra* note 77.

87 *See* FOSTA-SESTA, *supra* note 26.

88 *See, e.g.*, Bedell & Major, *supra* note 46.

89 U.S. DEP'T OF JUST., *supra* note 50, at 3.

carveouts for crimes such as drug trafficking[90] and hate speech.[91] These crimes are often those that would easily shock the conscience, leading to their bipartisan approval. However, the truth is that there is little that could objectively differentiate these crimes from any others in relation to Section 230's policy goals. The idea of a carveout approach to Section 230 "is inevitably underinclusive, establishing a normative hierarchy of harms that leaves other harmful conduct to be addressed another day."[92] As horrible as sex trafficking and other similarly egregious crimes may be, it is unlikely that these reforms will help victims, and some argue it might actually hurt them.[93] For example, Professor Eric Goldman argued that FOSTA-SESTA's enactment "pushed sex workers back to the streets, where they once again become subject to the dominion of pimps, and where they lose some of the physical safety protections they had gained through online negotiations."[94] Furthermore, by establishing this hierarchy, the crimes that are not carved out are in essence treated as less important than the others or as not worth removing the legal shield for. The message this might send to victims of these other crimes that are not carved out, but who nonetheless feel wronged by criminal behavior on the internet, cannot be said to be a positive one. An approach that creates carveouts for "heinous" crimes would not only be counterintuitive, but it would require Section 230 to be regularly and unrealistically updated by Congress as it reacts to the ever-changing values of modern society.[95]

C. *Proposals Seeking to Condition Immunity on "Reasonable" Moderation Practices*

This approach, originally proposed by Danielle Citron and Lawfare editor-in-chief Benjamin Wittes, would carve out from Section 230 defendants who fail to take "reasonable steps to prevent or address unlawful uses of their services."[96] This proposal has the stated aim of "eliminat[ing] the immunity for the worst actors," so-called "Bad Samaritans," who were debatably not envisioned to be covered by the immunity provided in Section

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90 Samantha Cole, *Senator Suggests the Internet Needs a FOSTA/SESTA for Drug Trafficking*, VICE (Sept. 5, 2018, 2:47 PM), https://motherboard.vice.com/en_us/article/8xbwvp/joe-manchin-fosta-sesta-law-for-drug-trafficking-senate-intelligence-committee-hearing.

91 Ron Wyden, *The Consequences of Indecency*, TECHCRUNCH (Aug. 23, 2018, 2:15 PM), https://techcrunch.com/2018/08/23/the-consequences-of-indecency/.

92 Citron & Franks, *supra* note 64, at 69.

93 *See, e.g.*, Goldman, *supra* note 27, at 289–92.

94 *Id.* at 291–92.

95 *See* Citron & Franks, *supra* note 64, at 69.

96 *See* Citron & Wittes, *supra* note 54, at 419.

230.[97] Other than a full repeal of Section 230, it is perhaps the most sweeping and burdensome of all proposals,[98] and it would likely require "expensive and lengthy factual inquiries into all evidence probative of the reasonableness" of the internet platform's behavior.[99] Unlike targeted proposals, an across-the-board reasonableness requirement would have far-reaching consequences. It would immediately deprive businesses of Section 230's biggest procedural benefits, as more cases would have to go to trial for factual determinations rather than be dismissed, increasing the costs of the litigation.[100] These procedural losses will lead to the elimination or exit of internet services, much like what occurred after FOSTA-SESTA, but on a much wider scale because of its more sweeping nature.[101]

Furthermore, a "reasonable steps" inquiry is vague and will likely remain unpredictable for businesses. This will result in businesses either under-moderating, if they believe erroneously that their moderation practices are reasonable enough when they are not—facing unexpected and possibly enormous financial liability—or over-moderating due to cautiousness, resulting in more collateral censorship, as internet services remove legitimate borderline content out of fear that a judge might otherwise hold their practices unreasonable.[102] Reasonableness itself is an amorphous term that is likely to develop and evolve over time as technologies and public attitudes change, resulting in businesses who are left behind by their peers to suddenly face liability where they were once deemed to have acted reasonably.

Finally, a "reasonable steps" condition before immunity is granted would run contrary to the objective of Section 230 to encourage internet moderation.[103] A reasonable standard would not only catch "Bad Samaritans", but it would also catch those that are negligent in their services. Leaving aside whether the law should protect those that negligently allow illegal conduct to thrive in their website, if taking reasonable steps is too burdensome for an internet platform and it does not want to close its business, it is once again faced with the moderator's dilemma that prompted Congress to take action in the first place.[104] After all, *CompuServe* shows us that even before Section 230, an effective way to avoid liability was just to take a

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97 *Id.* at 409, 419.

98 See Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. ONLINE at *45 (2019).

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *See* 47 U.S.C.S. § 230(b)(4) (LEXIS through Pub. L. No. 117-36).

104 *Compare* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *with* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

completely hands-off approach to moderation.[105] Other courts have found *CompuServe* to have established persuasive precedent in this area, at least inasmuch as it concerns defamation.[106] There is little reason to believe that courts will decide cases any differently after such an amendment, as liability for internet platforms that take this hands-off approach (and therefore have no reason to know of any illegal material) was not prevalent even before Section 230.[107] Even in the offline world where Section 230 does not apply, courts have found book publishers, for example, not liable for defamatory statements if they did not engage in any substantive editing or writing of the book.[108] As UNC law professor David S. Ardia wrote, "[m]any of the intermediaries that invoked section 230 likely would not have faced liability under the common law because they lacked knowledge of and editorial control over the third-party content at issue in the cases."[109]

By erasing Section 230's procedural benefits, the disincentive to moderating that sparked Section 230's passage in the first place simply returns along with the rising litigation costs, and this reformed Section 230 will therefore fail to meet its policy goals.[110] Rather than engage in some content moderation, which if insufficient may be seen as negligent by a court and result in financial liability, it would be safer from the point of view of the internet platform to leave every internet user to fend for themselves and hope that courts will find that the passive nature of their business practice absolves them from liability. A reasonable standard that erases Section 230's procedural benefits would make Section 230 almost entirely pointless and would needlessly punish platforms for engaging in content moderation when they fail to meet this reasonableness standard. Putting on an internet blindfold is a tried-and-true method of avoiding liability exposure that is likely to persuade at least some businesses to rethink their online moderation practices. Rather than encourage this, it is better to incentivize platforms to do some content moderation—even if they do so poorly or do not devote enough resources to it—by offering Section 230's legal shield even when

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105 *See generally* Cubby, Inc., 776 F. Supp. at 135.

106 *See, e.g.*, Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361, 1367 (N.D. Cal. 1995) ("[r]ecent decisions have held that where a BBS exercised little control over the content of the material on its service, it was more like a 'distributor' than a 'republisher' and was thus only liable for defamation on its system where it knew or should have known of the defamatory statements").

107 *Cubby, Inc.*, 776 F. Supp. at 140–41.

108 *See* Sandler v. Calcagni, 565 F. Supp. 2d 184, 194 (D. Me. 2008) (holding that without proof of scienter, book publisher was not liable for defamatory statements made by author).

109 David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. REV. 373, 480 (2010).

110 47 U.S.C.S. § 230(b)(4) (LEXIS through Pub. L. No. 117-36).

they are incompetent or unreasonable. Section 230 allows these platforms to change their moderation policies over time as they learn what works and what does not without worrying about the meaning of abstract concepts like reasonableness and the potential or real litigation costs that come alongside a reasonableness standard.

D. *Proposals Advocating Carveouts for Platforms with Actual Knowledge or Notice that the Third-Party Content at Issue Was Illegal*

Proponents of this type of proposal argue that platforms who have actual knowledge of illegal third-party content, or have reason to have such knowledge, have a duty to remove said content and should be liable if they choose inaction. The California Fourth Circuit Court of Appeal reached the conclusion advocated by this proposal, but the result was short-lived as the court's holding was quickly overturned by the California Supreme Court in *Barrett v. Rosenthal*.[111] Various internet entities such as Google, Amazon, and eBay argued that the California Fourth Circuit Court of Appeal's interpretation of Section 230 would lead to an internet where platforms remove any content upon receiving a defamation notice, choosing not to waste resources for inquiring into the notice's validity or credibility, all so as to easily circumvent any possible liability.[112] This, they argue, would seriously chill internet speech.[113] The California Supreme Court agreed when it decided *Rosenthal*,[114] and the *Zeran* court similarly stated that "[L]iability upon notice has a chilling effect on the freedom of internet speech" because "service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification."[115] Because notice liability encourages service providers to remove content first and ask questions later, implementing notice liability could also lead to abuses from malicious internet users who send defamation notices to silence legitimate voices, such as victims of sexual assault.

The internet, as voluminous a space as it is, is riddled with information and misinformation. While a notice-based liability system makes sense on a smaller scale, verifying each and every one of the pieces of information given

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111 Barrett v. Rosenthal, 146 P.3d 510, 529 (Cal. 2006).

112 *See* Brief of Amici Curiae Amazon.com, Inc. et al. at 63, Barrett v. Rosenthal, 146 P.3d 510 (Cal. 2006) (No. S122953), 2004 CA S. Ct. Briefs LEXIS 172, at *63.

113 *Id.* at *61.

114 *Rosenthal*, 146 P.3d at 525 (holding that "subjecting internet service providers and users to defamation liability would tend to chill online speech.").

115 Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

to internet platforms is not only burdensome and costly, but likely impossible. This is even more so for smaller platforms who do not have the resources to undergo projects of such scale. If any platforms were to survive, it would likely be the biggest platforms who can afford the litigation and business costs, especially after all their competition is reduced to a negligible number of competitors. The California Supreme Court's reversal in *Barrett v. Rosenthal* "was meant to continue protection for free speech of ISPs and individuals using online platforms to post non-author content, reduce online intrusion of government regulation, interpret Congress's intentions literally, and prevent costs for ISPs to screen offensive material that would otherwise increase if liability were opened."[116] For the same reasons that a notice-based approach for Section 230 was not desirable when *Rosenthal*[117] was decided, it is not desirable now.

In order to ensure that internet platforms simply do not respond by blinding themselves to the illegal content, this proposal often pairs Section 230 immunity with the requirement to design one's internet service in a way such that it can detect illegal activity.[118] However, it is questionable whether those who have an internet service design that is unable to detect illegal activity would even need Section 230 immunity since benign internet services which do not have any reason to know of the illegal conduct would not likely be liable under the common law. This fact already puts into question the effectiveness of this supposed incentive mechanism. That aside, forcing platforms to monitor illegal activity in this manner would raise costs further, putting an even bigger burden on smaller platforms with few resources, even if effective.

E. *Proposals for a Purposive Approach that Leaves Out Bad Samaritans: How the Ninth Circuit Got Section 230 Right*

As part of the Department of Justice's proposals on Section 230 there is a proposal that suggests codifying a "Bad Samaritan" carveout to Section 230, which would exempt from immunity those defendants who "purposefully promote, solicit, or facilitate the posting of material that the platform knew or had reason to believe would violate federal criminal law."[119] The Department of Justice reasons that a company that "solicits third parties to sell illegal drugs to minors, exchange[s] child sexual abuse

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116 LYNNMA97, *Barrett v. Rosenthal*, FOUNDS. L. AND SOCIETY (Dec. 5, 2018), https://foundationsoflawandsociety.wordpress.com/2018/12/05/barrett-v-rosenthal/.

117 *See Rosenthal*, 146 P.3d at 529 (Cal. 2006).

118 U.S. DEP'T OF JUST., *supra* note 50, at 3.

119 *Id.* at 15.

material, or otherwise engage[s] in criminal activity on its service" should not receive Section 230 protections.[120] It sees an explicit "Bad Samaritan" carveout as "necessary to ensure that bad actors do not benefit from Section 230's sweeping immunity at the expense of their victims."[121]

One important example of a case that would have been decided differently had the proposal been adopted when the case was heard is *Daniel v. Armslist*.[122] In *Armslist*, a man murdered his wife and two other people with an illegal firearm.[123] However, the website that facilitated the sale was found to be immune under Section 230.[124] The court granted immunity despite allegations that the website was designed specifically with the purpose of providing users with a way to skirt federal firearm laws.[125] Under the Department of Justice's proposal, plaintiffs would have likely been able to show that the website purposefully promoted these illegal firearm sales, which would have prevented Armslist from receiving Section 230 immunity.[126]

This approach is reminiscent of the Ninth Circuit's Section 230 opinions, as well as that of those where other courts that have ruled similarly.[127] By attaching a "purposefully" mens rea, the Department of Justice retains Section 230's immunity for passive conduits of illegal conduct but still punishes those, as the Ninth Circuit put it, that are "responsible, in whole or in part" for the illegality.[128] All of the examples the Department of Justice stated in its report would likely already be found to not be protected by Section 230 in the Ninth Circuit, either because they induce illegal conduct or because the platform takes part in the illegality of the action.[129] However, other courts with a broader interpretation of Section 230, such as the court in *Armslist*, might have previously decided differently.[130]

Of course, in practice the line is not always so clear. When a website, for example, recommends user-generated content to other users, such as when YouTube recommends videos to their users or other websites highlight "trending" content, they often do so through automated means that are not necessarily meant to, but often can, encourage illegal content. Courts are

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120 *Id.* at 14.

121 *Id.*

122 Daniel v. Armslist, LLC, 926 N.W.2d 710, 726 (Wis. 2019).

123 *Id.* at 715.

124 *Id.* at 726.

125 *Id.* at 723.

126 *See id.*; U.S. DEP'T OF JUST., *supra* note 50, at 15.

127 *See, e.g.,* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008).

128 *Id.* at 1174.

129 U.S. DEP'T OF JUST., *supra* note 50, at 14.

130 *See* Daniel v. Armslist, LLC, 926 N.W.2d 710, 727 (Wis. 2019).

likely to focus very deeply on the specific facts in each case to decide just how far the illegal content being featured is a product of the website design promoting illegal conduct in its structure and how far it is unintended.

It is important to note that had other circuits followed the holding of the Ninth Circuit from the beginning, the *Backpage*[131] case would likely have been decided differently. Because Backpage.com was arguably designed in such a way as to encourage illegal conduct, it would likely not have obtained Section 230 immunity in the Ninth Circuit.[132] With the opposite result from *Backpage*, Congress would not have felt pressured to pass legislation such as FOSTA-SESTA[133] to reform Section 230, and many of the perceived ills of Section 230 could have been ameliorated.

Effectively, this proposal maintains most of the status quo that has worked to create the internet as we know it. Although new legislation would not be needed if, say, the Supreme Court heard a Section 230 case to resolve any perceived conflicts between circuit courts and ruled in favor of the Ninth Circuit's interpretation or even a similar rationale, reforms such as this one could help expediate uniformity between courts before that happens. More importantly, because all the proposal does is punish truly bad actors who intentionally solicit or induce illegal conduct, unlike most other proposals, it would not affect legitimate businesses. In fact, the biggest complaint that others might have is that this proposal is likely to do a whole lot of nothing. But as the old saying goes: if it ain't broke, don't fix it.

IV. CONCLUSION

In 1996, U.S. Representatives Christopher Cox and Ron Wyden suggested an amendment to the CDA that would encourage internet moderation and promote internet decency.[134] The House Rules Committee, when it allowed consideration of this amendment, described that provision as "protecting from liability those providers and users seeking to clean up the internet."[135] This was the beginning of the twenty-six words that created the internet, or at least the internet as we know it.[136] Although Section 230 has not been without its controversies, its impact in shaping the internet world is undeniable.

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131 Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016).

132 *Id.* at 16.

133 *See* FOSTA-SESTA, *supra* note 26.

134 H.R. REP. NO. 104-223, at 2 (1995).

135 *Id.*

136 JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (Cornell Univ. Press 2019).

Critics claim Section 230 has taken a turn for the worse, and even Ron Wyden, now a Senator, recently stated that it has become "increasingly difficult for [him] to protect Section 230 in Congress" because of the failures of internet CEOs to properly police content.[137] The political tide is turning further and further against Section 230, and new proposals of all kinds from both sides of the political spectrum are being drafted.[138] But these proposals often fail to consider that Section 230 is not only a legal shield—it is an incentive mechanism, and its protections are only a means to an end. When proposals for Section 230 are made, the first question that proponents and legislators should make to themselves is: How would these changes affect the incentives for internet moderation? Regrettably, although many of the reforms are in no doubt well-intentioned, often these proposals lose sight of the legislative purpose Section 230 was enacted for in the first place. As happened with FOSTA-SESTA, failure to consider Section 230 as the incentive mechanism that it is can regrettably cause unexpected consequences and actually do more harm than good.[139] Similarly, although Section 230 has in no doubt been a large vehicle in the promotion of free speech, it is important to note that moderation was the goal of Section 230, not an unintended side effect. Goals like political neutrality have little to do with Section 230. Senator Wyden explained it well: "Section 230 is not about neutrality. Period. Full stop."[140]

When interpreting Section 230, courts should follow the lead of the Ninth Circuit and ask whether the platform is a passive conduit or solicited, induced, or contributed to the alleged illegality.[141] For those platforms whose goals are illegal, there is simply no reason, policy-wise, why Section 230 protections should be extended. After all, Section 230 of the CDA was not meant to immunize "Bad Samaritans" whose business is the active subversion of online decency.[142] In fact, it is exactly the opposite.

Reforming Section 230, if done at all, should not go further than where courts have already gone. Today, we have internet platforms that by and large voluntarily undergo vast amounts of moderation in their services, not because they must, but because they can. It is not as big of a financial burden because

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137 Ron Wyden, *The Consequences of Indecency*, TECHCRUNCH (Aug. 23, 2018, 2:15 PM), https://techcrunch.com /2018/08/23/the-consequences-of-indecency/.

138 *See* Bedell & Major, *supra* note 54.

139 *See* Goldman, *supra* note 27, at 280.

140 Emily Stewart, *Ron Wyden Wrote the Law That Built the Internet. He Still Stands by It—And Everything It's Brought with It*, RECODE (May 16, 2019, 9:50 AM), https://www.vox.com/recode/2019/5/16/18626779/ron-wyden -section-230-facebook-regulations-neutrality.

141 *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

142 *See* Citron & Wittes, *supra* note 54, at 403–04.

Section 230 exists. Without it, thousands of internet platforms would have to rethink the economic calculi in those decisions. Today, we have a diverse and open internet where people can generally choose from a variety of options that suit their tastes, whether it be a kid-friendly website with very strict moderation or perhaps one that takes a more *laissez-faire* approach and only moderate the most egregious content. Many of the biggest internet players agree on a lot of things while still disagreeing on some others, but we have nonetheless achieved an internet balance where people can navigate the web and find the type of internet services they desire with relative ease amongst a myriad of options. If Section 230 reforms step out of bounds, they threaten to destroy this balance. The extent to which the internet as we know it would collapse would entirely depend on the scope of the reform, but there is little doubt that, at the end of the day, the internet would have shrunk.