

Boston University School of Law

## Scholarly Commons at Boston University School of Law

---

Faculty Scholarship

---

2020

### The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform

Danielle K. Citron

*Boston University School of Law*

Mary Anne Franks

*University of Miami School of Law*

Follow this and additional works at: [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)



Part of the [Internet Law Commons](#), and the [Privacy Law Commons](#)

---

#### Recommended Citation

Danielle K. Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, in Boston University School of Law, Public Law & Legal Theory Paper Series (2020).

Available at: [https://scholarship.law.bu.edu/faculty\\_scholarship/836](https://scholarship.law.bu.edu/faculty_scholarship/836)

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact [lawlessa@bu.edu](mailto:lawlessa@bu.edu).



**THE INTERNET AS A SPEECH MACHINE AND  
OTHER MYTHS CONFOUNDING SECTION 230  
SPEECH REFORM**

Boston University School of Law  
Public Law & Legal Theory Paper No. 20-8

January 2020

**Danielle Keats Citron**  
Boston University School of Law

**Mary Anne Franks**  
University of Miami School of Law

Appearing in the University of Chicago Legal Forum (forthcoming 2020)

## *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*

Danielle Keats Citron\* and Mary Anne Franks\*\*

### **Abstract**

*A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion, but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms be responsible for user-generated content? If so, under what circumstances? What exactly would such responsibility look like? Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. The public discourse around Section 230, however, is riddled with misconceptions. As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230 – its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. Part III offers potential solutions to help Section 230 achieve its legitimate goals.*

### **Introduction**

A robust public debate is currently underway about the responsibility of online platforms. We have long called for this discussion,<sup>1</sup> but only recently has it been seriously taken up by legislators and the public. The debate begins with a basic question: should platforms be responsible for user-generated content?<sup>2</sup> If so, under what circumstances? What exactly would such responsibility look like?

\* Professor of Law, Boston University School of Law, Vice President, Cyber Civil Rights Initiative.

\*\* Professor of Law & Dean’s Distinguished Scholar, University of Miami School of Law, President, Cyber Civil Rights Initiative. Deep thanks to the editors of the University of Chicago Legal Forum for including us in the symposium. Genevieve Lakier, Brian Leiter, and symposium participants provided helpful comments. It was a particular pleasure to engage with co-panelists Amy Adler, Leslie Kendrick, and Fred Schauer.

<sup>1</sup> DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Mary Anne Franks, *Sexual Harassment 2.0*, Md. L. Rev. (2012).

<sup>2</sup> That is, beyond the select avenues that currently are not shielded from liability, such as intellectual property, federal criminal law, the Electronic Communications Privacy Act, and the knowing facilitation of sex trafficking.

Under consideration is Section 230 of the Communications Decency Act—a provision originally designed to encourage tech companies to clean up “offensive” online content. At the dawn of the commercial internet, federal lawmakers wanted the internet to be open and free, but they realized that such openness risked noxious activity.<sup>3</sup> In their estimation, tech companies were essential partners in any effort to “clean up the Internet.”

A troubling 1995 judicial decision, however, imperiled the promise of self-regulation in ruling that any attempt to moderate content increased an online service’s risk of liability.<sup>4</sup> Lawmakers devised Section 230 as a direct repudiation of that ruling. The idea was to incentivize—not penalize—private efforts to filter, block, or otherwise address noxious activity.<sup>5</sup> Section 230 provided that incentive, securing a shield from liability for “Good Samaritans” that under- or over-filtered “offensive” content.<sup>6</sup>

Over the past two (plus) decades, Section 230 has helped secure a variety of opportunities for online engagement, but individuals and society have not been the clear winners. Regrettably, state and lower federal courts have extended Section 230’s legal shield far beyond what the law’s words, context, and purpose support.<sup>7</sup> Platforms have been shielded from liability even when they encourage illegal action, deliberately keep up manifestly harmful content, or take a cut of users’ illegal activities.<sup>8</sup>

No matter, because for many, Section 230 is an article of faith. Section 230 has been hailed as “the most important law protecting internet speech” and online innovation.<sup>9</sup> For years, to question Section 230’s value proposition was viewed as sheer folly.

No longer. Politicians across the ideological spectrum are raising concerns about the leeway provided content platforms under Section 230.<sup>10</sup> Conservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint.<sup>11</sup> Liberals criticize Section 230 for giving platforms the freedom to profit from harmful speech and conduct.

<sup>3</sup> Written Testimony of Danielle Keats Citron before House Energy and Commerce Committee in “Fostering a Healthier Internet to Protect Consumers” hearing (October 16, 2019), available at, <https://docs.house.gov/meetings/IE/IE16/20191016/110075/HHRG-116-IE16-Wstate-CitronD-20191016.pdf>.

<sup>4</sup> See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). For a superb history of Section 230 and the cases leading to its passage, see JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019).

<sup>5</sup> CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at 170-73.

<sup>6</sup> Citron & Wittes, *supra* note, at 404-06.

<sup>7</sup> *Id.*

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

<sup>9</sup> CDA 230: The Most Important Law Protecting Internet Speech, Electronic Frontier Found., <https://www.eff.org/issues/cda230>.

<sup>10</sup> Danielle Citron & Quinta Jurecic, Platform Justice, Hoover Institute.

<sup>11</sup> [https://www.cruz.senate.gov/?p=press\\_release&id=4630](https://www.cruz.senate.gov/?p=press_release&id=4630)

Although their assessment of the problem differs, lawmakers agree that Section 230 needs fixing. In a testament to the shift in attitudes, the House Energy and Commerce Committee held a hearing on October 16, 2019 on how to make the internet “healthier” for consumers, bringing together academics (including one of us, Citron), advocates, and social media companies to discuss whether and how to amend Section 230.<sup>12</sup> The Department of Justice is holding an event devoted to Section 230 reform in February 2020. Needless to say, these developments are unique.

In a few short years, Section 230 reform efforts have turned from academic fantasy to legislative reality.<sup>13</sup> One might think that we would cheer this opportunity. But we approach it with caution. Congress cannot fix what it does not understand. Sensible policymaking depends on a clear-eyed view of the interests at stake. As advisers to federal lawmakers on both sides of the aisle, we can attest to the need to dispel misunderstandings to clear the ground for meaningful policy discussions.

The public discourse around Section 230 is riddled with misconceptions.<sup>14</sup> As an initial matter, many people who opine about the law are unfamiliar with its history, text, and application. This lack of knowledge impairs thoughtful evaluation of the law’s goals and how well they have been achieved. Accordingly, Part I of this Article sets the stage with a description of Section 230 – its legislative history and purpose, its interpretation in the courts, and the problems that current judicial interpretation raises. A second, and related, major source of misunderstanding is the conflation of Section 230 and the First Amendment. Part II of this Article details how this conflation distorts discussion in three ways: it assumes all Internet activity is protected speech; it treats private actors as though they were government actors; and it presumes that regulation will inevitably result in less speech. These distortions must be addressed in order to pave the way for clear-eyed policy reform. This is the subject of Part III, which offers potential solutions to help Section 230 achieve its legitimate goals.

## I. Section 230: A Complex History

<sup>12</sup> Witnesses also included computer scientist Hany Farid of University of California at Berkeley, Gretchen Petersen of the Alliance to Counter Crime Online, Corynne McSherry of the Electronic Frontier Foundation, Steve Huffman of Reddit, and Katie Oyama of Google. At that hearing, one of us (Citron) took the opportunity to combat myths around Section 230 and offer sensible reform possibilities, which we explore in Part III. <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-fostering-a-healthier-internet-to-protect-consumers>

<sup>13</sup> There are several House and Senate proposals to amend or remove Section 230’s legal shield.

<sup>14</sup> This is not to say that every lawmaker misunderstands Section 230. Nancy Pelosi, the House Speaker, has agreed that Section 230 should be rethought because companies are not “treating it with respect” and “being responsible enough.” <https://www.techdirt.com/articles/20190411/18521741986/nancy-pelosi-joins-ted-cruz-louis-gohmert-attacking-cda-230.shtml>. Pelosi’s comments suggest that she has a clear sense of the problem – that tech companies are not acting as responsible Good Samaritans as Section 230’s drafters hoped – unlike far too many of her colleagues.

Tech policy reform is often a difficult endeavor. Sound tech policy reform depends upon a clear understanding of the technologies and varied interests at stake. As recent hearings on Capitol Hill have shown, lawmakers often struggle to effectively address fast-moving technological developments.<sup>15</sup> Part of the problem stems from age and habits.<sup>16</sup> The slowness of the lawmaking process further complicates matters.<sup>17</sup> Lawmakers may be tempted to throw up their hands in the face of technological change that seems destined to outpace their efforts.

This Part highlights the developments that bring us to this moment of reform. Section 230 was devised to incentivize responsible content moderation practices.<sup>18</sup> And yet its drafting fell short of that goal by failing to explicitly condition the legal shield on responsible practices. This has led to an overbroad reading of Section 230, with significant costs to individuals and society.

#### *A. Reviewing the History Behind Section 230*

In 1996, Congress faced a challenge. Lawmakers wanted the internet to be open and free, but they also knew that openness risked the posting of illegal and “offensive” material. They knew that federal agencies could not deal with it all “noxious material” on their own and that they needed tech companies to help moderate content. Congress devised an incentive: a shield from liability for “Good Samaritans” that did an incomplete or overly aggressive job in their efforts to “clean up the Internet.”<sup>19</sup>

The Communications Decency Act (CDA), part of the Telecommunications Act of 1996, was introduced to make the internet safer for children and to address concerns about

<sup>15</sup> The 2018 congressional hearings on the Cambridge Analytica data leak poignantly illustrate the point. For instance, Facebook CEO Mark Zuckerberg testified for several days before the House and the Senate. During the questioning, lawmakers made clear that they had never used social network and had little understanding of online advertising, which is how the dominant tech companies make money. Senator Orrin Hatch asked Zuckerberg how his company made money since it does not charge users for its services. <https://money.cnn.com/2018/04/10/technology/senate-mark-zuckerberg-testimony/index.html>. As is clear from committee hearings and our work, there are indeed lawmakers and staff devoted to tackling tech policy including Senator Kamala Harris, Senator Richard Blumenthal, Congresswoman Jackie Speier, and Congresswoman Kathleen Clark.

<sup>16</sup> We know from experience that staff endeavor to remedy those deficits.

<sup>17</sup> A widely known quip is that federal laws take on average seven years to get passed. Not so of course with urgent matters, especially when lawmakers’ selfish interests hang in the balance. The Video Privacy Protection Act’s rapid-fire passage is an obvious case in point. That law passed in mere months after the failed nomination of Judge Robert Bork to the Supreme Court revealed that journalists could easily obtain people’s video rental records. Lawmakers fearing that their video rental records would be released to the public passed VPPA in short order. See William McGeeveran, *Data Privacy and Policy* (2017).

<sup>18</sup> Or at least this is the most generous reading of its history. One of us (Franks) is somewhat more skeptical about the narrative that Section 230’s flaws were not evident at its inception. See Mary Anne Franks, *The Cult of the Constitution*, *supra* note, at.

<sup>19</sup> Citron & Wittes, *supra* note, at.

pornography.<sup>20</sup> Besides proposing criminal penalties for the distribution of sexually explicit material online, members of Congress underscored the need for private sector help in reducing the volume of “offensive” material online. Then-Representatives Christopher Cox and Ron Wyden offered an amendment to the CDA entitled “Protection for Private Blocking and Screening of Offensive Material.”<sup>21</sup> The Cox-Wyden Amendment, codified as Section 230, provided immunity from liability for “Good Samaritan” online service providers that over- or under-filtered objectionable content.<sup>22</sup>

Section 230(c), entitled “Good Samaritan blocking and filtering of offensive content,” has two key provisions. Section 230(c)(1) specifies that providers or users of interactive computer services will not be treated as publishers or speakers of user-generated content.<sup>23</sup> Section 230(c)(2) says that online service providers will not be held liable for good-faith filtering or blocking of user-generated content.<sup>24</sup> Section 230 also carves out limitations for its immunity provisions: its protections do not apply to violations of federal criminal law, intellectual property law, the Electronic Privacy Communications Act, and, as of 2018, the facilitation of sex trafficking.<sup>25</sup>

In 1996, lawmakers could hardly have imagined the role that the internet would play in modern life. Yet Section 230’s authors were prescient. In their view, “if this amazing new thing – the Internet – [was] going to blossom,” companies should not be “punished for *trying* to keep things clean.”<sup>26</sup> Cox recently explained that, “the original purpose of [Section 230] was to help clean up the Internet, not to facilitate people doing bad things on the Internet.”<sup>27</sup> The key to Section 230, Wyden agreed, was “making sure that companies in return for that protection – that they wouldn’t be sued indiscriminately – were being responsible in terms of policing their platforms.”<sup>28</sup>

#### *B. Explaining the Judiciary’s Interpretation of Section 230*

The judiciary’s interpretation of Section 230 has not squared with this vision. Rather than a legal shield for responsible moderation efforts, courts have stretched Section 230 far beyond what its words, context, and purpose support.<sup>29</sup> Section 230 has been read to immunize platforms from liability that:

<sup>20</sup> Citron & Wittes, *supra* note, at.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 47 U.S.C. § 230(c)(1).

<sup>24</sup> 47 U.S.C. § 230(c)(2).

<sup>25</sup> 47 U.S.C. § 230(e).

<sup>26</sup> See Citron & Jurecic, *supra* note.

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

<sup>28</sup> *Id.*

<sup>29</sup> Citron & Wittes, *supra* note, at 406-10; Mary Anne Franks, *How the Internet Unmakes the Law*, Ohio S. Tech. L. J. (forthcoming 2020).

- knew about users' illegal activity, deliberately refused to remove it, and ensured that those responsible could not be identified;<sup>30</sup>
- solicited users to engage in tortious and illegal activity;<sup>31</sup> and
- designed their sites to enhance the visibility of illegal activity and to ensure that the perpetrators could not be identified and caught.<sup>32</sup>

Courts have attributed this broad-sweeping approach to the fact that "First Amendment values [drove] the CDA."<sup>33</sup> For support, court have pointed to Section 230's "findings" and "policy" sections, which highlight the importance of the "vibrant and competitive free market that presently exists" for the internet and the internet's role in facilitating "myriad avenues for intellectual activity" and the "diversity of political discourse."<sup>34</sup> As one of us (Franks) has underscored, Congress' stated goals also included the:

development of technologies that "maximize user control over what information is received" by Internet users, as well as the "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking and harassment by means of the computer." In other words, the law [wa]s intended to promote the values of privacy, security and liberty alongside the values of open discourse.<sup>35</sup>

Section 230's liability shield has been extended to activity that has little or nothing to do with free speech, such as the sale of dangerous products.<sup>36</sup> Consider Armslist.com, the self-described "firearms marketplace."<sup>37</sup> Unlicensed gun sellers use the site to find buyers who cannot pass background checks.<sup>38</sup> Armslist.com is where Radcliffe Haughton illegally purchased a gun.<sup>39</sup> Haughton's estranged wife obtained a restraining order against him that banned him from legally purchasing a firearm.<sup>40</sup> Haughton used Armslist.com, to easily find a gun seller that did not require a background check.<sup>41</sup> He

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Citron, *Section 230's Challenge to Civil Rights and Civil Liberties*. See generally Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 1 (2017).

<sup>33</sup> *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016), cert. denied, 137 S. Ct. 622 (2017).

<sup>34</sup> See, e.g., *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

<sup>35</sup> Mary Anne Franks, *The Lawless Internet? Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Feb. 17, 2014).

<sup>36</sup> See, e.g., *Hinton v. Amazon.com, LLC*, 72 F. Supp. 3d 685, 687, 690 (S.D. Miss. 2014); Franks, *How the Internet*, supra \_\_ at \_\_.

<sup>37</sup> <https://www.armslist.com/>

<sup>38</sup> See Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES, October 11, 2019, available at <https://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html>.

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

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

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



used the gun he purchased to murder his estranged wife and her two co-workers.<sup>42</sup> The Wisconsin Supreme Court found Armslist immune from liability based on Section 230, despite the fact that its activities – i.e., knowingly profiting from illegal firearms purchases – were conduct, not speech.<sup>43</sup>

Extending Section 230's shield from liability to platforms that refuse to prohibit, and in some cases deliberately encourage, unlawful activity directly contradicts the stated goals of the CDA. Armslist.com can hardly be said to "provide 'educational and informational resources' or contribute to 'the diversity of political discourse.'" <sup>44</sup> Immunizing from liability enterprises that have nothing to do with moderating online speech, such as marketplaces that connect sellers of deadly weapons with prohibited buyers for a cut of the profits, is unjustifiable.

### C. *Evaluating the Status Quo*

Section 230's overbroad interpretation means that platforms have scant legal incentive to combat online abuse. Rebecca Tushnet put it well a decade ago: Section 230 ensures that platforms enjoy "power without responsibility."<sup>45</sup>

Market forces alone are unlikely to encourage responsible content moderation. Platforms make their money through online advertising generated when users like, click, and share.<sup>46</sup> Allowing attention-grabbing abuse to remain online often accords with platforms' rational self-interest.<sup>47</sup> Platforms "produce nothing and sell nothing except advertisements and information about users, and conflict among those users may be good for business."<sup>48</sup> If a company's analytics suggest that people pay more attention to content that makes them sad or angry, then the company will highlight such content.<sup>49</sup> Research shows that people are more attracted to negative and novel information.<sup>50</sup> Thus, keeping up destructive content may make the most sense for a company's bottom line.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The non-profit organization the Cyber Civil Rights Initiative, of which one of us (Franks) is the President and one of us (Citron) is the Vice President, filed an amicus brief in support of the petitioner's request for writ of certiorari in the Supreme Court. Brief of Amicus Curiae of Cyber Civil Rights Initiative and Legal Academics in Support of Petitioners in *Yasmine Daniel v. Armslist.com*, available at [https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530\\_Brief.PDF](https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530_Brief.PDF).

<sup>44</sup> Amicus Curiae of Cyber Civil Right Initiative, *supra* note, at 16.

<sup>45</sup> Rebecca Tushnet, *Power without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

<sup>46</sup> Mary Anne Franks, *Justice Beyond Dispute*, 131 HARV. L. REV. 1374, 1386 (2018) (reviewing ETHAN KATSH & ORNA RABINOVICH-EINY, *DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES* (2017)).

<sup>47</sup> Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet As It Is (and as It Should Be)*, 118 MICH. L. REV. (forthcoming 2020).

<sup>48</sup> *Id.*

<sup>49</sup> Dissenting Statement of Commissioner Rohit Chopra, *In re Facebook, Inc.*, Commission File No. 1823109, at 2 (July 24, 2019).

<sup>50</sup> *Id.*

As Federal Trade Commissioner Rohit Chopra warned in his powerful dissent from the agency's 2019 settlement with Facebook, the behavioral advertising business model is the "root cause of [social media companies'] widespread and systemic problems."<sup>51</sup> Online behavioral advertising generates profits by "turning users into products, their activity into assets," and their platforms into "weapons of mass manipulation."<sup>52</sup> Tech companies "have few incentives to stop [online abuse], and in some cases are incentivized to ignore or aggravate [it]."<sup>53</sup>

To be sure, the dominant tech companies have moderated certain content by shadow banning, filtering, or blocking it.<sup>54</sup> What often motivates these efforts is pressure from the European Commission to remove hate speech and terrorist activity.<sup>55</sup> The same companies have banned certain forms of online abuse, such as nonconsensual pornography<sup>56</sup> and threats, in response to pressure from users, advocacy groups, and advertisers.<sup>57</sup> They have expended resources to stem abuse when it has threatened their bottom line.<sup>58</sup>

Yet the online advertising business model continues to incentivize revenue-generating content that causes significant harm to the most vulnerable among us. Online abuse generates traffic, clicks, and shares because it is salacious and negative.<sup>59</sup> Deep fake pornography sites<sup>60</sup> as well as revenge porn and gossip sites<sup>61</sup> thrive thanks to advertising revenue.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Franks, *Justice Beyond Dispute*, *supra* note, at 1386.

<sup>54</sup> Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018); Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for the Information Age*, 91 B.U. L. REV. 1435, 1468-71 (2011).

<sup>55</sup> Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, *supra* note, at 1038-39.

<sup>56</sup> See Mary Anne Franks, *Revenge Porn Reform: A View from the Front Lines*, Fla. L. Rev. (2017).

<sup>57</sup> *Id.* at 1037.

<sup>58</sup> CITRON, *HATE CRIMES IN CYBERSPACE*, *supra* note, at 229 (discussing how Facebook changed its position on pro rape pages after fifteen companies threatened to pull their ads); Mary Anne Franks, *"Revenge Porn" Reform: A View from the Front Lines*, 69 FLA. L. REV. 1251 (2017).

<sup>59</sup> For instance, eight of the top ten pornography websites host deepfake pornography, and there are nine deepfake pornography websites hosting 13,254 fake porn videos (mostly featuring female celebrities without their consent). These sites generate income from advertising. Indeed, as the first comprehensive study of deepfake video and audio explains, "deepfake pornography represents a growing business opportunity, with all of these websites featuring some form of advertising." Deeptrace Labs, *The State of Deepfakes: Landscape, Threats, and Impact* 6 (September 2019), available at <https://storage.googleapis.com/deeptrace-public/Deeptrace-the-State-of-Deepfakes-2019.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> See, e.g., *Erna Besic Psycho Mom of Two!*, THE DIRTY (Oct. 9, 2019, 10:02 AM), <https://thedirty.com/#post-2374229>.

Without question, Section 230 has been valuable to innovation and expression.<sup>62</sup> It has enabled vast and sundry businesses. It has led to the rise of social media companies that many people find valuable, such as Facebook, Twitter, and Reddit.

At the same time, Section 230 has subsidized platforms whose business is online abuse. It enables platforms to make money off of abuse without having to bear the costs that its business externalizes.<sup>63</sup> It takes away the leverage that victims might have had to get harmful content take down.

This laissez-faire approach has been costly to individuals, groups, and society. As more than ten years of research have shown, cyber mobs and individual harassers target individuals with sexually threatening and sexually humiliating online abuse.<sup>64</sup> According to a 2017 Pew Research Center study, one in five U.S. adults have experienced online harassment that includes stalking, threats of violence, or cyber sexual harassment.<sup>65</sup> More often, targeted individuals are women—particularly women of color and bisexual women— and other sexual minorities.<sup>66</sup>

Victims of online abuse do not feel safe on- or offline.<sup>67</sup> They experience anxiety and severe emotional distress. They suffer damage to their reputations, their intimate relationships, their employment and educational opportunities. Some victims are forced to relocate, change jobs, or even change their names.<sup>68</sup> In the face of online assaults, victims have difficulty finding employment or keeping their jobs because the abuse appears in searches of their names.<sup>69</sup>

Failing to address online abuse does not just inflict economic, physical, and psychological harms on victims – it also jeopardizes their right to free speech. Online abuse silences victims.<sup>70</sup> Targeted individuals often shut down social media profiles and email accounts

<sup>62</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at.

<sup>63</sup> See Mary Anne Franks, Moral Hazard on Stilts, Knight Institute of the First Amendment (2019).

<sup>64</sup> See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note. The 2017 Pew study found that one in four Black individuals say they have been subject to online harassment due to their race; one in ten Hispanic individuals have said the same. For white individuals, the share is far lower: just three percent. Women are twice as likely as men to say they have been targeted online due to their gender (11 percent versus 5 percent). Duggan, *supra* note. Other studies have made clear that LGBTQ individuals are particularly vulnerable to online harassment, CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, and nonconsensual pornography. Data & Society, Online Harassment, Digital Abuse, and Cyberstalking in America (November 21, 2016), available at [https://innovativepublichealth.org/wp-content/uploads/2\\_Online-Harassment-Report\\_Final.pdf](https://innovativepublichealth.org/wp-content/uploads/2_Online-Harassment-Report_Final.pdf).

<sup>65</sup> Maeve Duggan, Online Harassment 2017 Study, Pew Research Center (July 11, 2017).

<sup>66</sup> CITRON, HATE CRIMES IN CYBERSPACE, *supra* note.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 125–26 (2016); see also Jonathon W. Penney, *Internet Surveillance, Regulation, and Chilling Effects Online: A*

and withdraw from public discourse.<sup>71</sup> Those with political ambitions are deterred from running for office.<sup>72</sup> Journalists refrain from reporting on controversial topics. Sexual assault victims are discouraged from holding perpetrators accountable.

An overly capacious view of Section 230 has undermined equal opportunity in employment, politics, journalism, education, cultural influence, and free speech.<sup>73</sup> The benefits Section 230's immunity has enabled likely could have been secured at a lesser price.<sup>74</sup>

## II. Debunking the Myths about Section 230

After writing about overbroad interpretations of Section 230 for more than a decade, we have eagerly anticipated the moment when federal lawmakers would begin listening to concerns about Section 230. Today, finally, lawmakers are questioning the received wisdom that any tinkering with Section 230 would lead to a profoundly worse society.

Yet we approach this moment with a healthy dose of skepticism. Nothing is gained if Section 230 is changed to indulge bad faith claims, address fictitious concerns, or disincentivize content moderation. We have been down this road before and it is not pretty.<sup>75</sup> Yes, Section 230 is in need of reform, but not if it would make matters worse.

Our reservations stem from misconceptions riddling the debate. Those now advocating repealing or amending Section 230 often dramatically claim that broad platform immunity betrays free speech guarantees by sanctioning the censorship of political views. By contrast, Section 230 absolutists oppose any effort to amend Section 230 on the grounds that broad platform immunity is indispensable to free speech guarantees. Both sides tend to conflate the First Amendment and Section 230, though to very different ends. This conflation reflects and reinforces three major misconceptions. One is the presumption that all Internet activity is speech. The second is the treatment of private actors as if they were government actors. The third is the assumption that any regulation of online conduct will inevitably result in less speech. This Part identifies and debunks these prevailing myths.

*Comparative Case Study*, 6 INTERNET POL'Y REV., May 26, 2017, at 1, 3. See generally CITRON, HATE CRIMES IN CYBERSPACE, *supra* note, at; Danielle Keats Citron, *Civil Rights In Our Information Age*, in THE OFFENSIVE INTERNET (Saul Levmore & Martha C. Nussbaum, eds. 2010); Citron & Richards, *supra* note, at 1365 (“[N]ot everyone can freely engage online. This is especially true for women, minorities, and political dissenters who are more often the targets of cyber mobs and individual harassers.”); Citron & Franks, *supra* note, at 385; Citron, *Cyber Civil Rights*, *supra* note.

<sup>71</sup> *Id.*

<sup>72</sup> Katie Hill, for instance, resigned from Congress after her vengeful ex shared intimate photos of her and a woman who she and her husband were engaged in a consensual relationship.

<sup>73</sup> MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (2019).

<sup>74</sup> Citron & Wittes, *supra* note.

<sup>75</sup> FOSTA-SESTA as case in point.

### A. *The Internet as a Speech Machine*

Both detractors and supporters agree that Section 230 provides online intermediaries broad immunity from liability for third-party content. The real point of contention between the two groups is whether this broad immunity is a good or a bad thing. While critics of Section 230 point to the extensive range of harmful activity that the law's deregulatory stance effectively allows to flourish, Section 230 enthusiasts argue that the law's laissez-faire nature is vital to ensuring a robust online marketplace of ideas.

Section 230 enthusiast Elizabeth Nolan Brown argues that "Section 230 is the Internet's First Amendment."<sup>76</sup> David Williams, president of the Taxpayers Protection Alliance, similarly contends that, "The internet flourishes when social media platforms allow for discourse and debate without fear of a tidal wave of liability. Ending Section 230 would shutter this marketplace of ideas at tremendous cost."<sup>77</sup> Eric Goldman contends that Section 230 is "even better than the First Amendment."<sup>78</sup>

The view of Section 230 presumes that the Internet is primarily, if not exclusively, a medium of speech. The text of Section 230 reinforces this characterization through the use of the terms "publishers" and "speakers" in 230(c)(2) as well as the finding that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."<sup>79</sup>

But the assertion that the Internet is primarily a medium of speech should be interrogated.<sup>80</sup> When Section 230 was passed, it may have made sense to think of the Internet that way. In 1996, the Internet had for most of its history been text-based and limited to non-commercial activity. Only 20 million American adults had Internet access, and these users spent less than half an hour a month online. By comparison, in 2019, 293 million Americans were using the Internet,<sup>81</sup> and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs.<sup>82</sup> As one Section 230 proponent has described it,

<sup>76</sup> <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/>

<sup>77</sup><https://www.theverge.com/2019/7/10/20688778/congress-section-230-conservative-internet-law-content-moderation>

<sup>78</sup> Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 Notre Dame L. Rev. Reflections (2019).

<sup>79</sup> § 230(a)(3).

<sup>80</sup> See Franks, *How the Internet Unmakes the Law*.

<sup>81</sup> J. Clement, *Internet usage in the United States - Statistics & Facts*, Statista (Aug. 20, 2019), <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/>.

<sup>82</sup> J. Clement, *Most popular online activities of adult internet users in the United States as of November 2017*, Statista (Nov. 7, 2018), <https://www.statista.com/statistics/183910/internet-activities-of-us-users/>.

the entire suite of products we think of as the internet—search engines, social media, online publications with comments sections, Wikis, private message boards, matchmaking apps, job search sites, consumer review tools, digital marketplaces, Airbnb, cloud storage companies, podcast distributors, app stores, GIF clearinghouses, crowdsourced funding platforms, chat tools, email newsletters, online classifieds, video sharing venues, and the vast majority of what makes up our day-to-day digital experience—have benefited from the protections offered by Section 230.

Many of these activities have very little to do with speech, and indeed many of the offline cognates would not be considered protected speech for First Amendment purposes. “Like any other rule, the First Amendment does not regulate the full range of human behavior.”<sup>83</sup> The First Amendment draws a line, contested though it might be, between speech and conduct. While some actions are sufficiently expressive to be considered speech for First Amendment purposes,<sup>84</sup> “[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.”<sup>85</sup> The Court has made clear that conduct is not automatically protected simply because it involves language in some way: “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>86</sup>

That is, while many Supreme Court free speech cases are focused on whether a particular kind of speech is protected, and to what degree, by the First Amendment, whether an act is speech *at all* for the purposes of the First Amendment is an even more fundamental question. When presented with cases involving the wearing of black armbands, setting flags on fire, making financial contributions to political campaigns, or burning draft cards, the Court has first engaged with the question of whether the acts in question are being regulated as speech before turning to the degree of protection that speech is afforded. The answer to the question “is it speech” can often be, once one is no longer dealing with the spoken or printed word, very complicated. As one of us (Citron) has written, “[a]dvances in law and technology . . . complicate this distinction as they make more actions achievable through ‘mere’ words.”<sup>87</sup> Because so much online activity involves elements that are not unambiguously speech-related, whether such activities are in fact speech should be a subject of express inquiry.

<sup>83</sup> Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 Wm. & Mary L. Rev. 1613, 1617–18 (2015).

<sup>84</sup> See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing of black armbands conveyed message regarding a matter of public concern).

<sup>85</sup> *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540, 105 L.Ed.2d 342 (1989); see also *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

<sup>86</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

<sup>87</sup> Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 99 (2009).

But the conflation of Section 230 and the First Amendment short-circuits this inquiry. Intermediaries invoking Section 230 implicitly characterize the acts or omissions at issue as speech, and courts allow them to do so without challenge. When “courts routinely interpret Section 230 to immunize all claims based on third-party content,” including “negligence; deceptive trade practices, unfair competition, and false advertising; the common law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines,”<sup>88</sup> they grant online intermediaries a presumption not available to offline intermediaries, thereby establishing a two-track system of liability.

In addition to short-circuiting the analysis of whether particular content qualifies as speech at all, an overly indulgent view of Section 230 also short-circuits the analysis of whether the speech is or should be protected. This view treats all online activity as normatively significant free expression. It supposes that all user-generated content involves presumptively protected speech. Under this view, collateral censorship is inevitable as is the destruction of the “marketplace of ideas.”

This view reflects what Leslie Kendrick describes as “First Amendment expansionism” – the tendency to treat speech as normatively significant no matter the actual speech in question.<sup>89</sup> As Kendrick wisely observes, First Amendment expansionism is likely “in an information economy where many activities and products involve communication.”<sup>90</sup> The debate over Section 230 bears this out.

Viewing all online speech as normatively significant or presumptively protected elides the different reasons why certain speech is viewed as distinctly important in our system of free expression.<sup>91</sup> Some speech matters for self-expression, but not all speech does.<sup>92</sup> Some speech is important for the search for truth or for self-governance, but not all speech serves those values. Also, as Kenneth Abraham and Edward White argue, the “all speech is free speech” view devalues the special cultural and social salience of speech about matters of public concern.<sup>93</sup> And it disregards the fact that speech about private individuals about purely private matters may not remotely implicate free speech values

<sup>88</sup> (Goldman, *supra*, at 6)

<sup>89</sup> Leslie Kendrick, *First Amendment Expansionism*, 56 *William & Mary L. Rev.* 1199, 1212 (2015). As Leslie Kendrick explains, freedom of speech is a “term of art that does not refer to all speech activities, but rather designates some area of activity that society takes, for some reason, to have special importance.”

<sup>90</sup> *Id.*

<sup>91</sup> Kendrick, *supra* note, at.

<sup>92</sup> *Id.*

<sup>93</sup> Kenneth S. Abraham & Edward G. White,

at all. As the Court has repeatedly observed, not all speech receives full protection under the First Amendment.<sup>94</sup>

The indulgent approach to Section 230 veers far away from the public discourse values at the core of the First Amendment, as well as from the original intentions of Section 230's sponsors. Christopher Cox, a former Republican Congressman who co-sponsored Section 230, has been openly critical of "how many Section 230 rulings have cited other rulings instead of the actual statute, stretching the law," asserting that "websites that are 'involved in soliciting' unlawful materials or 'connected to unlawful activity should not be immune under Section 230.'"<sup>95</sup> The Democratic co-sponsor of Section 230, Senator Ron Wyden, has similarly emphasized that he "wanted to guarantee that bad actors would still be subject to federal law. Whether the criminals were operating on a street corner or online wasn't going to make a difference."<sup>96</sup>

There is no justification for treating the Internet as a magical speech conversion machine: if the conduct would not be speech protected by the First Amendment if it occurs offline, it should not be transformed into speech merely because it occurs online. Content that unquestionably qualifies as speech should not be presumed to be doctrinally or normatively protected. Intermediaries seeking to take advantage of Section 230's protections – given that those protections were intended to foster free speech values – should have to demonstrate, rather than merely tacitly assert, that the content at issue is in fact speech.

### *B. Neutrality and the State Action Doctrine*

The conflation of the First Amendment and Section 230, and Internet activity with speech, contributes to another common misconception about the law, which is that it requires tech companies to act as "neutral public forums" in order to receive the benefit of immunity. Stated slightly differently, the claim here is that tech companies receive Section 230's legal shield only if they refrain, as the First Amendment generally requires the government to refrain, from viewpoint discrimination. On this view, a platform's removal, blocking, or muting of user-generated content based on viewpoint amounts to impermissible censorship under the First Amendment that should deprive the platform of its statutory protection against liability.<sup>97</sup>

<sup>94</sup> See *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (noting existence of "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942))).

<sup>95</sup> Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018). <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

<sup>96</sup> Ron Wyden, *Floor Remarks: CDA 230 and SESTA*, Medium (Mar. 21, 2018). <https://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e>.

<sup>97</sup> <https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act>



This misconception is twofold: first, there is nothing in the legislative history or text of Section 230 that supports such an interpretation.<sup>98</sup> Not only does Section 230 not require platforms to act neutrally vis-à-vis political viewpoints as state actors should, it urges exactly the opposite. Under Section 230(b)(4), one of the statute's policy goals includes "remov[ing] disincentives for the development and utilization of blocking and filtering technologies."<sup>99</sup>

Secondly, the "neutral platform" myth completely ignores the state action doctrine, according to which the obligations created by the First Amendment fall only upon government actors, not private actors. Attempting to extend First Amendment obligations to private actors is not only constitutionally incoherent, but endangers the First Amendment rights of private actors against compelled speech.<sup>100</sup>

High-profile examples of the "neutral platform" argument include Representative Gianforte denouncing Facebook's refusal to run a gun manufacturer's ads as blatant "censorship of conservative views."<sup>101</sup> Senator Ted Cruz has argued that "big 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."<sup>102</sup> Along these lines, Representative Louie Gohmert contended that "Instead of acting like the neutral platforms they claim to be in order obtain their immunity . . . social media companies have use[d their] platforms and algorithms to silence and prevent income to conservatives."<sup>103</sup>

It is not just politicians who fall under the spell of the viewpoint neutrality myth. The Daily Wire's Editor, Chief Josh Hammer, tweeted: "It is not government overreach to demand that Silicon Valley tech giants disclose their censorship algorithms in exchange for continuing to receive CDA Sec. 230 immunity."<sup>104</sup>

<sup>98</sup> As Rep. Cox recently underscored, "nowhere, nowhere, nowhere does the law say anything about [neutrality]." <https://www.nbcnews.com/politics/congress/why-republicans-even-couple-democrats-want-throw-out-tech-s-n1043346>

<sup>99</sup> 230(b)(4).

<sup>100</sup> See *West Virginia v. Barnette*; *Manhattan Corp. v. Halleck*.

<sup>101</sup> <https://www.c-span.org/video/?465331-1/google-reddit-officials-testify-internet-consumer-protection>

<sup>102</sup> <https://www.fastcompany.com/90252598/ted-cruz-made-it-clear-he-supports-repealing-tech-platforms-safe-harbor>. Democratic Senators have also reinforced this myth. For instance, Senator Mark Warner claimed that "there was a decision made that social media companies, and their connections, were going to be viewed as kind of just dumb pipes, not unlike a telco." <https://www.techdirt.com/articles/20190929/00171443090/senator-mark-warner-repeats-senator-ted-cruzs-mythical-made-up-incorrect-claims-about-section-230.shtml>

<sup>103</sup> <https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676>.

<sup>104</sup> <https://www.vox.com/2019/6/26/18691528/section-230-josh-hawley-conservatism-twitter-facebook>

Several legislative proposals endeavor to reset Section 230 to incentivize platforms to act as quasi-governmental actors with a commitment to viewpoint neutrality. Consider Senator Josh Hawley’s bill “Ending Support for Internet Censorship Act.”<sup>105</sup> Under the Hawley proposal, Section 230’s legal shield would be conditioned on companies of a certain size obtaining FTC certification of their “political neutrality.” Under Representative Gohmert’s proposal, Section 230 immunity would be conditioned on a content platform’s posting of user-generated content in chronological order. Making judgments—in other words, moderating—about content’s prominence and visibility would mean the loss of the legal shield.<sup>106</sup>

It is important to note that there is no empirical basis for the claim that conservative viewpoints are being suppressed on social media. Facebook, responding to concerns about anti-conservative bias, hired former Senator John Kyl and lawyers at Covington & Burling to conduct an independent audit of potential anti-conservative bias.<sup>107</sup> The Covington Interim Report did not conclude that Facebook had anti-conservative bias.<sup>108</sup> As Siva Vaidhyanathan observes, there is no evidence for accusations that social media companies are disproportionately silencing conservative speech: the complaints are “simply false” and that studies suggest that conservative political campaigns have in fact leveraged social media to much greater advantage than their adversaries.<sup>109</sup>

But even if the claims of anti-conservative bias on platforms did have basis in reality, the “neutral platform” interpretation of Section 230 takes two forms that actually serve to undermine, not promote, First Amendment values. The first involves the conflation of private companies with state actors, while the second is the characterization of social media platforms with public forums. Tech companies are not governmental or quasi-governmental entities, and social media companies and most online service providers are not publicly owned or operated.<sup>110</sup> Both of these forms of misidentification ignore private actors’ own First Amendment rights to decide what content they wish to endorse or promote.

<sup>105</sup> Hawley claimed in a tweet that Section 230’s legal shield was predicated on platforms serving as “for[a] for a true diversity of political discourse.” <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/>

<sup>106</sup> <https://gohmert.house.gov/news/documentsingle.aspx?DocumentID=398676>

<sup>107</sup> Senator John Kyl, Covington Interim Report, available at <https://fbnewsroomus.files.wordpress.com/2019/08/covington-interim-report-1.pdf>.

<sup>108</sup> *Id.* The audit found Facebook’s advertising policies prohibiting shocking and sensational content resulted in the rejection of pro-life ads focused on survival stories of infants born before full-term. Facebook adjusted its enforcement of this policy to focus on prohibiting ads only when the ad shows someone in visible pain or distress or where blood and bruising is visible.

<sup>109</sup> <https://www.theatlantic.com/ideas/archive/2019/07/conservatives-pretend-big-tech-biased-against-them/594916/>.

<sup>110</sup> Citron & Richards, *supra* note, at 1361 (exploring how entities comprising our digital infrastructure, including search engines, browsers, hosts, transit providers, security providers, internet service providers, and content platforms, are privately-owned with certain exceptions like the Internet Corporation for Assigned Names and Numbers).

Neither Section 230 nor judicial doctrine equates “interactive computer services” with state guarantors of First Amendment protections. As private actors, social media companies are no more required to uphold the First Amendment rights of their users than would be bookstores or restaurants to their patrons.<sup>111</sup> As Eugene Kontorovich testified before the Senate Judiciary Committee’s hearing on “Stifling Free Speech: Technological Censorship and the Public Discourse:”

If tech platforms “engage in politically biased content-sorting . . . it is not a First Amendment issue. The First Amendment only applies to censorship by the government. . . . The conduct of private actors is entirely outside the scope of the First Amendment. If anything, ideological content restrictions are editorial decisions that would be protected by the First Amendment. Nor can one say that the alleged actions of large tech companies implicate ‘First Amendment values,’ or inhibits the marketplace of ideas in ways analogous to those the First Amendment seeks to protect against.”<sup>112</sup>

The alternative argument attempts to treat social media platforms as traditional public forums like parks, streets, or sidewalks. The public forum has a distinct purpose and significance in our constitutional order. The public forum is owned by the public and operated for the benefit of all.<sup>113</sup> The public’s access to public parks, streets, and sidewalks is a matter of constitutional right.<sup>114</sup> The public forum doctrine is premised on the notion that parks, streets, and sidewalks have been open for speech “immemorially . . . time out of mind.”<sup>115</sup> For that reason, denying access to public parks, streets, and sidewalks on the basis of the content or viewpoint of speech is presumptively unconstitutional.<sup>116</sup> But wholly privately-owned social media platforms have never been designated as “neutral public forums.”<sup>117</sup>

As one of us (Franks) has written, the attempt to turn social media controversies into debates over the First Amendment is an yet another example of what Frederick Schauer describes as “the First Amendment’s cultural magnetism”<sup>118</sup> It suggests that “because

<sup>111</sup> See *Manhattan Community Access v. Halleck*, 139 S. Ct. 1321 (2019) (finding privately-owned cable television channel not a state actor).

<sup>112</sup> Written Testimony of Professor Eugene Kontorovich Before Senate Judiciary Committee for “Stifling Free Speech: Technological Censorship and the Public Discourse” (April 10, 2019).

<sup>113</sup> Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won’t Believe #3!)*, 95 Wash. U. L. Rev. 1353, 1360 (2018).

<sup>114</sup> *Id.*

<sup>115</sup> *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>116</sup> Cf. *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895), *aff’d*, *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897).

<sup>117</sup> <https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act>

<sup>118</sup> Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, Knight Institute, available at <https://knightcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment>.

private companies like Facebook, Twitter, and Google have become “state like” in many ways, even exerting more influence in some ways than the government, they *should* be understood as having First Amendment obligations, even if the First Amendment’s actual text or existing doctrine would not support it.”<sup>119</sup> Under this view, the First Amendment should be expanded beyond its current borders.

But the erosion of the state action doctrine would actually undermine First Amendment rights, by depriving private actors of “a robust sphere of individual liberty,” as Justice Gorsuch recently expressed it in *Halleck*.<sup>120</sup> An essential part of the right to free speech is the right to choose what to say, when to say it, and to whom. Indeed, the right not to speak at all is a fundamental aspect of the First Amendment’s protections. As the Court famously held in *West Virginia v. Barnette*, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>121</sup>

If content platforms are treated as governmental actors or their services deemed public fora, then they could not act as “Good Samaritans” to block online abuse. This would directly contravene the will of Section 230’s drafters.<sup>122</sup> They could not combat spam, doxing, nonconsensual pornography, or deep fakes.<sup>123</sup> They could not prohibit activity that chases people offline. In our view, it is desirable for content platforms to address online abuse that imperils people’s ability to enjoy life’s crucial opportunities, including the ability to engage with others online.

At the same time, the power that social media companies and other content platforms have over digital expression should not proceed unchecked, as it does in some respects. Currently, Section 230(c)(1)—the provision related to under-filtering content—shields companies from liability without any limit or condition, unlike Section 230(c)(2) that conditions the immunity for under-filtering on a showing of “good faith.” In Part III, we offer legislative reforms that would check that power afforded content platforms. The legal shield should be cabined to interactive computer services that wield their content-moderation powers responsibly, as the drafters of Section 230 wanted.<sup>124</sup>

<sup>119</sup> *Id.*; Citron & Richards, *supra* note, at 1371.

<sup>120</sup> *Manhattan Cmty. Access Corp. v. Halleck* (2019).

<sup>121</sup> *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943)

<sup>122</sup> Citron & Richards, *supra* note, at 1371.

<sup>123</sup> In connection with our work with CCRI, we have helped tech companies do precisely that. See Danielle Keats Citron, *Sexual Privacy*, Yale LJ (2019); Mary Anne Franks, “*Revenge Porn*” Reform: A View from the Front Lines, 69 FLA. L. REV. 1251 (2017).

<sup>124</sup> Of course, not all companies involved in providing our online experiences are alike in their power and privilege. Citron & Richards, *supra* note, at 1374. “As a company’s power over digital expression grows closer to total (meaning there are few to no alternatives to express oneself online), the greater the responsibilities (via regulation) attendant to that power.” *Id.* Companies running the physical infrastructure of the internet, such as internet service and broadband providers, have power over digital

We would lose much and gain little if Section 230 were replaced with the Hawley or Gohmert proposals. Section 230 already has a mechanism to address the unwarranted silencing of viewpoints. Under Section 230(c)(2), users or providers of interactive computer services enjoy immunity from liability for over-filtering or over-blocking speech only if they acted in “good faith.” Under current law, platforms could face liability for removing or blocking content without “good faith” justification, if a theory of relief exists on which they can be sued.<sup>125</sup>

### *C. The Myth that Any Change to Section 230 Would Destroy Free Speech*

Another myth is that any Section 230 reform would jeopardize free speech in a larger sense, even if not strictly in the sense of violating the First Amendment. It is certainly true that free speech is a cultural as well as a constitutional matter. It is shaped by non-legal as well as legal norms, and tech companies play an outsized role in establishing those norms. We agree that there is good reason to be concerned about the influence of tech companies and other powerful private actors over the ability of individuals to express themselves. This is an observation we have been making for years – that some of the most serious threats to free speech come not from the government, but from non-state actors.<sup>126</sup> Marginalized groups in particular, including women and racial minorities, have long battled with private censorial forces as well as governmental ones. But the unregulated Internet – or rather, the selectively regulated Internet – is exacerbating, not ameliorating, this problem. The current state of Section 230 may ensure free speech for the privileged few, but protecting free speech for all will require reform.

The concept of “cyber civil rights”<sup>127</sup> speaks precisely to the reality that the Internet has rolled back many gains made for racial and gender equality. The anonymity, amplification, and aggregation possibilities offered by the Internet have allowed private actors to discriminate, harass, and threaten vulnerable groups on a massive scale.<sup>128</sup> There is abundant empirical evidence showing that the Internet has been used to further chill

expression tantamount to governmental power. In locations where people only have one broadband provider in their area, being banned from that provider would mean no broadband internet access at all. The (now-abandoned) net neutrality rules were animated by precisely those concerns. And, as Genevieve Lakier and Frank Pasquale have argued, the power of search engines may warrant far more regulation than currently exists. See Genevieve Lakier, *The Problem Isn't Analogies but the Analogies that Courts Use*, Knight Institute; FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2014). Although social media companies are powerful, they do not have the kind of control over our online experiences as broadband providers or even search engines do. Users banned on Facebook could recreate a social network elsewhere, though it would be time consuming and likely incomplete. Dissatisfaction with Facebook has inspired people’s migration to upstart social network services like MeWe. See Citron & Richards, *supra* note, at 1374 (exploring different non-constitutional ways that law can protect digital expression).

<sup>125</sup> At the symposium, Brian Leiter provided helpful comments on this point.

<sup>126</sup> See Franks, *Democratic Surveillance; Beyond Free Speech for the White Man*

<sup>127</sup> See Citron, *Cyber Civil Rights*, *supra* note, at.

<sup>128</sup> *Id.*; Franks, *Unwilling Avatars*

the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.

Even as the Internet has multiplied the possibilities of expression, it multiplied the possibilities of repression.<sup>129</sup> The new forms of communication offered by the Internet have been used to unleash a regressive and censorious backlash against women, racial minorities, sexual minorities, and any other groups seeking to assert their rights of expression. The Internet lowers the costs of engaging in abuse by providing abusers with anonymity and social validation, while providing new ways to increase the range and impact of that abuse. The online abuse of women in particular amplifies sexist stereotyping and discrimination, compromising gender equality online and off.

The reality of unequal free speech rights demonstrates why regulation not only may not chill speech, but can, when done carefully and well, enhance speech and encourage more people to freely engage in speech. According to a 2017 study, regulating online abuse “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.” The study’s author suggests that when women “feel less likely to be attacked or harassed,” they become more “willing to share, speak, and engage online.” Knowing that there are laws criminalizing online harassment and stalking “may actually lead to more speech, expression, and sharing online among adult women online, not less.” As expressed in the title of a recent article by one of us (Citron) and Jonathon Penney, sometimes “law frees us to speak.”<sup>130</sup>

### III. Moving Beyond the Myths: A Menu of Potential Solutions

Having addressed misconceptions about the relationship between Section 230 and the First Amendment, state and private actors, and regulation and free speech outcomes, we turn to reform proposals that address the problems that actually exist and are legitimately concerning. This Part explores different possibilities for fixing the overbroad interpretation of Section 230.

#### A. *Against Carveouts*

Some reformers urge Congress to maintain Section 230’s immunity, but to create an explicit exception from its legal shield for certain types of behavior. A recent example of that approach is the Stop Enabling Sex Traffickers Act (SESTA), which passed by an overwhelming vote in 2016. The bill amended Section 230 by rendering websites liable for knowingly hosting sex trafficking content.

That law, however, is flawed. By effectively pinning the legal shield on a platform’s lack of knowledge of sex trafficking, the law reprises the dilemma that led Congress to pass

<sup>129</sup> Franks, *Cult of the Constitution*, *supra* note, at..

<sup>130</sup> Jonathon W. Penney & Danielle Keats Citron, *When Law Frees us to Speak*, *Fordham L. Rev.* (2018).

Section 230 in the first place. To avoid liability, platforms have resorted to either filtering everything related to sex or sitting on their hands so they cannot be said to have knowingly facilitated sex trafficking.<sup>131</sup> That is the opposite of what the drafters of Section 230 wanted – responsible content moderation practices.

Olivier Sylvain offers another potential route for reform, who urges Congress to maintain Section 230's immunity but to create an explicit exception from the legal shield for civil rights violations.<sup>132</sup> He argues that other exceptions could be added, such as those related to combating nonconsensual pornography or child sexual exploitation.

While we sympathize with the impulse to address particularly egregious harms, we argue that the best way to reform Section 230 is not through a piecemeal approach. The carveout approach is inevitably underinclusive, establishing a normative hierarchy of harms that leaves other harmful conduct to be addressed another day. Such an approach requires that Section 230's exceptions would need to be regularly updated, an impractical option given the slow pace of congressional efforts and partisan deadlock.<sup>133</sup>

### *B. A Modest Proposal – Speech, not Content*

In light of the observations made in Part II.A., one simple reform of Section 230 would be to make explicitly clear that the statute's protections only apply to speech. The statutory fix is simple: replace the word "information" in (c)(1) with the word "speech." Thus, that section of the statute would read:

#### (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 **speech** provided by another information content provider.

This revision would put all parties in a Section 230 case on notice that the classification of content as speech is not a given, but a fact to be demonstrated. If a platform cannot make a showing that the content or information at issue is speech, then it should not be able to take advantage of Section 230 immunity.

### *C. Excluding Bad Samaritans*

Another effective and modest adjustment would involve amending Section 230 to exclude bad actors from its legal shield. There are a few ways to do this. One possibility would be to deny the immunity to online service providers that "deliberately leave up

<sup>131</sup> Citron & Jurecic, *supra* note.

<sup>132</sup> Sylvain, *supra* note, at.

<sup>133</sup> See Citron, <https://knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties>.

unambiguously unlawful content that clearly creates a serious harm to others.”<sup>134</sup> Another would be to exclude from the immunity “the very worst actors:” sites encouraging illegality *or* that principally host illegality.<sup>135</sup>

A variant on this theme would deny the legal shield to cases involving platforms that have solicited or induced unlawful content. This approach takes a page from intermediary liability rules in trademark and copyright law. As Stacey Dogan observed in that context, inducement doctrines allow courts to target bad actors whose business models center on infringement.<sup>136</sup> Providers that solicit or induce unlawful content should not enjoy immunity from liability. This approach targets the harmful activity while providing breathing space for protected expression.<sup>137</sup>

A version of this approach is embraced in the SHIELD Act, which one of us (Franks) assisted in drafting and the other (Citron) supported in advising lawmakers on behalf of CCRI. Because SHIELD is a federal criminal statute, Section 230 cannot be used as a defense against it. However, the statute creates a separate liability standard for providers of communications services that effectively grants them Section 230 immunity so long as the provider does not intentionally solicit, or knowingly and predominantly distribute, content that the provider actually knows is in violation of the statute.<sup>138</sup>

#### *D. Conditioning the Legal Shield on Reasonable Content Moderation*

There is a broader legislative fix that Benjamin Wittes and one of us (Citron) have proposed. Under that proposal, platforms would enjoy immunity from liability *if* they could show that their content-moderation practices writ large are reasonable. The revision to Section 230(c)(1) would read as follows:

No provider or user of an interactive computer service that *takes reasonable steps to address unlawful uses of its service that clearly create serious harm to others* shall be treated as the publisher or speaker of any information provided by another information content provider *in any action arising out of the publication of content provided by that information content provider.*

If adopted, the question before the courts in a motion to dismiss on Section 230 grounds would be whether a defendant employed reasonable content moderation practices in the face of unlawful activity that manifestly causes harm to individuals.

<sup>134</sup> E-mail from Geoffrey Stone, Professor of Law, Univ. of Chi., to author (Apr. 8, 2018).

<sup>135</sup> Citron, *Hate Crimes in Cyberspace*, *supra* note, at. One of us (Citron) supported this approach as an important interim step to broader reform. *Id.*

<sup>136</sup> Stacey Dogan, *Principled Standards vs. Boundless Discretion: A Tale of Two Approaches to Intermediary Trademark Liability Online*, 37 COLUM. J.L. & ARTS 503, 507-08 (2014).

<sup>137</sup> *Id.* at 508-09.

<sup>138</sup> H.R. 2896: SHIELD Act of 2019; *see also* Franks, *Revenge Porn Reform* (explaining the exception).



The question would *not* be whether a platform acted reasonably with regard to a specific use of the service. Instead, the court would ask whether the provider or user of a service engaged in reasonable content moderation practices writ large with regard to unlawful uses that clearly create serious harm to others.<sup>139</sup>

Congressman Deven Nunes has argued that reasonableness is a vague and unworkable policy.<sup>140</sup> Eric Goldman considers the proposal a “radical change that would destroy Section 230.” In Goldman’s estimation, “such amorphous eligibility standards” makes “Section 230 litigation far less predictable, and it would require expensive and lengthy factual inquiries into all evidence probative of the reasonableness of defendant’s behavior.”<sup>141</sup>

Yes, a reasonableness standard would require evidence of a site’s content moderation practices. But impossibly vague or amorphous—it is not. Courts have assessed the reasonableness of practices in varied fields, from tort law to the Fourth Amendment’s ban on unreasonable searches and seizures.<sup>142</sup> In a wide variety of contexts, the judiciary has invested the concept of reasonableness with meaning.<sup>143</sup>

Courts are well suited to address the reasonableness of a platform’s speech policies and practices vis-à-vis particular forms of illegality that cause clear harm to others (at the heart of a litigant’s claims). The reasonableness inquiry would begin with the alleged wrongdoing and liability. To state the obvious, platforms are not strictly liable for all content posted on their sites. Plaintiffs need a theory of relief to assert against content platforms. Section 230’s legal shield would turn on whether the defendant employed reasonable content moderation practices to deal with the kind of harmful illegality alleged in the suit.

<sup>139</sup> Tech companies have signaled their support as well. For instance, IBM issued a statement saying that Congress should adopt the proposal and wrote a tweet to that effect as well. Ryan Hagemann, *A Precision Approach to Stopping Illegal Online Activities*, IBM THINK POLICY (July 10, 2019), <https://www.ibm.com/blogs/policy/cda-230/>; see also @RyanLeeHagemann, TWITTER (July 10, 2019, 3:14 PM), <https://twitter.com/RyanLeeHagemann/status/1149035886945939457?s=20> (“A special shoutout to @daniellecitron and @benjaminwittes, who helped to clarify what a moderate, compromise-oriented approach to the #Section230 debate looks like.”).

<sup>140</sup> See Congressman Deven Nunes’ questioning of one of us at a House Intelligence Committee hearing about deep fakes in June 2018, <https://www.c-span.org/video/?c4802966/user-clip-danielle-citron-explains-content-moderation>. As Benjamin Zipursky explains, “For a term or a phrase to fall short of clarity because of vagueness is quite different from having no meaning at all, and both are different from having multiple meanings—being ambiguous.” Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 Penn. L. Rev. 2131 (2015).

<sup>141</sup> Goldman, *supra* note, at 45.

<sup>142</sup> Reasonableness is the hallmark of negligence claims. Benjamin C. Zipursky, *Reasonableness In and Out of Negligence Law*, 163 PENN. L. REV. 2131, 2135 (2015) (“The range of uses of “reasonableness” in law is so great that a list is not an efficient way to describe and demarcate it.”).

<sup>143</sup> This is not to suggest that all uses of the concept of reasonableness are sound or advisable. There is a considerable literature criticizing various features of reasonableness inquiries. In this piece, we endeavor to tackle the most salient critiques of reasonableness in the context of content moderation practices.

Let's take an example. Suppose a social network is sued for defamation and negligent enablement of a crime. In the complaint, the plaintiff alleges that her nude photos were posted on defendant's site without consent. Plaintiff further alleges that the photos and deep fake videos appeared alongside her name and address. Hundreds of strangers rang the plaintiff's doorbell at night, demanding sex. One man broke into her house and plaintiff had to call the police. Regrettably, defendant failed to respond to her reports of abuse. The defendant filed a motion to dismiss on Section 230 grounds, alleging that its terms of service (TOS) bans stalking and sexual-privacy invasions like nonconsensual pornography and the site has procedures in place that enables it to respond to complaints quickly.

The question before the court would be whether the defendant's content moderation practices towards the kind of harm-causing conduct alleged in the suit – defamation and sexual-privacy invasions – were reasonable. Defendant submits evidence showing it has a clear policy against cyber stalking and sexual privacy invasions. On average, the site's content moderators respond to complaints about sexual-privacy invasions and cyberstalking within a week's time. The site has an easy-to-use process to report abuse. It uses a hashing process to prevent the reposting of nude images determined by the site to violate the site's TOS.<sup>144</sup> Defendant acknowledges that its moderators did not act quickly enough in plaintiff's case but that generally speaking its speech rules and procedures satisfy the reasonableness inquiry.

The court would likely grant the defendant's motion to dismiss on Section 230 grounds. The defendant has clearly stated standards and a systematic process to consider complaints. The court would likely find the site's moderation practices reasonable given its systematic process to deal with the harmful conduct of the sort alleged in the complaint even though the site had fallen short of that standard in the plaintiffs' case. The key is the reasonableness of the site's practices writ large, not its response in any given case.

There isn't a one-size-fits-all approach to reasonable content moderation. Reasonableness is tailored to the harmful conduct at hand and the size and nature of the platform. A reasonable approach to sexual-privacy invasions would be different from a reasonable approach to fraud or spam. Crucially, the assessment of reasonable content-moderation practices would take into account differences among content platforms. A blog with a few postings a day and a handful of commenters is in a different position than a social network with millions of postings a day. The social network could not plausibly respond to complaints of abuse immediately, let alone within a day or two, whereas the blog

<sup>144</sup> For a discussion of Facebook's hashing process as an illustration of an effective market response to nonconsensual pornography, see Danielle Keats Citron, *Sexual Privacy*, Yale LJ (2019).

could. On the other hand, the social network and the blog could deploy technologies to detect and filter content that they previously determined was unlawful.<sup>145</sup>

A reasonableness standard would not “effectively ‘lock in’ certain approaches, even if they are not the best or don’t apply appropriately to other forms of content,” as critics suggest.<sup>146</sup> The promise of a reasonableness approach is its elasticity. As technology and content moderation practices changes, so will the reasonableness of practices. As new kinds of harmful online activity emerge so will the strategies for addressing them.

A reasonable standard of care will reduce opportunities for abuse without interfering with the further development of a vibrant internet or unintentionally turning innocent platforms into involuntary insurers for those injured through their sites. Approaching the problem as one of setting an appropriate standard of care more readily allows differentiating between different kinds of online actors. Websites that solicit illegality or that refuse to address unlawful activity that clearly creates serious harm should not enjoy immunity from liability. On the other hand, social networks that have safety and speech policies that are transparent and reasonably executed at scale should enjoy the immunity from liability as the drafters of Section 230 intended.

### Conclusion

A crucial task in any reform project is clear-eyed thinking. And yet clear-eyed thinking about the Internet is often difficult. The Section 230 debate is, like many other tech policy reform projects, beset by misconceptions. We have taken this opportunity to dispel myths around Section 230 so that this reform moment, a long time coming and anticipated, is not wasted.

Reforming Section 230 is long overdue. Law should change to ensure that such power is wielded responsibly. With Section 230, Congress sought to provide incentives for “Good Samaritans” engaged in efforts to moderate content. Their goal was laudable. Section 230 should be amended to condition the immunity on reasonable moderation practices rather than the free pass that exists today. Market pressures and morals are not always enough, and they should not have to be.

<sup>145</sup> Citron, *Sexual Privacy*, *supra* note (discussing Facebook’s hashing initiative to address nonconsensual distribution of intimate images).

<sup>146</sup> Mike Masnick, *supra* note, at.

