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In Defense of Section 230: How Misguided Revisions Will Trample the Internet

Section 230, known as the '26 words that created the Internet', allows companies to moderate content on their website – acting as 'publishers' – while not being held liable for user content – prosecuted as a 'platform'. Part of the Communications Decency Act (CDA), the bill was first proposed in February of 1995 to combat spreading pornography and obscenity on the Internet[1]. As a result, the Internet has thrived – most websites, especially social media, could not grow if they risked being sued every time a user posted objectionable content. Under this shield, social media companies like Facebook have become massive hubs of information and ideas. The staggering power yielded by these companies has led many, on all sides, to question and attack Section 230. Republicans assert that Section 230 allows social media companies to censor at will from market pressures, threatening first amendment rights. Democrats, on the other hand, argue that the bill lets companies off the hook for not moderating their content *enough*, allowing sexual exploitation, hate speech, and extremism to run rampant[2]. However, I argue that Section 230 should remain standing. Proposed revisions to or the repeal of Section 230 fail to address the problems they seek to solve and unravel the free speech and decentralization of the digital world

[1] Lotty, "Apps Too," 889.

[2] Matula, "Any Safe Harbor in a Storm," 367. Note that concerns over section 230 are not purely along partisan lines of too much or too little censorship; there was, for instance, bipartisan support for the SESTA-FOSTA bill that restricted section 230 with the goal of preventing sex trafficking. This is further discussed in Matula's work.

that we rely so heavily on. Other legal mechanisms can and should be used to address legitimate concerns of Internet misconduct without threatening the integrity of the Internet itself.

"The predicate for Section 230 immunity under the CDA," Senator Ted Cruz opined in a Senate hearing, "is that you're a neutral public forum."[3] He, along with several media figures and politicians, have advocated for the revision or complete repeal of Section 230. Their concern, and one that 58% of registered voters hold, is that technology companies have bias against conservatives.[4] Given the power to moderate content at will, social media companies can overtly censor political speech they disagree with, or more subtly adjust visibility and reach on certain posts, which could shift national opinion and elections. While these concerns may be credible, the proposed solutions fail to address free speech concerns. If Section 230 were to be repealed, companies would have no protection from user content, and would need to regulate it *significantly more*. As legal scholar Charles Matula notes in the Duke Law & Technology Review, revoking liability protections centralizes power over information in the hands of the technology oligopolies.[5] Only large corporations can afford the resources for extensive moderation to avoid liability. Smaller platforms will shut down and any competition will be discouraged from entering the industry. This explains why the largest technology companies supported Section 230 revisions while smaller ones objected to it. The open conversation brought about by the relative openness, diversity, and quantity of platforms like Twitter would perish, if not at the hands of lawsuits, then by restrictive moderation. The free discourse brought about by the Internet would die a suffocating death, tragically by those who sought to protect it.

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[3] Joshua A. Geltzer, The President and Congress are Thinking of Changing This Important Internet law, Slate Feb. 25, 2019), https://slate.com/technology/2019/02/cda-section-230-trump-congress.html.

[4] Matthew Sheffield, Majority Think That Tech Giants are Biased Against Conservatives, Poll Shows, Hill (Dec. 31, 2018), https://thehill.com/hilltv/what-americas-thinking/421238-poll-majority-of-americans-think-social-media-companies-are.

[5] Matula, "Any Safe Harbor in a Storm," 361.

On the other hand, many believe Section 230 allows companies to be negligent in their policing of content. "Section 230 … immediately should be revoked, number one," President Joe Biden argued in a New York Times Interview. "It's [under-regulation at Facebook] totally irresponsible."[6] However, revoking or even altering Section 230 will fail to address only specific content problems; because the bill covers all content on the Internet, any edits to it hold dangerous implications for *all* Internet speech. An almost universal concern of under-regulation, for instance, is that of the Internet's facilitation of sex trafficking. In 2018, the SESTA-FOSTA[7] bills revoked liability protections under Section 230 for platforms that acted in "reckless disregard" to sex trafficking or prostitution. While passed with noble intent, it had an enormously negative ripple effect across the digital *and* the physical world. It effectively silenced, for one, the speech of groups like the Woodhull Freedom Foundation and the Human Rights Watch, which argue for the decriminalization of sex work.[8] Such speech would be scrutinized and potentially be held liable as 'reckless actions' towards prostitution under the SESTA-FOSTA. Furthermore, many law enforcement agencies have attributed an *increase* in violence towards sex workers to the bill, as digital platforms used to facilitate transactions are torn down.[9] Yet, one may be inclined to ask: why should *I* care? What does this have to do with *me* and *my speech*? The answer: plenty. As Lucy Khan, a sex worker, writes: "While currently the impact of FOSTA/SESTA is felt most acutely by those of us participating in the commercial sex trade, this bill affects everyone — escorts are just the canaries in the coal mine trying to make our warning call before it's too late."[10] Indeed, toxic gas is already beginning to fill the coal mine. The

[6]Joe Biden, "The Choice: Joe Biden, Former vice president of the United States," interview by New York Times Editorial Board, *New York* Times, December 16, 2019, https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html.

[7] Stop Enabling Sex Traffickers Act and the Fight Online Sex Trafficking Act.

[8] Morgan, "On FOSTA and the Failures of Punitive Speech Restrictions", 505.

[9] Morgan, "On FOSTA and the Failures of Punitive Speech Restrictions", 507.

[10] Morgan, "On FOSTA and the Failures of Punitive Speech Restrictions", 504.

revision, importantly, made free speech a *liability* for companies to uphold. In mere anticipation of the bill, Craigslist dismantled its personal ads section, and Google and Microsoft began monitoring and deleting questionable content from users – all to avoid potential liability.[11] SESTA-FOSTA was only one example of the impact revisions to Section 230 make, and a mild one at that, being passed with bipartisan support. Section 230 is the thin blanket that covers and maintains the integrity of the Internet. When it is haphazardly punctured with exceptions, not to mention completely revoked, all free speech – not just the target speech of revisions – becomes a liability, subjected to scrutiny and even censorship. Using Section 230 to target problems with Internet discourse is like using a bomb to create the hole for a pond in a garden; in the attempt to make the environment more pleasant, the environment itself has become uninhabitable. As Emily Morgan, J.D., writes, these types of revision "present… First Amendment concerns regarding its chilling effect on internet speech."[12] First Amendment speech is a right for all, for the many *and* the few. As courts have ruled in the past, it is the duty of these public platforms – even if they are companies – to uphold this sacred principle of democracy.[13]

This is not to be flippant about concerns of overregulation and under-regulation that are legitimate. Section 230 is simply not the vessel to address them. There are many mechanisms to do so without infringing on the law that created and maintains free speech on the Internet. For instance, the sex trafficking scandal that initiated SESTA-FOSTA was addressed when state attorneys successfully pursued criminal cases – one month before the bill went into effect.[14] This suggests that the legal mechanisms to prosecute and disincentivize serious breaches of humanity

[11] Matula, "Any Safe Harbor in a Storm," 361.
[12] Morgan, "On FOSTA and the Failures of Punitive Speech Restrictions," 507.
[13] O'Kelley, "State Constitutions as a Check on the New Governors," 130-136. O'Kelley outlines in these sections the idea of private companies being held as traditional public forums whose obligation is to uphold free speech. Malls, he highlights, have become information and gathering hubs for communities, and courts have ruled that these shopping centers, and other private companies that satisfy a delicate test of commercial and public function, cannot bar unobtrusive speech.
[14] Matula, "Any Safe Harbor in a Storm," 358.

exist without violating speech rights. Even Alexandra Lotty, Executive Senior Editor of the Southern California Law Review, of the strong opinion that section 230 is harmful, acknowledges the impracticality of legislative revisions in curtailing sexual harassment and instead proposes judicial reinterpretation.[15] But similar methods can be employed for more ambiguous problems, like that of under-censoring hate speech and over-censoring political speech. For one, the free speech clauses in state constitutions are textually different from the First Amendment, and can be used to fill in the gaps a solidly free-speech stance can leave, like dangerous speech. If these problems are more routinely brought to state courts, social media companies will be able to moderate *how* the political speech is expressed – where a hateful communication may be regulated – but not by its content.[16] While this still leaves some to be addressed, such as misinformation, it is a large step in confronting both concerns of hate speech and censorship of political speech.

At a news conference on December 10, House Speaker Nancy Pelosi declared that Section 230 "is a real gift to Big Tech".[17] She, and opponents of Section 230 on both sides of the aisle, fail to see that the largest gift of the monumental bill is *to us*, the people. Our most creative, uplifting, and empowering ideas and thoughts have spread across the Internet as a decentralized system open to speech. Because of the blanket nature of Section 230, piercing its defense of the platforms that let ideas from all peoples and perspectives flourish will pose a

[15] Lotty, "Apps Too," 908-909. In the journal article, Lotty takes the opinion that Section 230 does little to stop sexual harassment on the Internet. However, in this section she hesitantly notes that changing Section 230 legislatively fails to be practical, arguing that the best avenue for change is in judicial reinterpretation. That is, "Section 230 Doctrine", not Section 230 itself, can be modified by placing judges that will more narrowly interpret Section 230 into courts.

[16] O'Kelley, "State Constitutions as a Check on the New Governors," 146-154. O'Kelley argues that state constitutions give platforms a delicate balance of public and commercial function. If platforms are significant to the public, and the public function does not damage the commercial value of the platform, then state courts will allow public functions. Thus, hate speech, which social media companies have a commercial investment in regulating, can be moderated. On the other hand, political speech that may be unconventional in its content but polite in its rhetoric,

[17] Dean DeChiaro, "'A real gift to Big Tech': Both parties object to immunity provision in USMCA, Roll Call" (December 17, 2019), https://www.rollcall.com/2019/12/17/a-real-gift-to-big-tech-both-parties-object-to-immunity-provision-in-usmca/.

serious risk to the freedom of those ideas. Altering Section 230 isn't a stand for free speech – it is asking for that speech to be centralized and controlled by Big Tech, even bigger and more powerful. It's also not a practical way to control hate speech and under-regulation – as a blanket covering the Internet, any change will cause ripples throughout the entire digital world, impacting minorities and ordinary citizens. Legal scholars – even ones opposed to Section 230 – agree that there are better ways to address these questions. It's not a question about choosing between protecting the future of the Internet, championing free speech, or fighting for a more civil online discourse. We can do it all, but only if Section 230 remains.

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