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ABOUT US

The **International Journal of Digital and Data Law / Revue Internationale de droit des données et du numérique (RIDDN)** is an academic journal created and edited by Irène Bouhadana and William Gilles at IMODEV, the Institut du monde et du développement pour la bonne gouvernance publique.

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SOCIAL MEDIA PLATFORM CENSORSHIP

by **Russell L. WEAVER**, Professor of Law & Distinguished University Scholar, University of Louisville, Louis D. Brandeis School of Law¹

In the broad sweep of human history, as newly communications technologies were developed, those technologies have been controlled by “gatekeepers” who controlled access to those technologies.¹ Although Johannes Gutenberg’s invention of the printing press in the fifteenth century was revolutionary, and ultimately led to dramatic societal changes,² Gutenberg’s invention was not widely accessible. Printing presses were expensive, and owned and operated by wealthy individuals,³ who had the power to decide who could use their technologies to mass communicate.⁴ Many of the technologies that followed, including radio,⁵ television,⁶ satellite⁷ and cable,⁸ were correspondingly expensive, or required the owner to obtain one of a limited number of governmental licenses,⁹ and therefore were also owned and operated by wealthy individuals or corporations who could control their use.¹⁰ Without access to new technologies, ordinary people were forced to communicate in much more primitive ways (e.g., orally or through handwritten documents), and found it difficult to “mass communicate.”¹¹

The internet revolutionized communication by giving ordinary people the opportunity to mass communicate, and to widely disseminate their ideas, generally free of the traditional gatekeepers.¹² Like the Gutenberg printing press, the internet’s communications potential led to profound societal changes.¹³ Outside of the United States, the internet played a prominent role

¹ Portions of this article were previously published with the *Mercer Law Review*. Reprinted by permission.

² See R.L. WEAVER, *From Gutenberg to the Internet: Free Speech, Advancing Technology and the Implications for democracy*, pp. 21-60, Carolina Academic Press, 2nd ed., 2019.

³ *Id.*, at 12-20.

⁴ *Id.*, at 21-38.

⁵ See *id.*

⁶ *Id.*, at 42-43.

⁷ *Id.*, at 44-45.

⁸ *Id.*, at 45-46.

⁹ *Id.*, at 45.

¹⁰ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹¹ See *id.*, at 42-46.

¹² *Id.*, at 21-38 & 51-60.

¹³ *Id.*, at 67.

¹⁴ *Id.*, at 67-114.

in the Arab Spring uprisings in the Middle East,¹⁴ as well as in social movements in China, Russia and around the world.¹⁵ Within the U.S., the internet has helped spur social movements,¹⁶ and played a major role in politics and political campaigns.¹⁷

As with prior technologies, the internet has slowly come under the influence and restraint of social media companies who have started to function as the internet's new "gatekeepers."¹⁸ While social media companies have unquestionably expanded the ability of ordinary individuals to express themselves on both personal and political matters,¹⁹ their platforms are private and have not therefore been regarded as subject to the First Amendment.²⁰ As a result, these platforms have exercised the power to censor and restrict expression on their platforms.²¹

The power of social media companies to promote free expression, as well as to censor it, has been greatly enhanced by Section 230 of the Communications Decency Act of 1996 (CDA).²² Section 230 gives social media platforms broad protections against civil liability for information posted on their platforms by others,²³ but it specifically authorizes them to limit or censor material posted on their platforms. This article argues that Section 230 is fundamentally inconsistent with this nation's First Amendment tradition. While Congress might have had good reasons for providing social media companies with broad protections against civil liability for information posted by others on their platforms, it was inappropriate for Congress to vest those platforms with the power to censor speech and ban individuals from their platforms. Either social media companies are not serving as editors of material posted on their platforms, in which case they should be exempt from liability for information posted by others, or they are editors in which case they should be subject to liability. At the very least, social media platforms should be prohibited from discriminating on the basis of content or viewpoint.

§1–THE FIRST AMENDMENT AND GOVERNMENTAL CENSORSHIP

Although the U.S. free speech tradition has developed slowly over the centuries, it resulted in a consensus that government has very

¹⁴ *Id.*, at 73-82.

¹⁵ *Id.*, at 70-82.

¹⁶ *Id.*, at 84-95.

¹⁷ *Id.*, at 95-109.

¹⁸ *Id.*, at 124-132.

¹⁹ *See id.*, at 71-83.

²⁰ *See Manhattan Community Access Corp. v. Halleck*, 139 S.Ct. 2191 (2019); *see also* RUSSELL L. WEAVER, STEVEN I. FRIEDLAND & RICHARD ROSEN, *CONSTITUTIONAL LAW: CASES, MATERIALS & PROBLEMS* 557-624 (5th ed. 2021).

²¹ *Id.*, at 124-132.

²² 47 U.S.C. § 230.

²³ *Id.*

limited power to censor speech.²⁴ The U.S. approach marked a significant departure from the prior history of speech censorship and repression that previously existed in both Europe and the American colonies.²⁵ Even Gutenberg's invention printing press was subject to speech restrictions.²⁶ Governments of the time limited the number of printing presses that could exist, and generally allocated licenses to print only to those who they regarded as favorable to the government.²⁷ Governments also imposed content-licensing requirements which required those who wished to publish manuscripts to submit them to governmental censors, and prohibited publication absent the approval of those censors.²⁸ The English government even went so far as to impose the crime of seditious libel, which made it a crime to criticize the King as well as other high clergy,²⁹ and truth was not a defense.³⁰ Indeed, if defendant's criticism of the King were true, the English punished the defendant more severely on the theory that truthful criticisms might be more damaging to the crown.³¹

As it has evolved over the last two plus centuries, the U.S. free speech tradition has come to include number of important principles. First, prior restraints on speech are presumptively unconstitutional.³² Thus, government may not impose content-licensing requirements, similar to those imposed by medieval governments,³³ and is generally prohibited from imposing injunctions against speech, even if the speech is arguably defamatory³⁴ or potentially implicates national security interests (absent a compelling set of circumstances).³⁵

A second principle is the idea that content-based restrictions on speech, and viewpoint-based restrictions on speech, are presumptively unconstitutional.³⁶ Of course, under the U.S. free speech tradition, there are certain categories of speech that are treated as completely "unprotected" under the First

²⁴ See *United States v. Alvarez*, 567 U.S. 709 (2012); *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011); see also *New York Times Company v. United States*, 403 U.S. 713 (1971); *Near v. State of Minnesota*, 283 U.S. 697 (1931).

²⁵ See R. L. WEAVER & C. HANCOCK, *FIRST AMENDMENT: CASES, PROBLEMS & MATERIALS* 5-7 (6th ed. 2020) [hereafter "THE FIRST AMENDMENT"].

²⁶ See *id.*, at 5 & 476-490.

²⁷ See *id.*, at 5 & 476-490.

²⁸ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938); see also THE FIRST AMENDMENT at 5-6.

²⁹ See W.T. MAYTON, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 248 (1982).

³⁰ *Id.*

³¹ See S.D. KRAUSS, *An Inquiry into the Right of Criminal Juries to Determine the Law in America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 183 n.290 (1998).

³² See *New York Times Company v. United States*, 403 U.S. 713 (1971); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Near v. State of Minnesota*, 283 U.S. 697 (1931).

³³ See *Lovell v. City of Griffin*, 303 U.S. 444 (1938); see also THE FIRST AMENDMENT at 5-6.

³⁴ See *Near v. State of Minnesota*, 283 U.S. 697 (1931).

³⁵ See *New York Times Company v. United States*, 403 U.S. 713 (1971).

³⁶ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Amendment.³⁷ Outside of those unprotected categories, however, content-based and viewpoint-based restrictions on speech are not only regarded as presumptively unconstitutional, but are subject to strict scrutiny (meaning, of course, that those restrictions must be supported by a compelling or overriding governmental objective, and must be the least restrictive means possible for accomplishing that objective).³⁸

Similarly, government generally has only limited authority to ban speech on the ground that it is false. Except in a few limited contexts (e.g., prosecutions for perjury or civil actions for defamation if the constitutional requirements are satisfied), government does not have the power to declare that particular facts are true and unassailable.³⁹ As the U.S. Supreme Court recognized in *United States v. Alvarez*,⁴⁰ the “remedy for speech that is false is speech that is true.”⁴¹

Indeed, permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.² Freedom of speech and thought flows not from the beneficence of the state but from the inalienable right of the person. Suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.⁴²

§ 2 – THE FIRST AMENDMENT, SECTION 230 AND SOCIAL MEDIA PLATFORMS

Because of their private status, social media platforms have not been regarded as bound by the strictures of the First Amendment. Thus, these platforms have a unique status which gives them the power to censor speech that is posted on their platforms, and to ban individuals from accessing those platforms. The power of social media platforms is enhanced by Section 230 of the Communications Decency Act of 1996 (CDA).⁴³ Under

³⁷ See *Virginia v. Black*, 538 U.S. 343 (2003); *Ferber v. New York*, 458 U.S. 747 (1982) (child pornography unprotected); *Miller v. California*, 413 U.S. 15 (1973) (obscene speech unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words unprotected).

³⁸ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

³⁹ See *United States v. Alvarez*, 567 U.S. 709 (2012).

⁴⁰ 567 U.S. 709 (2012).

⁴¹ *Id.*, at 727.

² See G. ORWELL, *Nineteen Eighty-Four* (1949), Centennial ed., 2003.

⁴² *Id.*, at 728.

⁴³ 47 U.S.C. § 230.

that Act, social media companies are given two special benefits. First, Section 230 makes clear that they are not considered as having published or spoken information posted on their sites, and therefore they are not liable for information posted by other content providers.⁴⁴ Second, the CDA established a “Good Samaritan” defense which specifically gives social media companies the power to censor information posted on their platforms without the risk of civil liability.⁴⁵ That defense states that:

“No provider or user of an interactive computer service shall be held liable on account of – (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).”

Section 230 marks a significant departure from the nation’s free speech tradition. If the government had tried to restrict the types of speech that Section 230 allows social media companies to prohibit, the governmental restrictions would undoubtedly be struck down as unconstitutional. Section 230 allows social media companies to remove material that is “excessively violent, harassing, or otherwise objectionable.” Undoubtedly, such language suffers from an unconstitutional level of vagueness and overbreadth. It is doubtful whether speech that is regarded as “excessively violent” would be treated as “unprotected speech” under the First Amendment.⁴⁸ In addition, although there are several categories of unprotected speech, there is no unprotected category that covers “otherwise objectionable” speech.⁵⁰ That is presumably why the CDA explicitly allows social media companies to censor speech “whether or not such material is constitutionally protected.”⁵¹

Given their unique status, and the special power conferred by Section 230, social media platforms have aggressively used their power to censor speech. For one thing, they have exercised one power that government would never have been allowed to do:

⁴⁴ *Id.*, at (c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Section 230’s protections extend, not only to social media companies, but also to internet service providers (ISPs), and any online intermediary that hosts or republishes speech.

⁴⁵ *Id.*, at (c).

⁴⁸ See *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

⁵⁰ See R. WEAVER, C. HANCOCK, J. KNECHTLE, *The First Amendment: Cases, Problems, and Materials*, Carolina Academic Press, 2020.

⁵¹ *Congressional Research Service*, Section 230: An Overview, <https://crsreports.congress.gov/product/pdf/R/R46751>

ban speech by particular individuals. For example, both Facebook and YouTube have banned former President Donald Trump from their platforms.⁵² Indeed, Donald Trump has been banned from Facebook through 2023.⁵³ Likewise, YouTube temporarily banned U.S. Senator Rand Paul for posting a video claiming that masks are ineffective against Covid.⁵⁴ Various controversial individuals have also been banned by social media platforms, including Alex Jones,⁵⁵ Louis Farrakhan,⁵⁶ Milo Yiannopoulos,⁵⁷ the Daily Stormer,⁵⁸ the Taliban,⁵⁹ and Infowars.⁶⁰

Social media platforms also routinely censor both speech and ideas. Even though the government does not have the power to ban ideas that it regards as false, social media platforms routinely exercise that authority. Facebook's user bans apply not only to persons, but to anything that Facebook regards as "harmful" information or "disinformation." Indeed, in a single three month-period, Facebook banned some 1.3 billion accounts because it concluded that they were distributing harmful material or what some might refer to as "fake news."⁶¹

Facebook decides for itself what constitutes "disinformation" and summarily bans it. For some time, Facebook banned all claims that Covid-19 was man-made.⁶² However, Facebook changed its

⁵² See W. FEUER, J. BRUFKE & S. NELSON, *As Facebook bans Trump 'til 2023, he fires back: Next time I'm in White House there'll be no more dinners with Mark Zuckerberg*, N.Y. Post (June 4, 2021) <https://nypost.com/2021/06/04/facebook-says-trump-ban-wont-end-until-at-least-2023/>

⁵³ *Id.*

⁵⁴ See R. SHABAD, *YouTube suspends Sen. Rand Paul over a video falsely claiming masks are ineffective*, NBC News (Aug. 11, 2021): <https://www.nbcnews.com/politics/congress/youtube-suspends-sen-rand-paul-over-video-falsely-claiming-masks-n1276534>

⁵⁵ S. MUSIL & S. HOLLISTER, Facebook bans Infowars' Alex Jones for 30 days -- but he's still streaming, c/net (July 27, 2018) <https://www.cnet.com/news/facebook-bans-infowars-alex-jones-for-30-days-but-hes-still-streaming/>

⁵⁶ See M. CAPPETTA and B. COLLINS, A. JONES, L. FARRAKHAN, others banned from Facebook and Instagram, NBC News (May 2, 2019): <https://www.nbcnews.com/tech/tech-news/facebook-bans-alex-jones-louis-farrakhan-others-facebook-instagram-n1001311>

⁵⁷ *Id.*

⁵⁸ See A. SWOYER, *Daily Stormer banned by Facebook after criticizing Charlottesville victim Heather Heyer*, The Washington Times (Aug. 16, 2017): <https://www.washingtontimes.com/news/2017/aug/16/daily-stormer-banned-by-facebook-after-criticizing/>

⁵⁹ See J. C. YORK, Why Facebook's continuing Taliban ban should concern us all, CNN (Aug. 20, 2021) <https://www.msn.com/en-us/news/world/why-facebooks-continuing-taliban-ban-should-concern-us-all/ar-AAANuYAO?ocid=uxbndllbing>

⁶⁰ See K. ROOSE, *Facebook Banned Infowars. Now What?*, The New York Times (Aug. 10, 2018): <https://www.nytimes.com/2018/08/10/technology/facebook-banned-infowars-now-what.html>

⁶¹ See M. HOLZBERG, *Facebook Banned 1.3 Billion Accounts Over Three Months To Combat 'Fake' And 'Harmful' Content*, Forbes (Mar. 22, 2021): <https://www.forbes.com/sites/melissaholzberg/2021/03/22/facebook-banned-13-billion-accounts-over-three-months-to-combat-fake-and-harmful-content/?sh=72441d005215>

⁶² See T. BARRABI, *Facebook ends ban on posts claiming COVID-19 is man-made: Facebook had previously insisted the claim had been 'debunked'*, Fox Business (May 26, 2021):

mind in 2021 and decided to allow such claims.⁶³ In addition, Facebook purportedly banned references to certain Bible passages, as well as links to Biblehub.com.⁶⁴ After investigating, Facebook confirmed that links to Biblehub.com had been banned, but claimed that it had acted in error and purportedly rectified the problem.⁶⁵ Facebook even went so far as to ban academics who were doing research on ad transparency and the spread of misinformation on Facebook.⁶⁶ Facebook admitted to the ban, but claimed that it was imposed because the academics were scraping user data without permission.⁶⁷

Social media platforms frequently control and limit free expression. For example, Facebook has shut down online pages linked to the “Muslim Cyber Army.”⁶⁸ The allegedly neo-Nazi web site, the Daily Stormer, was banned by GoDaddy after it mocked a young woman, Heather Heyer, who was killed during a white nationalist rally that occurred in Charlottesville, Virginia, in 2017.⁶⁹ GoDaddy claimed that the article might incite violence and therefore violated its terms of service.⁷⁰ GoDaddy claimed that it was not engaging in “censorship,” and that it supported a “free and open internet.”⁷¹ The Daily Stormer then moved its website to Google which banned it for violating its terms of service.⁷²

Likewise, three internet companies (Google, Apple and Facebook) have moved aggressively to remove content produced by Alex Jones, and his Infowars site, as “hate speech.”⁷³ Infowars has been described by one newspaper as a “right-wing conspiracy site,”⁷⁴ and Jones is the founder of the New Century Foundation

<https://www.foxbusiness.com/technology/facebook-ends-ban-posts-claiming-covid-19-man-made>

⁶³ *Id.*

⁶⁴ See J. MARNIN, *Fact Check: Is Facebook Banning Bible Passages?*, Newsweek (Jan. 28, 2021):

<https://www.newsweek.com/fact-check-facebook-banning-bible-passages-1565190>

⁶⁵ *Id.*

⁶⁶ See J. VINCENT, *Facebook bans academics who researched ad transparency and misinformation on Facebook: The researchers say their work is being silenced*, The Verge (Aug. 4, 2021):

<https://www.theverge.com/2021/8/4/22609020/facebook-bans-academic-researchers-ad-transparency-misinformation-nyu-ad-observatory-plugin-in>

⁶⁷ *Id.*

⁶⁸ See M. FISHER, *Social Re-engineering, From Myanmar to Germany*, *The New York Times*, Tech We’re Using B3 (Nov. 8, 2018).

⁶⁹ See B. CHAPPELL, *Neo-Nazi Site Daily Stormer Is Banned By Google After Attempted Move From GoDaddy*, National Public Radio, *The Two-Way* (Aug. 14, 2017) (GoDaddy announced that it had “informed the Daily Stormer that they have 24 hours to move the domain to another provider, as they have violated our terms of service.”):

<https://www.npr.org/sections/thetwo-way/2017/08/14/543360434/white-supremacist-site-is-banned-by-go-daddy-after-virginia-rally>; Christine Hauser, *GoDaddy Drops Daily Stormer Site*, *The New York Times* A15 (Aug. 15, 2017).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Yuan, *supra* note 1642, at B3.

⁷⁴ See B. X. CHEN, *The Internet Trolls Have Won. Get Used to It*, *The New York Times* B-7 (Aug. 9, 2018).

which (according to the Southern Poverty Law Center) “purports to show the inferiority of blacks to whites.”⁷⁵ One newspaper referred to Jones as someone “who became famous for his spittle-flecked rants and far-fetched conspiracies, including the idea that the Sandy Hook massacre was an elaborate hoax promoted by gun-control supporters.”⁷⁶ Jones has also referred to the 9/11 attacks as an “inside job” and he helped spread the “Pizzagate” controversy (which involved allegations that Hillary Clinton was in cahoots with others to run a child sexual abuse ring out of a pizza parlor in Maryland).⁷⁷ In regard to the 9/11 attacks, Jones stated that “Now 9/11 was an inside job, but when I say inside job it means criminal elements in our government working with Saudi Arabia and others, wanting to frame Iraq for it.”⁷⁸ Other sites – including YouTube, Pinterest and MailChimp – also banned Infowars.

Although Twitter chose to leave Mr. Jones’ posts alone for a while,⁷⁹ it eventually changed course and banned both Jones and Infowars from its platforms for allegedly violating its terms of use policy.⁸⁰ Twitter expressed concern that Jones was harassing a CNN reporter.⁸¹ Jones responded that the reporter is a “public figure” who has been attempting to “bully” tech companies into banning Jones.⁸² Interestingly, 13 of Jones’ most popular tweets involved reposts of Tweets by President Trump.⁸³ Apple, Inc. removed links to most of Infowars podcasts, but initially left the Infowars app on its site.⁸⁴

Twitter considered whether to ban “dehumanizing” speech which did not go so far as to involve direct threats of violence, or hate speech,⁸⁵ but it struggled to find a suitable definition of the term “dehumanizing.”⁸⁶ Twitter expressed concern that such speech might lead to violence.⁸⁷ As a result, Twitter was forced to decide whether to allow anti-immigrant speech or whether to allow rape victims to relate their experiences.⁸⁸ Twitter struggled to find suitable policies for a platform that brought “together world leaders, celebrities, journalists, political activists and

⁷⁵ See Burnson, *supra* note 1740.

⁷⁶ See C. HAUSER, *Megyn Kelly Calls Alex Jones’s Sandy Hook Denial “Revolting,” but Still Plans to Air Interview*, *The New York Times* (June 12, 2017); K. ROOSE, *After the Ban On Infowars, What’s Next?*, *The New York Times* B1 (Aug. 10, 2018).

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ See Yuan, *supra* note 1642.

⁸⁰ See Burnson, *supra* note 1740; See Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, *The New York Times* B1 (Sept. 7, 2018).

⁸¹ See Conger & Nicas, *supra* note 1816.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See S. SALINAS, *Twitter permanently bans Alex Jones and Infowars Accounts*, CNBC (Sept. 6, 2018). <https://www.cnbc.com/2018/09/06/twitter-permanently-bans-alex-jones-and-infowars-accounts.html>

⁸⁵ *Id.*

⁸⁶ *Id.* at B6.

⁸⁷ *Id.*

⁸⁸ *Id.*

conspiracy theorists.”⁸⁹ Even though Twitter’s guiding light had been free expression, it has shifted to suggesting that “safety” should come first.⁹⁰ In an effort to protect its “safety team” against trolls, Twitter has asked that the members not be identified.⁹¹

Leading social media companies have also banned other right-wing individuals.⁹² Twitter has banned Milo Yiannopoulos allegedly for an online harassment campaign against an actress, as well as Chuck Johnson, a Breitbart writer, for alleged threats against a civil rights activist.⁹³ Twitter has also banned organizations such as the American Nazi Party and Golden Dawn.⁹⁴

§ 3 – IS THE SECTION 230 PARADOX JUSTIFIED?

As noted, since the First Amendment (as it has been construed thus far) does not govern the actions of social media companies, their actions are primarily governed by Section 230 of the Communications Decency Act of 1966 (CDA). The CDA was a transformative piece of legislation because it insulated social media platforms (ISPs and others) from liability by providing that they should not be treated as “publishers” or “speakers” for information posted on their sites by others.⁹⁵ The theory underlying this liability exemption was that social media platforms are not publishers, but simply provide platforms on which others may post their thoughts and ideas.

In some respects, this liability exemption makes sense. Given the millions of items posted on social media platforms every day, it would be virtually impossible for social media companies to curate all posts to make sure that they do not contain objectionable material. Section 230 therefore helps facilitate internet discourse. Indeed, the Electronic Frontier Foundation

⁸⁹ *Id.* at B6.

⁹⁰ *Id.* at B1.

⁹¹ *Id.*

⁹² See K. ROOSE, *The Alt-Right Finds a New Enemy in Silicon Valley*, *the New York Times* B6 (Aug. 10, 2017):

The alt-right isn’t necessarily wrong when it claims, as its followers often do, that Silicon Valley is steeped in social liberalism. These are companies that emerged out of Bay Area counterculture, that sponsor annual floats in gay pride parades and hang “Black Lives Matter” signs on the walls of their offices. Silicon Valley’s policy preferences aren’t always liberal, but tech executives routinely side with progressives on hot-button social issues like immigration, the Paris climate accords, and President Trump’s recent decision to bar transgender people from military service. In today’s political climate, these are partisan positions, and it’s no big shock that they have drawn suspicions from the other side.

⁹³ See Fisher, *supra* note 1804, at B5.

⁹⁴ *Id.*

⁹⁵ *Id.*, at (c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Section 230’s protections extend, not only to social media companies, but also to internet service providers (ISPs), and any online intermediary that hosts or republishes speech.

(EFF) describes Section 230 as one of the “most influential laws” governing the internet,⁹⁶ praising it for creating “a broad protection that has allowed innovation and free speech online to flourish,”⁹⁷ and for creating a positive governing framework:

This legal and policy framework has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to offer countless user reviews, craigslist to host classified ads, and Facebook and Twitter to offer social networking to hundreds of millions of Internet users. Given the sheer size of user-generated websites (for example, Facebook alone has more than 1 billion users, and YouTube users upload 100 hours of video every minute), it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users' actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online. In short, CDA 230 is perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive since 1996.⁹⁸

Section 230 protects, not only social media platforms, but also ISPs and bloggers who act as intermediaries when they host “comments on their blogs.”⁹⁹ Thus, “bloggers are not liable for comments left by readers, the work of guest bloggers, tips sent via email, or information received through RSS feeds. This legal protection can still hold even if a blogger is aware of the objectionable content or makes editorial judgments.”¹⁰⁰ Thus, “online intermediaries that host or republish speech are protected against a range of laws that might otherwise be used to hold them legally responsible for what others say and do. The protected intermediaries include not only regular Internet Service Providers (ISPs), but also a range of “interactive computer service providers,” including basically any online service that publishes third-party content.¹⁰¹

Interestingly, the legal protections provided by CDA 230 are unique to the U.S. “European nations, Canada, Japan, and the vast majority of other countries do not have similar statutes on the books.”¹⁰² While other countries have high levels of internet

⁹⁶ ELECTRONIC FRONTIER FOUNDATION, *CDA 230: The Most Important Law Protecting Internet Speech* (Hereafter “*The Most Important Law*”): <https://www.eff.org/issues/cda230> (“The Internet community as a whole objected strongly to the Communications Decency Act, and with EFF's help, the anti-free speech provisions were struck down by the Supreme Court. But thankfully, CDA 230 remains and in the years since has far outshone the rest of the law.”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

access, most online services are based in the U.S. “because CDA 230 makes the U.S. a safe haven for websites that want to provide a platform for controversial or political speech and a legal environment favorable to free expression.”¹⁰³

Even though Section 230 is in many respects beneficial, the Good Samaritan defense produces perverse results as well as a paradox. Not only does it shield social media companies from liability, on the theory that they are not editors of content, but it explicitly allows them to edit and control content. So, these “non-editors” can effectively serve as editors, or to state it more accurately, censors, while claiming an exemption from liability for their curation. Part of the problem lies with the Good Samaritan exception itself. As noted, it is both vague and overbroad, thereby giving social media companies broad authority to impose content restrictions on their websites.

While Section 230's protection against liability might be defensible, and consistent with the nation's free speech tradition, because it eliminates the potential liability that could be imposed for certain types of expression, the so-called Good Samaritan defense corrupts the system by giving social media companies broad authority to censor speech on their websites, including the banning of “objectionable speech.”¹⁰⁴

Of course, the problem is that a social media platform's views regarding “objectionable speech” may reflect its own views rather than societal views. Moreover, even if societal views are reflected, the general rule in the U.S. is that even offensive or objectionable speech is generally considered to be protected under the First Amendment. People are entitled to say offensive things provided that they do not constitute so-called “fighting words.”¹⁰⁵ For example, in *Cohen v. California*,¹⁰⁶ a man was allowed to express his opposition to the military draft in vulgar terms (“Fuck the Draft”) even though some were offended by his choice of words. As the U.S. Supreme Court recognized in *Cohen v. California*,¹⁰⁷ “while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric” The Court concluded that “because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”¹⁰⁸

Even if a majority of the U.S. public found a particular statement to be objectionable, that would not be a basis for censoring that

¹⁰³ *Id.*

¹⁰⁴ See M. CAPPETTA and B. COLLINS, A. JONES, L. FARRAKHAN, others banned from Facebook and Instagram, NBC News (May 2, 2019) <https://www.nbcnews.com/tech/tech-news/facebook-bans-alex-jones-louis-farrakhan-others-facebook-instagram-n1001311>

¹⁰⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰⁶ 403 U.S. 15 (1971).

¹⁰⁷ 403 U.S. 15, 25 (1971).

¹⁰⁸ *Id.*

statement. We do not allow the majority of the population to decide what people can, or cannot, say. As the U.S. Supreme Court recognized in *West Virginia State Board of Education v. Barnette*,¹⁰⁹

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In addition, social media platforms do not have solid mechanisms in place for censoring materials. Virtually all social media platforms attempt to control the use of their platforms through so-called “acceptable use” or “terms of service” policies;¹¹⁰ policies which give them broad authority to exclude various types of content or even to terminate or limit service to particular users.¹¹¹ Facebook uses its policy to exclude content that it deems inappropriate or unacceptable,¹¹² and it employs a team of individuals who are authorized to take down content that they deem to be illegal or in violation of Facebook’s policy.¹¹³ Until relatively recently, it was difficult to gain much insight into how social media platforms make decisions regarding which content to ban (or take down) because their content moderation guidelines were neither open nor transparent. Facebook actively tried to maintain secrecy regarding the content of its guidelines,¹¹⁴ but those guidelines became public in early 2017.¹¹⁵ The guidelines indicate that Facebook will take action against posts involving such things as hate speech, terrorist propaganda, graphic violence, adult nudity, sexual activity, child sexual exploitation, revenge porn, credible violence, suicidal posts,

¹⁰⁹ 319 U.S. 624, 638 (1943).

¹¹⁰ See *Hackers Overwhelm WikiLeaks Servers*, *supra* note 1696 (“Clay Shirky, who teaches in the Interactive Telecommunications Program at New York University, says terms-of-service agreements give these companies too much power. ‘Every corporate counsel at every large organization is basically paid to write a Web terms of service, which reads: ‘We can do anything at any time with no announcement and no recourse,’ he said.’”).

¹¹¹ See J. F. BURNS, *PayPal Drops WikiLeaks, Saying Rules Were Broken*, *International Herald Tribune*, at 7 (Dec. 6, 2010).

¹¹² *Id.*, at 7.

¹¹³ See E. PERALTA, *Is Lying on the Internet Illegal?*, National Public Radio, The Two Way (Nov. 15, 2011): <http://www.npr.org/blogs/thetwo-way/2011/11/15/142356399/is-lying-on-the-internet-illegal>.

¹¹⁴ See N. HOPKINS, *Revealed: Facebook’s internal rulebook on sex, terrorism and violence*, *The Guardian* (May 21, 2017); Kaminski & Klonick, *supra* note 1731.

¹¹⁵ *Id.*

bullying, harassment, breaches of privacy, and copyright infringement.¹¹⁶

However, Facebook’s guidelines suffer from both vagueness and ambiguity, and its policies on sexual content as “complex and confusing.”¹¹⁷ There are other problems as well. For example, the guidelines suggest that a statement like “Someone shoot Trump” should be deleted because it involves a reference to killing a governmental official,¹¹⁸ but a statement like “To snap a bitch’s neck, make sure to apply your pressure to the middle of her throat” is permissible.¹¹⁹ Facebook justifies leaving the latter post online by arguing that “people commonly express disdain or disagreement by threatening or calling for violence in generally facetious and unserious ways.”¹²⁰ Likewise, the statement fuck off and die” need not be removed.¹²¹ Photos of children being subjected to bullying or non-sexual physical abuse need not be deleted unless there is a “sadistic or celebratory element.”¹²² Videos of violent deaths are sometimes deleted, but attempts at self-harm need not be deleted.¹²³ Although photos of animal abuse or mutilation are permissible, they should be marked as “disturbing.”¹²⁴ Such photos can be removed if they reveal “sadism” which the guidelines define as “enjoyment of suffering.”¹²⁵ Child nudity is sometimes permissible but not in the context of the Holocaust.¹²⁶

The ability to make good decisions regarding take downs is aggravated by the fact that Facebook’s moderators are “overwhelmed” by the total volume of work.¹²⁷ Purportedly, Facebook receives more than 6.5 million reports a week regarding allegations of fake or improper accounts,¹²⁸ and Facebook’s moderators are sometimes forced to make decisions regarding the permissibility of content in as little as 10 seconds.¹²⁹

One thing is clear: a large amount of content has been excluded from social media platforms. In the first three months of 2018, Facebook closed some 583 million accounts that it characterized as “fake,” and took “moderation action” against some 1.5 billion

¹¹⁶ See A. HERN & O. SOLON, *Facebook closed 583m fake accounts in first three months of 2018: Firm’s first quarterly moderation report also shows scale of spam, hate speech and violence*, *The Guardian* (May 15, 2018).

¹¹⁷ See HOPKINS, *supra* note 1761.

¹¹⁸ *Id.* The explanation given was that a head of state is in a protected category.

¹¹⁹ *Id.* The explanation given was that the threat could not be regarded as a “credible” threat.

¹²⁰ *Id.*

¹²¹ *Id.* Again, it would not be regarded as a “credible threat.”

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See KAMINSKI & KLONICK, *supra* note 1731.

¹²⁶ See HERN & SOLON, *supra* note 1763.

¹²⁷ See HERN & SOLON, *supra* note 1763.

¹²⁸ *Id.*

¹²⁹ *Id.*

accounts.¹³⁰ Of these 1.5 billion moderation actions, Facebook removed some 2.5 million instances of hate speech, 1.9 million instances of terrorist propaganda, 3.4 million instances of graphic violence and 21 million instances of adult nudity and sexual activity.¹³¹ Youtube deleted 8.3 million videos in a 3 month period “for beaching its community guidelines.”¹³² These moderation actions affect a large quantity of speech. For example, in response to WikiLeaks’ decision to release diplomatic communications that had been stolen from the U.S. government, some online companies decided (perhaps, after prompting from governmental officials) to cut their ties to WikiLeaks and its supporters,¹³³ and to discontinue carrying WikiLeaks’ website.¹³⁴ Amazon was one of the companies that decided to exclude WikiLeaks,¹³⁵ stating that it was concerned about how the documents being posted online had been obtained and the possible injury that could result.¹³⁶ WikiLeaks’ website managed to stay online only by switching servers.¹³⁷

CONCLUSION

Section 230 is an anomaly. In order to encourage social media platforms to be more open and accepting of content, Section 230 provides those platforms and others with exemptions from civil liability for content posted by others. It does so on the theory that social media platforms are not “editors” of content posted by others. However, Section 230 also gives platforms the power to censor matters posted by others. As noted in this article, this power to censor goes well beyond the power that governments would be allowed to impose. One can argue that government’s decision to convey this censorial power on social media platforms, while simultaneously exempting them from civil liability, is inconsistent with the First Amendment.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *Hackers Overwhelm WikiLeaks Servers*, *supra* note 1696 (“Now if you’ve tried to see them for yourself at WikiLeaks.org, you might have run into some problems. In fact, you probably got an error message. That’s in part because all the files and website itself have been jumping around several different servers all over the world.”).

¹³⁵ *Id.*; *Amazon Cites Terms of Use in Expulsion of WikiLeaks*, *supra* note 1712, at A12 (“In a statement, Amazon – which rents server space to companies in addition to its better-known business of selling books, music and other products online – said that it had canceled its relationship with WikiLeaks not because of ‘a government inquiry,’ but because it decided that the organization was violating the terms of service for the program.”).

¹³⁶ *Id.* (“‘When companies or people go about securing and storing large quantities of data that isn’t rightfully theirs, and publishing this data without ensuring it won’t injure others, it’s a violation of our terms of service, and folks need to go operate elsewhere,’ the company said.”).

¹³⁷ *Id.*; *WikiLeaks Turns to Swiss Party for Help With Web Address, as Options Dwindle*, *The New York Times*, at A12 (Dec. 6, 2010).

It is not clear that there is an easy solution to the Section 230 problem. Obviously, Congress can amend Section 230 to limit the ability of social media platforms to censor speech. For one thing, it could prohibit them from exercising broad authority to censor any material that they regard as “objectionable.” This broad power can lead platforms to engage in viewpoint discrimination. However, an amendment to Section 230 is unlikely to happen. In recent years, although numerous statutory changes to Section 230 have been proposed,¹³⁸ none of them have gained traction. These bills fall into various categories, including efforts to repeal Section 230, to limit its scope, to impose new obligations (e.g., a duty of care), or to alter the Good Samaritan Defense to prohibit political bias or censorship.¹³⁹ For example, Representative Gohmert of Texas introduced legislation designed to repeal Section 230.¹⁴⁰ A second solution that has been proposed is to treat social media platforms as “common carriers.”¹⁴¹ The term “common carrier” refers to a company that transports goods or passengers on regular routes at set rates, or that provides a public service like telecommunications facilities.¹⁴² A common carrier is legally bound to carry all passengers or freight as long as there is enough space, the fee is paid, and no reasonable grounds to refuse to do so exist.¹⁴³ Indeed, a common carrier that unjustifiably refuses to carry a particular person or cargo may be sued for damages. Some commentators believe that, as common carriers, social media platforms should not be allowed to engage in viewpoint discrimination.¹⁴⁴

Some have called for social media platforms to be regulated in the same way as “mainstream broadcasters and publishers.”¹⁴⁵ If social media platforms were regulated like radio and television, that would mean that an entity like the U.S. Federal Communications Commission (FCC) would oversee those platforms in the U.S.¹⁴⁶ Social media platforms argue against this approach on the basis that they are not like traditional media companies. As Monica Bickered, Facebook’s head of global policy management, argues, “We build technology . . . We don’t

¹³⁸ See K. JEEVANJEE, B. LIM, I. ELY, M. PERAULT, J. RUDDOCK, T. SCHMELING, N. VATTIKONDA & J. ZHOU, *All the Ways Congress Wants to Change Section 230*, *Slate* (Mar. 23, 2021) <https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html>

¹³⁹ *Id.*

¹⁴⁰ H.R.874 — 117th Congress (2021-2022) (“This bill repeals Section 230 of the Communications Act of 1934, which protects a provider or user of an interactive computer service (e.g., social media company) from liability for screening or blocking objectionable content.”).

¹⁴¹ See P. HAMBURGER & C. MORELL, *On Censorship, Big Tech Has It Both Ways*, *The Wall Street Journal* A13 (July 31-Aug. 1, 2021).

¹⁴² See J. H. LISTER, *The Rights of Common Carriers and the Decision Whether to Become a Common Carrier or a Non-Regulated Communications Provider*, 53 F.C.L.J. 91, 92 (2000).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See HOPKINS, *supra* note 1761.

¹⁴⁶ *Id.*

write the news that people read on the platform.”¹⁴⁷ But, if social media platforms are going to exercise editorial authority over content posted on their websites, they are becoming much more like traditional media.

Despite the unlikeliness of that occurring, a preferred solution would be to amend Section 230 to limit the censorial power of social media platforms if they choose to accept civil liability protections. Thus, they could choose to decline Section 230 civil liability protections in exchange for the right to exercise censorial control over their platforms. However, if they choose to accept such protections, their censorial authority should only extend to material that government has the power to restrict under the First Amendment.

¹⁴⁷ *Id.*