
ONLINE HARASSMENT, PROFIT SEEKING, AND SECTION 230

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Liberals, to paint with a very broad brush, generally believe that government regulation will give us a better world than a free market will. For example, the environment will be cleaner if there are restrictions on how much factories can pollute the land, air and water. And working conditions will be better if employers must hire in a nondiscriminatory manner, pay a minimum wage, and devote attention to health and safety concerns. Speech, however, is often an outlier. Many liberals staunchly oppose any regulation of speech. The U.S. government has made so many truly bad speech interventions, this is understandable, but still problematic.

Stanley Fish has observed that within the realm of legal scholars, First Amendment absolutists “elevate the status of expression to an ultimate good and at the same time either deny the harm – the statistics are inconclusive; the claims cannot be proved—or minimize it in relation to the threat regulation poses to free expression.”¹ He credits Jeremy Waldron with explaining “that the position is formulated and presented as an admirable act of unflinching moral heroism by white liberal law professors who say loudly and often that we must tolerate speech we find hateful. Easy to say from the protected perch of a faculty study, where the harm being talked about is theoretical and not experienced.”²

The United States has a uniquely expansive view of free speech. Our First Amendment free speech jurisprudence, like our Second Amendment right to own guns, is an example of American exceptionalism that often privileges the rights of actors over those of the acted upon. In her book *Hate Crimes in Cyberspace*, Danielle Keats Citron exhaustively describes the terrible harms that are inflicted on people by other people using weaponized online speech.

Rather than further enumerating harms, however, one productive way to build upon Citron’s excellent work is to focus more intensively upon the monetary benefits of nearly unfettered Internet speech, and on who is reaping them. As Citron discusses in Chapter Seven, Internet Service Providers (ISPs) and website operators engineered the inclusion of a provision in the Communications Decency Act, Section 230, which immunized them from content based liability

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¹ Stanley Fish, *The Harm in Free Speech*, N.Y. TIMES (June 4, 2012), <http://opinionator.blogs.nytimes.com/2012/06/04/the-harm-in-free-speech/>.

² *Id.*

as long as the content was not generated by them, was not in violation of federal criminal law, or of the Electronic Communications Privacy Act or infringed someone's intellectual property rights.³

What she touches on far too briefly are the revenue producing and money saving advantages that Section 230 provides for Internet businesses both big and small. She laments the disgusting websites that profit from hate speech and nonconsensual porn. She expresses less concern about the mercenary corporations that earn billions by hosting, indexing, promoting and advertising these abhorrent websites; huge, "respectable" companies like Yahoo, Google, Facebook, Twitter, Instagram and Microsoft. They launder the proceeds of hate speech, and happily cash the checks.

Anyone hosting a small blog knows that a good flame war or pile on will increase your links and page views, and therefore your advertising income. On a much bigger scale the same incentives apply to the largest ISPs. They create and host platforms designed to attract as much online traffic as possible. They benefit monetarily from popular content that is often hostile and offensive to groups with less power in society, such as sexual minorities, racial minorities, religious minorities, and, as Citron describes in such harrowing detail, to women generally. Under Section 230 the financial incentives for ISPs all fall in favor of ignoring internet harassment. Controversial news reports, gossip blogs and sexy intriguing dating profiles, even when false, generate logons, eyeballs, and browser clicks, all the things that lead to revenue streams. Section 230 enables large ISPs to disclaim any legal or moral responsibility for the harms that online speech can inflict all the way to the bank.

Treating an Internet Service Provider like a conventional publisher would elide important differences between the process of publishing a book, magazine or newspaper, and the technological methods by which material is added to and distributed on the Internet. That is the problem Section 230 solves admirably. But that doesn't mean ISPs couldn't be legally required to offer assistance, when requested, to the victims of online bullying, stalking and harassment. Citron notes that the almost absolute immunity enjoyed by ISPs could be ratcheted down a little. She suggests amending Section 230 to allow civil or criminal liability when a website purposefully encourages cyberstalking or nonconsensual pornography and then seeks financial remuneration for its removal, or when it exists primarily to host cyberstalking or nonconsensual pornography. This, however, offers nothing to the victims of large corporate platform based abuse, as Citron concedes.⁴

Reform must be bolder to have any measurable effect. A more conditional ISP immunity could be framed somewhat along the lines of the Digital Millennium Copyright Act (DMCA). Under the so called "notice and takedown" provisions of the DMCA, when an ISP takes down online information that has been used in a way that a copyright holder alleges was not authorized, it is

³ DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 170-72 (2014).

⁴ *Id.* at 177-78.

essentially immune from copyright based liability for distributing infringing materials. If it chooses not to respond to the copyright holder's demand, however, the ISP may later have to defend its decision not to takedown the disputed material on the merits. Risk aversion usually motivates takedowns. Even now, when victims hold the copyright in photos used to torment them, and ask ISPs to remove them for copyright reasons, ISPs generally remove them with great alacrity to avoid potential liability for copyright infringement. A recalibration of Section 230 immunity could establish a similar framework that creates potential liability when ISPs refuse to assist people whose victimization through online bullying, stalking and harassment they are facilitating and profiting from. Because speech torts are so much harder to prove than intellectual property infringement, takedowns in this realm are less likely to be routine.

Opposition to changing Section 230 has been fierce, because complying with government regulations always costs money. This opposition is also incredibly disingenuous: The stentorian and self-serving ISP party line is that without Section 230, behemoth online presences like Google, Yahoo, Bing, Facebook, YouTube and Twitter would not exist. Citron appears to accept this argument.⁵ But I do not believe it for one second, and you shouldn't either. If they had to actively respond when their cyber products were actively harming people, just like other companies that make things are usually forced by law to do, their businesses might be less profitable. But they would still be highly profitable. And as long as there is money to be made on the Internet, ISPs will be pursuing those dollars. How do I know this with absolute certainty? Because all of these companies do business in countries that do not have corollary immunity laws. Canada has Facebook and Twitter and Google and Instagram and Yahoo *et al.* even though it does not have a Section 230 equivalent and even though it, like other democracies including Britain, France, Germany, Denmark, Canada and New Zealand, actively prohibits some forms of hate speech.

Section 230 saves ISPs money. That is its real value to them. It largely prevents them from having to protect, compensate or even interact with people who are harmed by the goods and services they produce. They love it, but they do not need it (though they instrumentally claim otherwise). Internet companies function and often reap huge profits all over the world without any extant Section 230 like content related immunity. They are willing to take risks for money.

Many multinational ISPs were alarmed when three Google executives were criminally convicted *in absentia* in Italy for a privacy violation because the company hosted a video in which an autistic child was being bullied.⁶

⁵ *Id.* at 171.

⁶ John Hooper, *Google Executives Convicted in Italy over Abuse Video*, *GUARDIAN* (Feb. 24, 2010), <http://www.theguardian.com/technology/2010/feb/24/google-video-italy-privacy-convictions>.

Ultimately, though, the convictions were reversed on appeal,⁷ and there is no evidence that a single Internet company stopped doing business in Italy, even though the possibility of future content related arrests remains.

If Section 230 style immunity was critical for any reason other than maximizing profits, no ISP would do business in China, which has a highly censored Internet infrastructure, and actively jails people for criminal speech offenses such as “spreading rumors.”⁸ Yet Google is actively trying to expand its presence there.⁹ So are Microsoft,¹⁰ Facebook,¹¹ Linked In,¹² and Twitter¹³ just to name a few. All the large Internet companies are operating in China to the maximum extent that the Chinese government will allow, because they can make a lot of money there, in spite of the dangers.

⁷ Two years later the executives were acquitted. Eric Pfanner, *Italian Appeals Court Acquits 3 Google Executives in Privacy Case*, N.Y. TIMES (Dec. 21, 2012), <http://www.nytimes.com/2012/12/22/business/global/italian-appeals-court-acquits-3-google-executives-in-privacy-case.html>.

⁸ See, e.g., Scott Neuman, *China Arrests Nearly 200 Over ‘Online Rumors,’* NAT’L PUB. RADIO (Aug. 30, 2015), <http://www.npr.org/sections/thetwo-way/2015/08/30/436097645/china-arrests-nearly-200-over-online-rumors>.

⁹ Alistair Barr, *Google Pursuing a Return to China*, WALL ST. J. (Sept. 4, 2015), <http://www.wsj.com/articles/google-negotiates-a-return-to-china-1441408051>.

¹⁰ Robert McMillan and Gillian Wong, *Microsoft Forms New Partnerships in China*, WALL ST. J. (Sept. 24, 2015), <http://www.wsj.com/articles/microsoft-signs-search-pact-with-baidu-in-china-1443045343>.

¹¹ Shannon Tiezzi, *Facebook’s China Push*, DIPLOMAT (Dec. 11, 2014), <http://thediplomat.com/2014/12/facebooks-china-push/>.

¹² Katie Benner, *How LinkedIn Cracked the Chinese Market*, BLOOMBERG VIEW (Oct. 30, 2014), <http://www.bloombergvie.com/articles/2014-10-30/how-linkedin-cracked-the-chinese-market>.

¹³ James Griffiths, *Twitter Launches Hong Kong Office to Court Mainland Chinese Firms*, SOUTH CHINA MORNING POST (Mar. 10, 2015), <http://www.scmp.com/news/hong-kong/article/1734257/no-intention-re-enter-china-says-twitter-executive-hong-kong-hq>.