

U.S. House of Representatives Committee on Energy and Commerce

Subcommittee on Communications and Technology

Hearing: “Where Are We Now: Section 230 of the Communications Decency Act of 1996.”

Written Testimony of Dr. Mary Anne Franks

Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil

Rights Law, George Washington Law School

President and Legislative & Tech Policy Director, Cyber Civil Rights Initiative

Submitted April 9, 2023

## Summary

Section 230 was enacted as a “Good Samaritan” law for the Internet, that is, a law that seeks to encourage pro-social behavior by providing legal protection for voluntary, good faith efforts to assist others. It was originally conceived to reward online intermediaries who take affirmative steps to restrict harmful content on their platforms with immunity from liability for those actions. For nearly thirty years, however, courts have instead interpreted the law to preemptively absolve online intermediaries of liability for harms facilitated by their sites and services, even when they could easily have chosen to prevent them and even when they solicit, amplify, or profit from them. Such unqualified immunity not only erases the incentive to help that Section 230 was intended to provide, but creates an incentive to harm. Doing nothing is always cheaper than helping, and harmful content can be very profitable. As long as tech platforms are allowed to enjoy the benefits of doing business without any of the burdens, they will have little incentive to take care and every incentive to be reckless in their pursuit of profit. There is no justification for exempting the tech industry from the liability that virtually all individuals and industries face when they contribute to harm, especially an industry with such outsized capacity to inflict or accelerate wide-scale and irreparable harm, including sexual exploitation, self-harm, violent radicalization, and democracy-destroying disruptions to the information ecosystem. For too long, Section 230 has been allowed to shut the courtroom door on individuals who have experienced grievous injury, giving the tech industry an unearned competitive advantage over other industries, displacing massive amounts of settled law, and keeping the public in the dark about practices that affect the health, education, and safety of us all.

## I. The Origins of Section 230 as a Good Samaritan Law for the Internet

In the Biblical parable of the Good Samaritan, a traveler is beaten by robbers and left half dead by the side of the road. A priest sees him but passes by without stopping; a Levite later does the same. Finally, a man from Samaria comes upon the injured traveler. Even though he was in no way responsible for the traveler's plight, the Good Samaritan stops, tends to the man's wounds, and takes him to an inn to receive further care.

In the United States, a bystander generally has no duty to be a "good Samaritan," that is, to assist an injured person even if one could easily do so. See Restatement (Second) of Torts § 314. The duty to assist an imperiled person arises only in specific circumstances, such as the existence of a special relationship between the parties or where the rescuer is responsible for creating the initial danger. *Id.* §§ 314A, 314B, 321, 322. Under common law, choosing to be a good Samaritan comes at a cost: a person who voluntarily undertakes to rescue or render aid to a stranger assumes a duty, which makes that person liable for harm that might result from this effort. *Id.* §§ 323, 324. "The result of all this is that the good Samaritan who tries to help may find himself mulcted in damages, while the priest and the Levite who pass by on the other side go on their cheerful way rejoicing." William L. Prosser & W. Page Keeton, *Law of Torts* § 56, at 340 (4th ed.1971).

In an attempt to eliminate the disincentive to help created by these common law rules, all states have enacted some form of "Good Samaritan" legislation to protect individuals from civil liability for any negligent acts or omissions committed while voluntarily providing emergency aid or assistance. See Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good*

*Samaritan*, 51 Val. U.L. Rev. 1, 31–32 (2016); Annotation, *Construction and application of “Good Samaritan” statutes*, 68 A.L.R.4th 294 (1989).

In 1996, Congress passed a “Good Samaritan” law for the internet: Section 230 of the Communications Decency Act. The operative provision of Section 230 is titled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” The heart of Section 230 is subsection (c)(2), which offers immunity from civil liability to providers and users of interactive computer services (such as search engines, social media platforms, and other online intermediaries) for actions “voluntarily taken in good faith to restrict access to or availability of” harmful content.

Congress was prompted to enact Section 230 to address a seeming tension between a pair of defamation cases decided in the early days of the commercial Internet. The first was *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), where a federal district court held that CompuServe, an early internet service provider, could not be liable for defamatory content posted on one of its forums because it had no notice of its unlawful nature. Because CompuServe made no effort to screen content, the federal court found that the service had no notice and therefore no liability. The second was *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), where a state trial court held that another early internet service provider, Prodigy Services Co., was liable for defamatory content on its platform because the site had made attempts to screen content for offensiveness. *Id.* at \*4. The state court characterized this screening as “editorial control,” rendering Prodigy a “publisher” for purposes of defamation law. *Id.*

Taken together, the rulings seemed to indicate that online intermediaries risked publisher liability if they attempted to screen or block certain content, but could avoid publisher liability if

they did not. Then-Congressman Chris Cox, one of the co-sponsors of Section 230, criticized the *Prodigy* ruling as “backward,” maintaining that internet service providers should be encouraged, not discouraged, from “do[ing] everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.” 141 Cong. Rec. H8460-01 at 8469 (Aug. 4, 1995).

Section 230 was intended to do just that: enable and incentivize online intermediaries to engage in moderation and other content-management practices to protect users from harmful content. As the House Committee Report on the law explained:

[Section 230] provides “Good Samaritan” protections from civil liability for providers or users of an interactive computer service for actions *to restrict or to enable restriction of access to objectionable online material*. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own *because they have restricted access to objectionable material*.

H.R. Conf. Rep. No. 104–458, at 194 (1996) (emphases added).

These overarching goals of encouraging online intermediaries to take affirmative, voluntary steps to remove harmful material were also codified in the law itself. Section 230 states that it is “the policy of the United States” to “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services,” and to “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.” 47 U.S.C. § 230(b).

Section 230(c)(2) is “a parallel to state Good Samaritan statutes that protect those who voluntarily provide emergency aid. Its aim is to shield (from tort liability) those who voluntarily protect individuals from Internet speech that would harm them; removing such speech or filtering will not generate civil liability; courts will not be allowed to convert an online intermediary’s affirmative undertaking into a basis for liability.” Zipursky, 51 Val. U.L. Rev. at 33. As with other Good Samaritan statutes, the immunity provided by Section 230(c)(2) is not unlimited. First, it does not apply when an online intermediary is already under an existing duty to act—*i.e.*, where its action to restrict access to objectionable third-party content is not “voluntary.” 47 U.S.C. §230(c)(2). In addition, Section 230(c)(2) does not provide immunity to online intermediaries that do nothing to address harm or that contribute to or profit from harm. See *id.* (requiring, as a condition of immunity for an online intermediary, that there be “action . . . taken” and that it is done in “good faith”).

Section 230’s other main provision, (c)(1), states that “[n]o 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.” This provision makes no reference to immunity, but impliedly limits the kinds of actions that can be brought against online intermediaries on the basis of third-party content. The choice of the terms “publisher” and “speaker” indicate that this limitation applies only to speech-related causes of action (*i.e.*, common-law defamation and comparable claims), and more specifically to what is known as “republishing liability” in defamation law.

At common law, defamation liability extended not only to the original speaker of a defamatory statement, but also to any “publisher” of the statement. See Restatement (Second) of Torts § 578 (1977) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to

liability as if he had originally published it.”). Liability of this nature extended to publishers such as newspapers, magazines, and book publishers, see *id.*, cmt. b, as well as to televisions and radio broadcasters, see *id.* § 581(b). Furthermore, other speech- or information-based “torts at common law follow this mold, imposing liability on publishers for the improper nature of their disseminated content.” *Henderson*, 53 F.4th at 122 n.15. (identifying as examples claims based on false-light invasion of privacy and publicity given to private life).

However, “[d]efamation at common law distinguished between *publisher* and *distributor* liability.” *Id.* at 121 n.12 (emphases added). While a publisher was strictly liable for carrying defamatory matter, a distributor who only “delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.” Restatement (Second) of Torts § 581. This sort of distributor-based liability extended to anyone “transferring or circulating” material they knew or had reason to know was defamatory, including news dealers, bookstores, libraries, and telegraph operators. See *id.*, cmts. d–f.

The meaning and scope of Section 230(c)(1) is clear when viewed through the lens of these common-law antecedents. Subsection (c)(1) operates solely to prevent *publisher*-based liability from attaching in a speech claim where the online intermediaries has done nothing more than provide access to third-party content. The fact that Congress chose to use the word “publisher” indicates that this protection does not extend beyond the kinds of speech claims where “publisher” status has relevance. Moreover, even in the context of such speech claims, Congress made clear that an online intermediary may still face *distributor*-based liability, based on third-party content an online intermediary knew or should have known was harmful. This result follows from the presumption that the omission of the term “distributor” was a deliberate choice

on the part of Congress in decided the scope of protection online intermediaries should enjoy for speech claims based on third-party content.

## II. Section 230 Has Become a Bad Samaritan Law

For nearly thirty years, however, most courts have ignored the text and history of Section 230 and instead interpreted this online Good Samaritan law to protect not only Internet sites and services that attempt to restrict harmful content, but also those that make no effort to restrict access to harmful content. Worse still, some courts have even interpreted the law to protect those who *solicit* harmful content, *amplify* it, and even *profit* from it. Section 230 has been used to protect online classifieds sites from facing liability for sex trafficking ads,<sup>1</sup> online firearms sellers from facing liability for facilitating unlawful gun sales to domestic abusers who went on to murder their estranged partners,<sup>2</sup> online message boards from facing liability for livestreaming massacres and spreading terrorist propaganda,<sup>3</sup> and online marketplaces from facing liability for putting defective products into the stream of commerce.<sup>4</sup> In this upside-down version of the Good Samaritan parable, not only indifferent priests and Levites, but also enterprising passersby directing crowds to the bloody spectacle for a price, are granted the same protections as the Good

---

<sup>1</sup> See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

<sup>2</sup> See, e.g., *Daniel v. Armslist, LLC*, 2019 WI 47, 386 Wis. 2d 449 N.W.2d 710, *cert. denied*, No. 19-153, 2019 WL 6257416 (U.S. Nov. 25, 2019).

<sup>3</sup> Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, *Wired* (Aug. 13, 2019) <https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/>.

<sup>4</sup> See, e.g., *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496 (M.D. Pa. 2017), *affirmed in part, vacated in part*, 930 F.3d 136 (3d Cir. 2019), *vacated en banc*, 936 F.3d 182 (3d Cir. 2019).

Samaritan. In other words, courts have treated Section 230 not as the Good Samaritan law that Congress enacted, but as a Bad Samaritan law that rewards reckless, unaccountable, and destructive online behavior.

“Notwithstanding what seems to be a direct message from Congress in the very naming of the statute, it turns out to have been difficult for courts and commentators alike to grasp its main point.” Zipursky, 51 Val. U.L. Rev. at 2. Instead, “courts have extended the immunity in [Section] 230 far beyond anything that plausibly could have been intended by Congress.” Rodney Smolla, 1 Law of Defamation § 4:86, at 4–380 (2d ed. 2019). “Nothing in the text, structure, or history of [Section] 230 indicates that it should provide blanket immunity to service providers that do nothing to respond” to harmful content. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 116 n.377 (2009). The unconditional-immunity view is “hard to square with a plain reading of the statute,” which clearly indicates that the “operative reasons for immunity” are screening and limiting access to objectionable content. Olivier Sylvain, *Intermediary Design Duties*, 50 Conn. L. Rev. 203, 239 (2018).

Beginning with the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), most courts have interpreted Section 230 as giving online intermediaries essentially unconditional immunity in cases involving third-party content. This interpretation of Section 230 contravenes the text, history, and purpose of the law as providing “Good Samaritan” protection. Put simply, a law cannot incentivize the rendering of aid if that law is interpreted to confer the same benefit upon those who render aid and those who do not. Interpreting Section 230 to shield online intermediaries from liability even when they are indifferent to or benefit from harm actively undermines Good Samaritan behavior and flouts the policy decision made by Congress.

This “unconditional-immunity” interpretation of Section 230 is a complete inversion of the law’s purpose of enabling and incentivizing “Good Samaritan” conduct. As Judge Frank Easterbrook noted in one lower court decision, this approach to Section 230 immunity makes online intermediaries “indifferent to the content of information they host or transmit [because] whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law.” *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003). Given that “precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers,” it follows that online intermediaries “may be expected to take the do-nothing option and enjoy immunity under [Section] 230(c)(1).” *Id.* at 660. Worse yet, decisions adopting a “outlandishly broad” interpretation of Section 230 “have served to immunize platforms dedicated to abuse and others that deliberately host users’ illegal activities.” Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 *Fordham L. Rev.* 401, 403 (2017). This reading of Section 230 gives indifferent and unscrupulous online intermediaries a competitive advantage over responsible online intermediaries dedicating costly resources to safety and harm prevention.

It also gives the tech industry generally a competitive advantage over virtually every other industry and over most private individuals. Most people, most of the time, can be held liable of for causing harm. This is true even if they cause it indirectly and unintentionally, and especially if they benefit in some way from the harm. As Justice Elena Kagan asked during oral argument in *Gonzalez v. Google*, 598 U. S. \_\_\_\_ (2023), “every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass?” Auto manufacturers can face liability for making engines that catch fire. Hospitals can be sued for botched surgeries.

Grocery stores can be held responsible for failing to maintain safe premises. Employers can be held liable for failing to respond to reports of discrimination.

Removing the potential for liability from an industry that thrives on risky behavior creates what economists call a moral hazard<sup>5</sup>: the increased willingness to take risks when one is protected from the consequences. If a tech company knows that it will not have to absorb the negative impact of potentially dangerous but lucrative product or service, there is little incentive for it to ensure that it is safe before unleashing it on the public. An industry moves fast and breaks things when it does not have to pick up the pieces.

Perpetuating this kind of Bad Samaritan immunity is especially egregious considering how Internet and social media platforms can exacerbate and magnify the harms of abuse and harassment. The anonymity provided by many social media platforms allows the perpetrators of abuse to avoid detection. The reach and amplification of social media allow abuse to be crowdsourced and broadcast to a wide audience. And the permanence of online content means that harmful content or private information can be nearly impossible to remove from public view. All of this contributes to the virtual captivity in which online abuse permeates every aspect of the victim's life, and opportunities to escape from the global reach of technology are extremely limited. It is therefore no wonder that online abuse has serious consequences for victims' freedom of expression, professional and educational opportunities, civic participation, and mental health. Given that the costs of online injuries so often fall disproportionately on marginalized populations, the ability to hold online intermediaries responsible is also key to

---

<sup>5</sup> See Mary Anne Franks, *Moral Hazard on Stilts: 'Zeran's' Legacy*, The Recorder (Nov. 10, 2017).

protecting “cyber civil rights,”<sup>6</sup> a phrase coined by Professor Danielle Keats Citron in 2009.<sup>7</sup>

Abundant empirical evidence demonstrates that online abuse further chills the intimate, artistic, and professional expression of individuals whose rights were already under assault offline.<sup>8</sup>

In denying those injured by reckless tech practices access to the courts, Section 230 impinges on a right “conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship ...” *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 28. Tort law, John Goldberg and Benjamin Zipursky write in their book *Recognizing Wrongs*, “is a mechanism of accountability” that provides victims of wrongdoing a direct path to redress, not contingent on “the solicitude of those who injure them or on the beneficence of charitable organizations or government benefits programs.” But Section 230 preempts plaintiffs from ever bringing suit in many cases, and

---

<sup>6</sup> Danielle Citron and Mary Anne Franks, “Cyber Civil Rights in the Time of COVID-19,” *Harvard Law Review* (blog), *Harvard Law Review*, May 14, 2020, <https://blog.harvardlawreview.org/cyber-civil-rights-in-the-time-of-covid-19>.

<sup>7</sup> Danielle K. Citron, “Cyber Civil Rights,” *Boston University Law Review*, (February 2009), [https://scholarship.law.bu.edu/faculty\\_scholarship/617](https://scholarship.law.bu.edu/faculty_scholarship/617).

<sup>8</sup> Jonathon Penney, “Whose Speech Is Chilled by Surveillance?,” *Slate*, Jul. 7, 2017, <https://slate.com/technology/2017/07/women-young-people-experience-the-chilling-effects-of-surveillance-at-higher-rates.html>; Caitlin Ring Carlson & Haley Witt, “Online harassment of U.S. women journalists and its impact on press freedom,” *First Monday*, 25, November 11, 2020, <https://firstmonday.org/ojs/index.php/fm/article/download/11071/9995>; Lucina Di Meco & Saskia Brechenmacher, “Tackling Online Abuse and Disinformation Targeting Women in Politics,” *Carnegie Endowment for International Peace*, November 30, 2020, <https://carnegieendowment.org/2020/11/30/tackling-online-abuse-and-disinformation-targeting-women-in-politics-pub-83331>

ensures that those suits which are brought will rarely survive a motion to dismiss on Section 230 grounds.

Litigation is valuable in ways that are not contingent on or reducible to whether the claim is vindicated in the end. “Even when a plaintiff’s case fails on the merits, judicial engagement with the details of her claim helps to frame her suffering as a legible subject of public attention and governance.” Douglas A. Kyar, “The Public Life of Private Law: Tort Law as a Risk Regulation Mechanism,” *European Journal of Risk Regulation*, 9, No. 1 (2018): 48–50. Moreover, in many cases, the discovery process will provide significant value not just to the plaintiff in the case at hand, but to legislators, regulators, future plaintiffs, and the public.

Prolonged discovery ... will enable plaintiffs to uncover more information about the nature, nexus, and extent of prior crimes and torts on websites. Plaintiffs could use the locomotive of discovery to unearth aggravating factors, such as whether the ISP profited by being too closely connected to fraudulent schemes that injured consumers. Discovery in these cases might even result in ISPs or websites being stripped of their immunity as primary publishers because of a close connection to the creators of illegal content.

Michael L. Rustad & Thomas H. Koenig, “Rebooting Cybertort Law,” 382.

### III. Response to Defenses of the Section 230 Status Quo

Defenders of the Section 230 status quo sometimes suggest that restriction of its protections would render online intermediaries legally responsible for everything users post on their platforms. But the withdrawal of immunity is not the same thing as the imposition of liability.

The bystander who fails to help a robbery victim does not enjoy the benefit of Good Samaritan immunity, but this does not mean the bystander is legally responsible for the robbery. It is only when and if that bystander not only fails to help, but actively causes harm—for example, by taking photos of the victim to distribute for profit—that they could and should face potential liability for that harm.

Another common claim is that Section 230 exceptionalism is justified because the tech industry is a speech industry, and speech deserves special protection under the First Amendment. Any risk of liability – the mere *possibility* of being sued – will force tech companies to take down any third-party content that could be controversial, resulting in the loss of valuable, First Amendment-protected expression.

It is first important to note that the way that Section 230 is currently interpreted shields far more than speech protected by the First Amendment – everything from defamation to credit card transactions to sales of illegal firearms. People use the Internet for a vast array of activities that are not “speech” in any First Amendment sense: paying bills, selling stolen goods, shopping for dog leashes, booking hotel rooms, renewing driver’s licenses. The fact that Section 230 uses the term “information” rather than “speech” has helped tech platforms invoke the law to absolve themselves of responsibility for virtually everything individuals do online – a protection that goes far beyond anything the First Amendment would or should protect.

Second, the tech industry is not the only speech-focused industry. Colleges and universities are very much in the business of speech, but they can be sued for discrimination and harassment. So can book publishers and book distributors, radio stations, newspapers, and television companies. The *New York Times* and *Fox News* have no special, sweeping immunity from liability the way the tech industry does. The newspaper and television industries have not

collapsed under the weight of potential liability, nor can it plausibly be argued that the potential for liability has constrained them to publishing and broadcasting only anodyne, non-controversial speech.

Of course, some calls for tech industry liability do indeed threaten free speech. Some of the most pernicious attacks on free speech and the First Amendment in recent years have come in the guise of Section 230 reform. Social media platforms are private entities with their own First Amendment rights of speech and association. It is vitally important to respect those rights and to reject any attempt by government actors to force social media platforms to carry certain speech or demand that they provide access to certain speakers. Respecting free speech and the First Amendment means respecting tech companies' right to fact-check, label, remove, ban, and make other interventions as they see fit about the content on their sites. Providing additional or alternative information to false or misleading posts is classic "counterspeech," a treasured First Amendment value. The First Amendment also protects the right to refuse to host content altogether, as the right to free speech includes both the right to speak and the right *not* to speak. As the Supreme Court held in *West Virginia State Board of Education 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." The First Amendment also protects the right of association, including the right of private actors to choose with whom they wish to associate. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). And the Supreme Court has long recognized that private-property owners generally have the right to exclude individuals from their property as they see fit. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980).

But allowing tech companies to enjoy unqualified immunity for everything they promote and profit from inflicts economic, physical, psychological and free speech harms. Those targeted for abuse shut down social media profiles and withdraw from public discourse. Those with political ambitions are deterred from running for office. Journalists refrain from reporting on controversial topics. While the current model shielding the tech industry from liability may ensure free speech for the privileged few, protecting free speech for all requires legal reform.

#### IV. Recommendations for Reform

Given that the Supreme Court in *Gonzalez* passed on the opportunity to correct the misreading of Section 230 that has plagued courts for decades, Congress should take up the responsibility of amending Section 230 to clarify its purpose and foreclose interpretations that render the statute incoherent. At a minimum, this means two specific changes: one, amending the statute to make clear that interactive computer service providers that demonstrate deliberate indifference to harmful content are ineligible for immunity; and two, making clear that the law's protections apply only to speech.

To accomplish the first change, Section 230 (c)(1) should be amended to state that providers or users of interactive computer services cannot be treated as the publisher or speaker of speech *wholly provided by* another information content provider, *unless such provider or user intentionally encourages, solicits, or generates revenue from the speech, or exhibits deliberate indifference to harm caused by that speech.*

To accomplish the second change, the word “information” in Section 230 (c)(1) should be replaced with the word “speech.” This revision would put all parties in a Section 230 case on notice that the classification of the content at issue as protected speech cannot be assumed, but

instead must 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.