STORMY WATERS FOR THE INTERNET'S SAFE HARBOR: THE FUTURE OF SECTION 230

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ABSTRACT

There is currently a legal loophole for interactive computer services like Google and Facebook that protects them from liability for content posted by others. The Communications Decency Act of 1996 provides this immunity under Section 230 (The Safe Harbor Provision). Though the law has been a stalwart of protection for Internet companies across a range of situations for decades, mounting political, public, and judicial pressure, compounded with the gap between the law's intended and actual outcomes, should lead tech giants to be wary of a sea change in liability. This paper examines how Internet giants and lawmakers can work together to provide a peaceable solution that best serves the interest of all parties, including the public.

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I. INTRODUCTION

Currently, there is a legal loophole for "interactive computer services" like Google and Facebook that protects them from liability for content posted by others.[1] The Communications Decency Act of 1996 (CDA) provides this immunity under § 230 (The Safe Harbor Provision).[2] Though originally intended to prevent the distribution of child pornography on the Internet,[3] the CDA has remained relevant for a different purpose: the nearly ironclad protection § 230 provides to websites from the actions of third-party bad actors.[4] However, social media's unrelenting cultural influence[5] begs the question: are lawmakers advised to revisit the Safe Harbor they created over two decades ago?[6] Alternately, will a changing tide of judicial opinion shift the consensus in

1. Telecommunications Act of 1996, 47 U.S.C. § 230 (1996); *see also* Manchanda v. Google, No. 16-CV-3350 (JPO), 2016 WL 6806250, at *2 (S.D.N.Y. Nov. 16, 2016); Getachew v. Google, Inc., 491 F. App'x 923 (10th Cir. 2012) (holding that Google, as an interactive computer service, is subject to § 230 protection).

2. 47 U.S.C. § 230.

3. *See* 141 CONG. REC. 2957, 3203 (1995) (statement of Sen. Exon); Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 1–2 (2017) (citing Reno v. ACLU, 521 U.S. 844, 885 (1997) (finding sections of the original law unconstitutional)).

4. Goldman, *supra* note 3. *See also* Shari Claire Lewis, *Self-Proclaimed Publisher of Fake News Sites Loses Circuit Appeal*, N.Y. L.J., Dec. 19, 2016, http://www.advance.lexis.com.

5. *Social Media Fact Sheet: Demographics of Social Media Users and Adoption in the United States*, PEW RES. CTR. (Feb. 5, 2017), http://www.pewinternet.org/fact-sheet/social-media/ (noting that in 2005, only five percent of Americans used a social media platform, while today that number has grown to sixty-nine percent).

6. *See generally* 47 U.S.C. § 230.

the wake of alleged presidential election meddling,[7] journalistic chaos,[8] terrorism,[9] and data privacy concerns?[10]

In 2016, the Second Circuit, in *FTC v. LeadClick Media, LLC*, articulated the long-held consensus that § 230 provides immunity for Internet service providers when "deciding whether to publish, withdraw, postpone or alter content," as long "interactive computer service[s]"make "'good faith' efforts to block and screen offensive content."[11] Section 230 makes this clear by explaining "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[12]

However, in the same case, the Second Circuit also ruled that the "fake news" site in question was not privy to § 230 protection since "a defendant acting with knowledge of deception who either directly participates in that deception or has the authority to control the deceptive practice of another, but allows the deception to proceed, engages, through its own actions, in a deceptive act or practice that causes harm to consumers."[13] The question emerges: if companies like Facebook knowingly allow promulgation of incorrect information,[14] or user data to be manipulated,[15] will judges continue to interpret § 230 as proffering an immutable defense?

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7. *See* Cecilia Kang, Nicholas Fandos & Mike Isaac, *Tech Executives are Contrite About Election Meddling, but Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html?_r=0 (reporting that during hearings concerning social media's role in Russia's influence in the 2016 election, Senator Chris Coons, a Democrat from Delaware, asked, "Why has it taken Facebook 11 months to come forward and help us understand the scope of this problem . . . and begin to work in a responsible legislative way to address it?").

8. *See* Craig Silverman & Lawrence Alexander, *How Teens in the Balkans are Duping Trump Supporters with Fake News*, BUZZFEED NEWS (Nov. 3, 2016, 7:02 PM), https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo?utm_term=.dyMr5k9KP#.buEyo3Jev.

9. *See* Sam Levin, *Tech Giants Team Up to Fight Extremism Following Cries That They Allow Terrorism*, GUARDIAN (June 26, 2017, 3:24 PM), https://www.theguardian.com/technology/2017/jun/26/google-facebook-counter-terrorism-online-extremism.

10. *See* Keith Collins & Larry Buchanan, *How Facebook Lets Brands and Politicians Target You*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/interactive/2018/04/11/technology/facebook-sells-ads-life-details.html?module=inline.

11. 838 F.3d 158, 173–75 (2d Cir. 2016).

12. *Id.* at 173 (quoting 47 U.S.C. § 230(c)(1) (2018)).

13. *Id.* at 170.

14. *See* Silverman & Alexander, *supra* note 8.

15. Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 PM), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election (describing how Steve-Bannon-headed Cambridge Analytica used Facebook data taken without the consent of users to create targeted political ads in 2014).

Though decades of precedent articulating § 230 immunity paint an initially rosy picture for tech companies,[16] this case presents a potential wrinkle: companies that produce their *own* content or *allow deception to proceed* might abdicate § 230 protection. Considering Facebook's public image woes, for instance, in the wake of CEO Mark Zuckerberg's questioning before Congress in April 2018,[17] the question of § 230 becomes even more intensely pressing.

The judicial sentiment here might be indicative of a trend that could create a sea change in liability.[18] Other courts in tech-rich California have dropped similar hints that such a shift might be imminent.[19] Alternatively, legislators might move first to make the change more explicit. When § 230 amended the Communications Decency Act of 1996, could legislators have realistically imagined the depth and scope of the power modern Internet giants wield? The absurdity of this question is

16. Getachew v. Google, Inc., 491 F. App'x 923, 926 (10th Cir. 2012); Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems."); Manchanda v. Google, No. 16-CV-3550 (JPO), 2016 WL 6806250 at *2 (S.D.N.Y. Nov. 16, 2016); *see also* Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014); Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1063–64 (N.D. Cal. 2016); Barrett v. Rosenthal, 146 P.3d 510, 514 (Cal. 2006). For a comprehensive list of key cases, see *CDA 230: Key Legal Cases*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230/legal (last visited Mar. 7, 2018).

17. Tony Romm, *Facebook's Zuckerberg Just Survived 10 Hours of Questioning by Congress*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/11/zuckerberg-facebook-hearing-congress-house-testimony/?noredirect=on&utm_term=.ee281f863ccb.

18. *See* Tom Jackman, *Senate Launches Bill to Remove Immunity for Websites Hosting Illegal Content, Spurred by Backpage.com*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/01/senate-launches-bill-to-remove-immunity-for-websites-hosting-illegal-content-spurred-by-backpage-com/?utm_term=.31cd697c10f1; Sam Levin, *Facebook Promised to Tackle Fake News. But the Evidence Shows It's Not Working*, GUARDIAN (May 16, 2017 5:00 PM), https://www.theguardian.com/technology/2017/may/16/facebook-fake-news-tools-not-working; Benjamin Wittes & Zoe Bedell, *Facebook, Hamas, and Why a New Material Support Suit May Have Legs*, LAWFARE (July 12, 2016 1:23 PM), https://www.lawfareblog.com/facebook-hamas-and-why-new-material-support-suit-may-have-legs.

19. *See* Nunes v. Twitter, Inc., 194 F. Supp. 3d 959, 967 (N.D. Cal. 2016) (holding Twitter was not protected by § 230 after sending unwanted texts to users); Airbnb, Inc. v. City of S.F., 217 F. Supp. 3d 1066, 1076 (N.D. Cal. 2016) (holding § 230 did not immunize Airbnb from punishment for violating municipal housing laws); Hassell v. Bird, 203 Cal. Rptr. 3d 203, 225 (Cal. Ct. App. 2016) (holding § 230 did not shield Yelp from complying with a judgment enjoining a user to remove defamatory statements).

compounded in light of social media's influence on journalism,[20] politics,[21] personal relationships,[22] and, perhaps for some, reality.[23] Changes in the law are already afoot. In April of 2018, President Donald Trump signed a bill into law amending § 230 to combat sex trafficking on the Internet.[24] The new law, nicknamed FOSTA,[25] enables both federal and state prosecutors to pursue causes of action against individual sites like Backpage.com, which previously served as conduits for online prostitution (and were formerly protected by § 230).[26] This has prompted commentators and legal experts to be wary of the continued stability of § 230's protections.[27] These factors, along with cases like *FTC v. LeadClick Media, LLC,* should lead tech titans to be wary of the stability of § 230's protections.[28]

20. *Social Media Has a Growing Impact on the News #SMING15*, ING: NEWSROOM (Oct. 8, 2015), https://www.ing.com/Newsroom/All-news/Social-media-has-a-growing-impact-on-the-news-SMING15.htm.

21. *See generally* Tonghoon Kim et al., *The Influence of Social Networking Sites on Political Behavior: Modeling Political Involvement via Online and Offline Activity*, 60 J. BROADCASTING & ELECTRONIC MEDIA 23 (2016).

22. Vanessa Marin, *How to Navigate Social Media Boundaries in a Relationship*, N.Y. TIMES (Aug. 29, 2017), https://www.nytimes.com/2017/08/29/smarter-living/navigating-social-media-relationships.html?rref=collection%2Ftimestopic%2FSocial%20Media.

23. Justin Mullins, *Can Facebook Make You Sad?*, BBC (Feb. 6, 2014), http://www.bbc.com/future/story/20140206-is-facebook-bad-for-you.

24. Tom Jackman, *Trump Signs "FOSTA" Bill Targeting Online Sex Trafficking, Enables States and Victims to Pursue Websites*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/04/11/trump-signs-fosta-bill-targeting-online-sex-trafficking-enables-states-and-victims-to-pursue-websites/?utm_term=.803f4defde09.

25. Its full title is the "Allow States and Victims to Fight Online Sex Trafficking Act." *Id.*

26. *Id.* (noting Backpage.com executives were arrested on a 93-count indictment alleging, among other things, sex trafficking of underage girls). However, civil liberties advocates and sex workers have criticized the bill, saying it places sex workers in an even more precarious situation by removing a stable platform for solicitation, thus creating a black(er) market. *Id.*

27. *See* Eric Goldman, *Senate's "Stop Enabling Sex Traffickers Act of 2017"—and Section 230's Imminent Evisceration*, TECH. & MARKETING L. BLOG (July 31, 2017), http://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm (cautioning "the Senate bill will have . . . deleterious consequences for Section 230 and free speech online"); Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017, 12:00 AM), https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/ ("Stark attempts by legislators and judges to refine or redefine Section 230's boundaries are chipping away at the broad immunity websites once took for granted.").

28. *See* Emily Dreyfuss, *Want to Stop Facebook Violence? You Won't Like the Choices*, WIRED (Apr. 22, 2017, 7:00 AM), https://www.wired.com/2017/04/face-law-cant-keep-violence-off-facebook-either/ ("Lawmakers could amend Section 230 to expand companies' liability. If the law designated Facebook a content developer like a traditional media

However, potential policing solutions in a post-§ 230 legal landscape are inelegant. On the one hand, unchecked, companies like Facebook and Google can continue to profit off of the actions of bad actors with impunity and with little regard to civic welfare.[29] On the other, government censors sifting through exponential amounts of content, armed with what can only be arbitrary standards used to define offensiveness, borders on dystopian and is antithetical to First Amendment protections of free speech.[30] What is the solution?

This article will argue that companies can reach a functional legal and ethical consensus by investing in responsive metrics to user complaints, by paying careful attention to rulings that focus the scope of § 230 liability in a contemporary context, and by being more transparent about data collection practices.[31] Additionally, potential avenues for lawmakers to modernize the CDA's Safe Harbor Provision exist in looking to European models of accountability for social media sites,[32] including the enactment of explicit consumer data protection laws,[33] or by passing laws that criminalize generating profits from a crime via the Internet. While these courses to increased liability each present multiple, complicated roadblocks, a practical, if less immediately linear, solution also exists in promoting media literacy education in public schools.[34] This note will conclude by exploring paths state legislators might take into

company, rather than an intermediary through which others post content, it could face penalties itself for what people put on its site.").

29. *See* Julia Angwin, Madeleine Varner & Ariana Tobin, *Facebook Enabled Advertisers to Reach "Jew Haters"*, PROPUBLICA (Sept. 14, 2017, 4:00 PM), https://www.propublica.org/article/facebook-enabled-advertisers-to-reach-jew-haters (noting the previous availability of Facebook's targeted advertising to hate groups).

30. For realities related to current censorship laws on the Internet, see Wired Staff, *6 Tales of Censorship in the Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00 AM), https://www.wired.com/story/free-speech-issue-censorship/.

31. FTC v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016); Wittes & Bedell, *supra* note 18.

32. *Germany Approves Plans to Fine Social Media Firms up to €50m*, GUARDIAN (June 30, 2017, 7:14 AM), https://www.theguardian.com/media/2017/jun/30/germany-approves-plans-to-fine-social-media-firms-up-to-50m.

33. *See, e.g.*, *Data Protection*, BRITISH COUNCIL, https://www.britishcouncil.org/privacy-cookies/data-protection (last visited Feb. 6, 2019).

34. *Legislation*, NAT'L ASS'N FOR MEDIA LITERACY EDUC., https://namle.net/about/legislation/ (last visited Feb. 16, 2018).

civics classrooms[35] to encourage critical thinking in the emerging social consciousness of digital natives.[36]

II. BACKGROUND

How did a 1996 bill aimed at combating child pornography end up as the "holy grail"[37] of protection for Facebook, a company worth over $500 billion[38] with two billion monthly users?[39] Two important cases helped to provide the groundwork for § 230: *Cubby, Inc. v. CompuServe, Inc*,[40] and *Stratton Oakmont, Inc. v. Prodigy Services Co*.[41]

In *Cubby*, decided in 1991, the Southern District of New York held that CompuServe, which provided a database where users could access "thousands of information sources"[42] , was not liable for defamatory comments made available on the site.[43] The court analogized the site to a distributor such as "a public library, book store, or newsstand" and noted finding it liable "would impose an undue burden on the free flow of information."[44] Perhaps sensing the budding importance of this area of the law, the court further cited "relevant First Amendment

35. *Media Literacy Legislative Roundup: 21 Bills, 11 States, 5 New Laws*, MEDIA LITERACY NOW (Jan. 2, 2018), https://medialiteracynow.org/media-literacy-legislative-roundup-21-bills-11-states-5-new-laws/ (demonstrating these efforts are well under way with 5 states already having passed Media Literacy legislation).

36. While the protections § 230 affords apply to a wide range of digital platforms, Facebook will dominate the conversation here for the purposes of clarity and coherence. For other platforms protected by § 230, see Doe v. SexSearch.com, 551 F.3d 412, 415 (6th Cir. 2008) (protecting SexSearch.com); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (protecting MySpace); Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (protecting AOL).

37. Tony Romm, *Tech Companies Fear Repercussions from a New Bill in the U.S. Congress to Combat Human Trafficking*, RECODE (Aug. 1, 2017, 10:43 AM), https://www.recode.net/2017/8/1/16074808/facebook-google-amazon-sex-human-trafficking-congress-section-230.

38. Matt Egan, *Facebook and Amazon Hit $500 Billion Milestone*, CNN: MONEY (July 27, 2017, 10:29 AM), http://money.cnn.com/2017/07/27/investing/facebook-amazon-500-billion-bezos-zuckerberg/index.html.

39. Anita Balakrishnan, *2 Billion People Now Use Facebook Each Month, CEO Mark Zuckerberg Says*, CNBC (June 27, 2017, 3:05 PM), https://www.cnbc.com/2017/06/27/how-many-users-does-facebook-have-2-billion-a-month-ceo-mark-zuckerberg-says.html; Gordon Donnelly, *75 Super-Useful Facebook Statistics for 2018*, WORDSTREAM: BLOG, https://www.wordstream.com/blog/ws/2017/11/07/facebook-statistics (last updated Sept. 7, 2018).

40. Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991).

41. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *7, *9–11 (N.Y. Sup. Ct. May 24, 1995).

42. *Cubby, Inc.*, 776 F. Supp. at 137.

43. *Id.* at 140.

44. *Id.*

considerations" in its reasoning that CompuServe should not be held liable for content posted by others.[45] Decided in 1991, this case seemed to create a legal haven for burgeoning digital entities.[46]

However, in 1995, the Supreme Court of New York reversed this course, holding Prodigy Services, which hosted a "computer bulletin board" titled "Money Talk," liable for libel after commenters posted that investment firm Stratton Oakmont "was a cult of brokers who either lie for a living or get fired," among other claims.[47] The court tried to analogize Prodigy to a traditional media publisher, like a newspaper, whose editorial agency created a pathway to liability, to apply the jurisprudence already in place for libel. This placed the onus of the analysis on whether Prodigy "exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper."[48]

The court ultimately found that it did, rationalizing its decision by noting that Prodigy participated in screening content posted on its message boards, and thus functioned in a deliberate way more analogous to a publisher than a more passive distributor like a library.[49] The court noted, "[b]y actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste'," Prodigy became a publisher, and was thus not immune from libel claims.[50]

In the wake of *Prodigy*, what were growing Internet companies to do? Could they perversely escape liability only by leaving content completely unfiltered and functioning merely as a conduit for third party material? What kind of content curation would lead to publisher liability in the future? Would this stunt the Internet's rapid proliferation of new forms of communication?

In 1995, Congressman Chris Cox, a Republican from California, read the *Prodigy* decision with alarm "on a flight from California to Washington and had one thought*: I can fix this!*"[51] He shared his solution with fellow Congressman Ron Wyden, a Democrat from Oregon.[52] Their

45. *Id.* at 140–42.

46. *See Court Cases*, DEFAMATION & THE INTERNET, https://cs.stanford.edu/people/eroberts/cs181/projects/defamation-and-the-internet/sections/precedent/cases.html (last visited Feb. 26, 2019).

47. *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *1–4 (N.Y. Sup. Ct. May 24, 1995).

48. *Id.* at *3.

49. *Id.* at *4.

50. *Id.*

51. Zara, *supra* note 27 ("A light bulb went off . . . [s]o I took out my yellow legal pad and sketched a statute.").

52. *Id.*

bi-partisan collaboration resulted in what ultimately became § 230, titled "Protection for Private Blocking and Screening of Offensive Material,"[53] which the House, likely sensing the burgeoning economic and social capabilities of growing Internet businesses, passed on a remarkably unified 420–4 vote.[54]

Congress articulates its admiration for the Internet as a populist hydra in unmistakably flushed language in section (a) of § 230.[55] Subpart (3) of section (a) states: "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[56] Section (b) articulates the policy goals of § 230, which include "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,"[57] and "to promote the continued development of the Internet and other interactive computer services and other interactive media[.]"[58]

Morally imbued language also pervades § 230. Its policy goals include "ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer,"[59] and "[removing] 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 . . . ."[60]

This language is all preamble to the legal heart[61] of § 230: (c)(1). This section, titled "Protection for 'Good Samaritan' blocking and screening of offensive material[,]"[62] states, "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."[63] An "interactive computer service" is defined as "any information service,

53. 47 U.S.C. § 230 (1996); *see also* David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of* Zeran v. America Online, 66 N.Y.U. ANN. SURV. AM. L. 371, 374 (2010).

54. *See CDA 230: Legislative History*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/cda230/legislative-history (last visited May 9, 2019).

55. 47 U.S.C. § 230(a).

56. *Id.* § 230(a)(3).

57. *Id.* § 230(b)(2).

58. *Id.* § 230(b)(1).

59. *Id.* § 230(b)(5).

60. *Id.* § 230(b)(4).

61. *See* Zara, *supra* note 27 (calling this language the "money quote" of § 230, and "the statutory glue behind everything you love and hate about the Internet"); *see also* Lukmire, *supra* note 53, at 375 (calling this the "key operative provision.").

62. *Id.* § 230(c).

63. *Id.* § 230(c)(1).

system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[64]

Thus, § 230 cleared the publisher liability roadblock posed by *Prodigy*, leaving the Internet's path to growth unencumbered by accountability for the actions of bad-actor third parties (or by individual courts creating rogue theories of liability). Section 230 is called the Safe Harbor provision because it ultimately eliminates civil liability for interactive computer services, as long as they do not "create or develop content" and instead "merely provide a neutral means by which third parties can post information of their own independent choosing online."[65] Good-faith screening measures that attempt to remove objectionable content are also protected from creating liability by § 230.[66]

Section 230 amended the Communications Decency Act of 1996 (CDA),[67] which was first introduced in February of 1995 by Senator John Exon, a Democrat from Nebraska,[68] to "protect society, especially children, from sexually graphic material transmitted through the Internet."[69] The Act was, in part, a response to the cultural and political climate of the mid-1990s; mounting concerns about the "explosive growth" of not only the Internet, but other potentially vituperative seismic cultural forces, such as cable television and cell phones, led a socially conservative Senate to act concertedly and decisively.[70] Section 230's language focusing on parental controls and the protection of children from "inappropriate online material"[71] and "obscenity"[72] mirror this moral directive.

However, the life of the CDA as a complete document was short-lived. In 1997, the Supreme Court struck down multiple provisions of the CDA

64. *Id.* § 230(f)(2).

65. Klayman v. Zuckerberg, 753 F.3d 1354, 1358 (D.C. Cir. 2014).

66. 47 U.S.C. § 230(c)(2)(a).

67. *Id.* § 223 (1996).

68. *See* 141 CONG. REC. 3203 (1995) (statement of Sen. Exon).

69. *Supreme Court Rules CDA Unconstitutional*, CNN (June 26, 1997, 10:00 AM), http://www.cnn.com/US/9706/26/cda.overturned.hfr/. *See* 141 CONG. REC. 3203 (1995) (statement of Sen. Exon).

70. Lukmire, *supra* note 53, at 373–75. To gain support for the CDA, Senator Exon presented a "blue book" to lawmakers—a "blue folder located on the Senator's desk containing pornographic downloads from the Internet. . . . Senator Exon also delivered a prayer on the Senate floor seeking help in controlling obscene and indecent material . . . ." *Id.* at 374.

71. 47 U.S.C. § 230(b)(4).

72. *Id.* § 230(b)(5).

in *Reno v. ACLU* by a 9-0 margin.[73] A number of plaintiffs, including organizations and individuals, challenged the constitutionality of two of the CDA's provisions, which broadly attempted to criminalize the communication of "obscene or indecent" material to those under 18 years of age.[74] The Court found that sections 223(a)(1) and 223(d), which concerned "indecent transmission" and displays that were "patently offensive," abrogated First Amendment protections of free speech.[75] Specifically, the Court cited the failure of these sections "to provide us with any definition of the term 'indecent,'" or to provide "any requirement detailing that the 'patently offensive' material . . . lack[s] serious literary, artistic, political, or scientific value;" therefore, the sections lack "the precision that the First Amendment requires when a statute regulates the content of speech."[76]

Put simply, the language of the provisions failed to place potential defendants on notice of whether material they were transmitting could be categorized as offensive.[77] Also, as the Court noted, although the question of children accessing inappropriate material is a moral issue, that assessment does not mean the type of content contemplated by the CDA should (or constitutionally could) be banned wholesale;[78] ultimately, the Act violated the First Amendment by attempting to place "a content-based blanket restriction on speech."[79]

Though an important milestone in the context of free speech and the Internet, *Reno* did not touch on § 230. The conversation generated by the CDA and *Reno* was concerned with cultural propriety and the moral topography of the wild west of the Internet; § 230 endured silently while the zeitgeist moved elsewhere.[80]

The question of morality, however, did not divorce itself permanently from § 230 after *Reno*. Difficult questions presented themselves to multiple district courts over the course of the next two decades.[81] Judges

73. Reno v. ACLU, 521 U.S. 844, 848 (1997).

74. 47 U.S.C. § 223(a); *Reno*, 521 U.S. at 859.

75. *Reno*, 521 U.S. at 859, 885.

76. *Id.* at 865, 874. On the topic of free speech, Justice Stevens noted that in a prior case, "[W]e remarked that the speech restriction at issue there amounted to 'burn[ing] the house to roast the pig.' The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community." *Id.* at 882 (citations omitted).

77. *Id.* at 884.

78. *Id.* at 874–75.

79. *Id.* at 868.

80. *See* Lukmire, *supra* note 53, at 371–72 ("After *Reno*, public awareness of the CDA subsided, with some commentators erroneously suggesting that the Court had struck down the CDA in its entirety.").

81. These situations include whether § 230 permitted or restricted internet providers enabling users facilitating sex with minors. *Compare* Doe v. SexSearch.com, 551 F.3d 412,

almost uniformly came down on the side of § 230.[82] In fact, the expansive shield that § 230 continues to provide[83] has been largely a creature of judicial creation.[84] Language in the statute itself is more specific on its moral objectives than its technological ones;[85] indeed, how could legislators in 1996 have predicted the exponential digital ecosystems created by platforms like Facebook?[86]

Section 230 began its transformation from a legislative seedling into a "judicial oak"[87] in *Zeran v. America Online*.[88] Decided in 1997, *Zeran* articulated expansive and clear protections under the freshly-passed amendment, and has remained incredibly influential in § 230 jurisprudence.[89] Kenneth Zeran brought his complaint against America Online, Inc. (AOL) after a posting on a message board falsely advertised him as selling "tasteless" shirts related to the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.[90] Zeran was inundated with threatening phone calls after AOL failed to remove the post and a local radio station broadcasted the information, including Zeran's phone number.[91] On appeal, the 4th Circuit affirmed AOL's use of § 230 as an affirmative defensive in sweeping language.[92] The Court reasoned:

> Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and, accordingly, to keep government

415 (6th Cir. 2008), *and* M.A. *ex rel* P.K. v. Vill. Voice Media Holdings, LLC, 809 F. Supp 2d 1041, 1043 (E.D. Mo. 2011), *with* Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 827 (2002) (hosting sports memorabilia with forged signatures), *and* Doe v. Am. Online, Inc., 718 So. 2d 385, 386 (Fla. Dist. Ct. App. 1998) (marketing child pornography through chat forums).

82. *See SexSearch.com*, 551 F.3d at 415; *M.A. ex rel P.K.*, 809 F. Supp 2d at 1043; *Gentry*, 99 Cal. App. 4th at 827; *Am. Online Inc.*, 718 So. 2d at 386.

83. *See, e.g.*, Gonzalez v. Google, Inc., 282 F. Supp. 3d 1150, 1153 (N.D. Cal. 2017) (granting Google's motion to dismiss via § 230(c)(1) after plaintiffs sought liability for the death of Nohemi Gonzalez in 2015 ISIS attacks in Paris; plaintiffs claimed Google allowed terrorists to access training materials via YouTube).

84. Lukmire, *supra* note 53, at 381–83.

85. *See* 47 U.S.C. § 230(b)(4) (2018) (stating a policy goal "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.").

86. For a more dramatic comparison of the parochial moral motivations of legislators versus the actual outcome of § 230 jurisprudence, see Lukmire, *supra* note 53, at 380–85.

87. Lukmire, *supra* note 53, at 372.

88. Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

89. *Id.* The *Zeran* court's specific interpretation of § 230(c)(1) as providing broad immunity has been cited in 141 opinions since March 1, 2017. Westlaw Search of 124 F. 3d 327, WESTLAW, http://westlaw.com (click on Headnote 4 "Telecommunications.").

90. *Zeran*, 129 F.3d at 329.

91. *Id.*

92. *Id.* at 330–34.

> interference to a minimum. . . . Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems.[93]

The court struck down Zeran's argument that § 230 only eliminated "publisher liability" (the idea that publishers are liable for defamatory content, even absent actual knowledge of the content).[94] Zeran contended AOL was more properly categorized as a "distributor," like a book seller, and therefore liable for defamatory statements, provided the site had actual knowledge.[95] The court rejected this distinction and concluded instead that the elimination of distributer liability (articulated nowhere in § 230) was inherent in the elimination of publisher liability.[96] In conferring this broad protection, the court transmogrified § 230 from a piece of legislation dually motivated by ethical concerns and incentives for Internet growth into a larger, more protective shield imbued with the righteous gloss of free speech ideals that would eventually help to usher in the advent of tech behemoths like Google and Facebook with alacrity.[97]

This is the narrative that continues today.[98] However, § 230's salad days might be coming to an accelerated conclusion. A tempest of public concern,[99] tectonic shifts in the Internet's relationship to our everyday

93. *Id*. at 330–31.

94. *Id*. at 332.

95. *Id*.

96. *Id*. at 332–34.

97. *See* David R. Sheridan, Zeran v. AOL *and the Effect of Section 230 of the Communications Decency Act Upton Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 177–79 (1997) (noting this change "is a choice that Congress may want to make, but there is little evidence that, in enacting the CDA, Congress made that choice."); *see also* Zara, *supra* note 27 (noting that with § 230, "the federal government established the regulatory certainty that has allowed today's biggest Internet companies to flourish.").

98. Many § 230 cases since 2010 have provided ISPs with immunity and cited *Zeran*'s specific language that "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect." 129 F.3d at 331. *Accord* Atl. Recording Corp. v. Project Playlist, Inc., 603 F. Supp. 2d 690, 700 (S.D.N.Y. 2009); Backpage.com, LLC. v. Cooper, 939 F. Supp. 2d 805, 824 (M.D. Tenn. 2013).

99. Scott Shane, *How Unwitting Americans Encountered Russian Operatives Online*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/18/us/politics/russian-operatives-facebook-twitter.html (detailing the use of Russian bots on Facebook to encourage protests).

lives,[100] the Internet as a terrorist recruiting tool,[101] the precedent-defying growth of tech companies,[102] and legislative pressure[103] might lead courts, who goaded § 230's legislative inch into a judicial mile, to re-examine that interpretation.[104] What follows is an exploration of possible legal pathways to balance the needs of all parties involved while mediating the original aims of the law with the modern realities of the Internet's inescapable dimensions.

III. WHAT TECH COMPANIES CAN DO: PROACTIVE APPROACHES TO POTENTIAL EROSIONS OF 230 IMMUNITY

A. Employ Proactive User Metrics to Flag and Remove Content

Facebook has two billion monthly users.[105] The company reported $9.3 billion in revenue in the second quarter of 2017 alone, a 45% increase from the previous year.[106] The sheer number of its users, coupled with the social and political influence inherent in its massive riches, mean that Facebook bears some semblance of ethical responsibility for the new frontier it has created.[107] Confronting bad actors on the site, whether

100. Kristen Bialik, *Key Trends in Social and Digital News Media*, PEW RES. CTR. (Oct. 4, 2017), http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/.

101. Gonzalez v. Google, Inc. 282 F. Supp. 3d 1150 (N.D. Cal. 2017).

102. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017) (arguing that Amazon.com has grown so large and powerful as to be beyond the scope of existing antitrust laws).

103. Jackman, *supra* note 18.

104. There are signs that this is already underway. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158 (2d Cir. 2016); *see also* Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014); Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997); Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1063–64 (N.D. Cal. 2016); Manchanda v. Google, No. 16-CV-3350 (JPO), 2016 WL 6806250 (S.D.N.Y. Nov. 16, 2016); Barrett v. Rosenthal, 146 P.3d 510, 514 (Cal. 2006).

105. Balakrishnan, *supra* note 39.

106. Mike Isaac, *Facebook's Profit and Revenue Surge, Despite Company Predictions of a Slowdown*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/technology/facebook-users-profit.html (calling this a "blockbuster quarter").

107. Indeed, Facebook CEO Mark Zuckerberg has made somewhat ungainly public attempts to articulate this sense of responsibility. *See* Mark Zuckerberg, FACEBOOK (Jan. 11, 2018), https://www.facebook.com/zuck/posts/10104413015393571 ("I'm changing the goal I give our product teams from focusing on helping you find relevant content to helping you have more meaningful social interactions."). For a more comprehensive exploration of ethics and tech companies, see Molly Jackman & Lauri Kanerva, *Evolving the IRB: Building Robust Review for Industry Research*, 72 WASH. & LEE L. REV. ONLINE 445 (2016).

they are terrorist organizations,[108] propagators of false information,[109] ill-intentioned state actors,[110] or adolescent bullies,[111] presents the company with a Gordian knot of issues related to censorship and free speech.[112]

But how does Facebook currently deal with problematic content and user complaints, regardless of the protections offered by § 230? On its Community Standards page, Facebook outlines several types of "abusive" content, including Direct Threats, Self-Injury, Attacks on Public Figures, and Criminal Activity.[113] In large type, under a heading titled "Credible Violence," the website states, "[w]e remove content, disable accounts, and work with law enforcement when we believe there is a genuine risk of physical harm or direct threats to public safety."[114] The affable vagueness in this statement is pervasive throughout Facebook's language about monitoring content. It does not specify how posts are monitored or reviewed, or what system of review content goes through when it is flagged or removed. Commentators have thus accurately described Facebook's screening technology as "extensive but little-discussed."[115]

However, in a 2017 interview, Facebook's Counterterrorism Policy Manager Brian Fishman stated Facebook employs 4,500 people globally in "community operations teams" to review "all types of content flagged by users for potential terrorism signals."[116] Further, he stated that every

108. Paul Cruickshank, *A View from the CT Foxhole: An Interview with Brian Fishman, Counterterrorism Policy Manager, Facebook*, 10 CTC SENTINEL 8 (2017), https://ctc.usma.edu/app/uploads/2017/09/CTC-Sentinel_Vol10Iss8-13.pdf.

109. Mark Verstraete, Derek E. Bambauer & Jane R. Bambauer, *Identifying and Countering Fake News* 1 (Ariz. Legal Studies Discussion Paper No. 17-15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971.

110. Tom McCarthy, *How Russia Used Social Media to Divide Americans*, GUARDIAN (Oct. 14, 2017, 9:47 AM), https://www.theguardian.com/us-news/2017/oct/14/russia-us-politics-social-media-facebook.

111. Emily Siner, *Facebook Takes on Cyberbullies as More Teens Leave Site*, NPR: ALL TECH CONSIDERED (Nov. 7, 2013, 5:19 PM), http://www.npr.org/sections/ alltechconsidered/ 2013/11/07/243710885/facebook-takes-on-cyberbullies-as-more-teens-leave-facebook.

112. *Facebook, Airbnb Go on Offense Against Nazis After Violence*, ADAGE (August 17, 2017), https://adage.com/article/digital/facebook-airbnb-offense-nazis-violence/310157. ("Companies historically have steered clear of trying to determine what is good and what is evil. . . [b]ut given the increasingly heated public debate in the U.S., they may feel they need to act.").

113. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards (last visited Mar. 7, 2018).

114. *Id.*

115. Joseph Menn, *Social Networks Scan for Sexual Predators, with Uneven Results*, REUTERS (July 12, 2012, 1:06 AM), https://www.reuters.com/article/us-usa-internet-predators/social-networks-scan-for-sexual-predators-with-uneven-results-idUSBRE86B05G20120712.

116. Cruickshank, *supra* note 108 (noting further that Facebook is in the process of hiring 3,000 more).

flagged report is assessed, "regardless of what it was reported for," for a potential connection to terrorism.[117]

As Fishman's language implies, it is likely that Facebook's strategy for flagging content and stopping problematic accounts is both proprietary and evolving, and thus too elusive of a topic for meaningful third-party analysis. However, if the platform is concerned with continuing to enjoy the legal immunity proffered by § 230, there are specific steps it should take to gird those protections.

Primarily, Facebook should continue to employ user-responsive metrics for flagging and removing content. This means first-hand complaints lodged by users should be the primary mechanism Facebook employs to detect objectionable content. This is because the more active Facebook is in its curation of content, the more it blurs the distinction between content creator and content distributor. By filling this role, and selectively screening and monitoring content through its own proprietary algorithms, Facebook potentially distances itself from the protections of § 230. Though the relevant section states, "[n]o provider or user of an interaction computer service shall be treated as the publisher or speaker of any information provided by *another information content provider*,"[118] arguably, Facebook becomes the content provider itself if it actively partakes in the selection, curation, and distribution of material it provides to users, especially without disclosure of how that process occurs.

Objectors might argue that the idea that screening content introduces liability was in essence the holding in *Prodigy* that § 230 was drafted to expressly reject. That argument would be girded by also pointing out that § 230(c)(2)(A) precludes civil liability for interactive computer services that partake in "good faith" screening practices to remove "objectionable" material, regardless of whether it is "constitutionally protected."[119]

However, consider the Second Circuit's recent conclusion in *LeadClick*. There, the court inferred the relationship between the content and the content provider was essentially too close for § 230 to apply, stating, "a defendant acting with knowledge of deception who either directly participates in that deception or has the authority to control the deceptive practice of another, but allows the deception to proceed, engages, *through its own actions*, in a deceptive act or practice that causes harm to consumers."[120] Using user metrics as the primary way to

117. *Id.*
118. 47 U.S.C. § 230(c)(1) (2018) (emphasis added).
119. *Id.* § 230(c)(2)(A).
120. FTC v. LeadClick Media, LLC., 838 F.3d 158, 170 (2d Cir. 2016).

flag posts removes Facebook from implicating itself in any such deception, while allowing its users to be the primary onus for content curation.

Further, the type of screening involved in *Prodigy* (from the era of dial-up Internet) can hardly be analogized to Facebook, which has the largest number of users of any social media site on the planet.[121] Regardless of the fact that the path to liability is, at the moment, a liminal one, if Facebook is interested in taking proactive steps to avoid the conversation entirely, a model of screening based on user-responsive tools would best serve its purposes and allow Facebook to confidently call itself an intermediary rather than a content creator.

User-responsive metrics also have the benefit of being more practical. Facebook Counterterrorism Policy Manager Brian Fishman notes that while the company currently uses Artificial Intelligence (AI) to combat extremist actors, "we still think human beings are critical because computers are not very good yet at understanding nuanced context."[122] A user-responsive model of moderation also aligns with Facebook's overtly stated optimistic ethos to "to give people the power to build community and bring the world closer together."[123] It further allows Facebook to distance itself from more recent claims that it promotes "a political monoculture that's intolerant of different views."[124] Thus, through user-responsive complaint measures, the company can work to keep its § 230 protections stable while adhering to its stated publicly-minded goals to create an egalitarian network for positive communication.[125]

121. *See* Cruickshank, *supra* note 108, at 8.

122. *Id.* at 8–9.

123. Mark Zuckerberg, *Bringing the World Closer Together*, FACEBOOK (June 22, 2017), https://www.facebook.com/notes/mark-zuckerberg/bringing-the-world-closer-together/10154944663901634/.

124. Kate Conger & Sheera Frenkel, *Dozens at Facebook Unite to Challenge Its 'Intolerant' Liberal Culture*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/technology/inside-facebook-employees-political-bias.html (quoting senior Facebook engineer Brian Amerige, head of a group called FB'ers for Political Diversity, who also stated, "We claim to welcome all perspectives, but are quick to attack—often in mobs—anyone who presents a view that appears to be in opposition to left-leaning ideology."). The idea of Facebook, a company with intimate access to the personal data of an unprecedented number of users, using opaque methods to advance a specific political point of view invokes serious ethical concerns, regardless of one's personal position on the ideological spectrum. *Id.*

125. *See* Jonah Engel Bromwich & Matthew Haag, *Facebook is Changing. What Does That Mean for Your News Feed?*, N.Y. TIMES (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/technology/facebook-news-feed-changes.html. Facebook, as of January 2018, has indeed changed its algorithms to promote "more posts from friends" than from "brands and publications," perhaps also in an effort to distance itself from publisher liability. *Id.*

Pertinent to note, perhaps, is Facebook's recent announcement that it is changing the algorithms underpinning the feeds users see to favor "meaningful social interactions"[126] over "posts from businesses, brands, and media,"[127] and "news articles shared by media companies."[128] Publicly, Facebook CEO Mark Zuckerberg has stated these changes are motivated by "a responsibility to make sure our services aren't just fun to use, but also good for people's well-being,"[129] even though this choice is likely to continue[130] to hurt Facebook financially, both through lost advertising dollars and through the decreased amount of time users will spend on the site.[131]

Though the proffered justifications for these changes are civically benevolent, they also serve two important purposes for Facebook in the context of § 230: 1) They place a softer focus on Facebook's editorial role. While curated news stories on feeds are more analogous to the content the court was critical of in *LeadClick*,[132] prioritizing content shared by family and friends places Facebook in a passive intermediary role that more closely aligns with existing § 230 jurisprudence.[133] This is further incentive for courts to avoid revisiting the § 230 status quo, and thus better protection for Facebook. 2) Public pressure on Facebook has been immense.[134] By focusing more on interactions between family and friends, perhaps lawmakers, the public, and the judiciary will move their invective elsewhere and be less vocal about any potential need for shifts in § 230 liability.[135]

126. Zuckerberg, *supra* note 107.

127. *Id*.

128. Mike Isaac, *Facebook Overhauls News Feed to Focus on What Friends and Family Share*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/technology/facebook-news-feed.html.

129. Zuckerberg, *supra* note 107.

130. Nicholas Rossolillo, *Why Facebook is Down 20% in 2018*, MOTLEY FOOL (Nov. 15, 2018, 8:48 AM), https://www.fool.com/investing/2018/11/15/why-facebook-is-down-20-in-2018.aspx (noting a precipitous drop in Facebook stock as "[i]t's been a forgettable year for investors in the social-media giant").

131. Isaac, *supra* note 128.

132. FTC v. LeadClick Media, LLC, 838 F.3d 158, 170 (2d Cir. 2016).

133. *See* Doe v. SexSearch.com, 551 F.3d 412, 415 (6th Cir. 2008) (protecting SexSearch.com); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (protecting MySpace); Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003) (protecting AOL).

134. Isaac, *supra* note 128 ("Facebook has been under fire for months over what it shows people and whether its site has negatively influenced millions of its users. The company has been dogged by questions about how its algorithms may have prioritized misleading news and misinformation in News Feeds, influencing the 2016 American presidential election as well as political discourse in many countries.").

135. Sheridan, *supra* note 97.

B. Pay Close Attention to Recent Rulings

Though he has since changed his public stance into a more culpable one,[136] in 2017, Mark Zuckerberg demurred that the conception that the site had been a mediating force in the 2016 Presidential election was "crazy."[137] However, the zeitgeist of "fake news,"[138] extensive international meddling on the site,[139] and massive breaches in the data collection of users[140] demonstrate that even the seemingly farfetched can become digital reality.

Again, these shifts in the cultural tide might force the judiciary to re-examine existing § 230 protections.[141] As previously mentioned, in *FTC v. LeadClick Media, LLC*, the court ruled that LeadClick, an affiliate-marketing network provider that made use of fake news sites to market the products of third parties, was not subject to § 230 immunity as it knowingly used fake news sites and actively participated in deceptive practices.[142]

While *LeadClick* presents a case that on its face is more egregious than Facebook's more passive function as a social media platform, which fits more traditionally into the scope of an "interactive computer service"[143] meant to "encourage discourse,"[144] and therefore subject to the protections afforded by § 230, *LeadClick* symbolizes a judicial willingness to add more nuance to a previously sweeping and monolithic understanding of § 230's protections.[145]

Facebook's recent privacy-gelding public fiascos concerning user data, perhaps most significantly the data breach of 50 million users' information to Cambridge Analytica, also evoke *LeadClick*'s

136. Mark Zuckerberg, FACEBOOK (Jan. 4, 2018) (forecasting 2018 as "a serious year of self-improvement" and that he is "looking forward to learning from working to fix our issues together").

137. Adam Entous, Elizabeth Dwoskin & Craig Timberg, *Obama Tried to Give Zuckerberg a Wake-up Call Over Fake News on Facebook*, WASH. POST (Sept. 24, 2017), https://www.washingtonpost.com/business/economy/obama-tried-to-give-zuckerberg-a-wake-up-call-over-fake-news-on-facebook/2017/09/24/15d19b12-ddac-4ad5-ac6e-ef909e1c1284_story.html?utm_term=.dfccf10eff15 (reporting that Barack Obama purportedly gave Zuckerberg "what he hoped would be a wake-up call" in a 2017 meeting).

138. Verstraete et al., *supra* note 109; *see also* John Herrman, *What if Platforms Like Facebook Are Too Big to Regulate?*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/magazine/what-if-platforms-like-facebook-are-too-big-to-regulate.html.

139. Shane, *supra* note 99.

140. Cadwalladr & Graham-Harrison, *supra* note 15.

141. *See* FTC v. LeadClick Media, LLC, 838 F.3d 158, 173 (2d Cir. 2016).

142. *Id.* at 176; *see also* Lewis, *supra* note 4.

143. 47 U.S.C. § 230(b)(2) (2018).

144. *LeadClick Media*, 838 F.3d at 176.

145. Lewis, *supra* note 4.

admonishment that § 230 fails to protect "a defendant acting with knowledge of deception who either directly participates in that deception or has the authority to control the deceptive practice of another, but allows the deception to proceed, engages, *through its own actions*, in a deceptive act or practice that causes harm to consumers."[146] Though Facebook has remained predictably imprecise about what it knew and when, CEO Mark Zuckerberg's public apologies that the company made "mistakes" that caused a "breach of trust" are evocative of agency, creating another possible erosion of § 230 immunity.[147]

Further evidence of this erosion exists in *Airbnb, Inc. v. City and County of San Francisco*, where a district court in California held in 2016 that Airbnb, a third-party home rental service, was not protected from following city ordinances by § 230.[148] The San Francisco regulation in question "makes it a misdemeanor to collect a fee for providing booking services for the rental of an unregistered unit."[149] Airbnb contended that § 230 shielded it from the ordinance, citing an often-used test in the Ninth Circuit for precluding liability.[150] The claim must involve "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."[151]

However, the court rejected Airbnb's argument, noting "the text and plain meaning of the Ordinance . . . in no way treats plaintiffs as the publishers or speakers of the rental listings . . . [and] creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts."[152] The court went on to note that the ordinance only held Airbnb liable "for their own conduct," which was "collecting a fee for . . . booking services in connection with an unregistered unit."[153]

Again here, contemporary judicial interpretation is more open to nuance in the context of § 230. While previously, using *Zeran* and its ilk as precedent, courts would be likely to see an ordinance essentially punishing Airbnb for the bad actions of its third-party users (renting

146. *LeadClick Media*, 838 F.3d at 170.

147. Julia Carrie Wong, *Mark Zuckerberg Apoligises for Facebook's "Mistakes" over Cambridge Analytica*, GUARDIAN (Mar. 22, 2018, 2:53 PM) https://www.theguardian.com/technology/2018/mar/21/mark-zuckerberg-response-facebook-cambridge-analytica.

148. Airbnb, Inc. v. City of S.F., 217 F. Supp. 3d 1066, 1072–76 (N.D. Cal. 2016).

149. *Id.* at 1071. "A violation constitutes a misdemeanor punishable by a fine of up to $1,000 and imprisonment for up to six months." *Id.*

150. *Id.* at 1072.

151. *Id.* (quoting Doe v. Internet Brands, Inc., 824 F.3d 846, 850 (9th Cir. 2016)).

152. *Id.*

153. *Id.* at 1073.

unregistered units) as within the ambit of § 230, here, the court more narrowly focused on the actions taken by the tech company itself and failed to use § 230 to insulate it from a harmful practice.[154] While the ordinance in *Airbnb* is specific to the fact that the service is connected to housing, a sector rife with municipal rules and regulations,[155] Facebook should still take pains to note that its own actions, perhaps specifically in the context of data collection and privacy, are not beyond judicial reproach in the context of § 230.

Nor has the Ninth Circuit shied away from parsing § 230 with more exacting scrutiny in the past; in *Fair Housing Council of San Fernando Valley v. Rommmates.com LLC*, the court waived § 230 immunity, holding that housing website Roommates.com was a "content developer" since it required users to fill out a survey with questions that revealed sensitive information in violation of state anti-discrimination housing laws.[156] Though decided in 2008, crucial here is the court's holding "that a website could be liable for creating or developing unlawful content posted by third parties if the website 'materially contributed' to the content."[157]

Read concomitantly, these cases present a hypothesis that companies like Facebook, through the use of targeted advertising[158] algorithms that specifically tailor content to users,[159] and abrogations in data protection,[160] might be liable for the proliferation of problematic content or promulgation of sensitive user information.[161] As plaintiffs continue to seek new ways to pierce § 230 immunity (and incidents over unsavory content continue to engender public distrust[162]), Internet platforms like

154. *Id.*

155. *Id.* at 1070.

156. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1166 (9th Cir. 2008).

157. Eric David & Ryan Fairchild, Brooks, Pierce, McLendon, Humphrey & Leonard, *Understanding New Attacks on Section 230 Immunity*, 34 NO. 20 WESTLAW J. COMPUTER & INTERNET 1 (2017).

158. Sapna Maheshwari & Mike Isaac, *Facebook, After "Fail" over Ads Targeting Racists, Makes Changes*, N.Y. TIMES (Sept. 20, 2017), https://www.nytimes.com/2017/09/20/business/media/facebook-racist-ads.html. *See also* Angwin, Varner & Tobin, *supra* note 29.

159. Will Oremus, *Who Controls Your Facebook Feed*, SLATE, (Jan. 3, 2016, 8:02 PM), https://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html.

160. Cadwalladr & Graham-Harrison, *supra* note 15.

161. *See* Lewis, *supra* note 4 (concluding that *LeadClick* prompts the conclusion that "[a] self-proclaimed publisher that actually is an information content provider involved with the creation of deceptive content may be subject to suit by the FTC.").

162. *See* Emily Dreyfuss, *Facebook Streams a Murder, and Must Now Face Itself*, WIRED (Apr. 16, 2017, 9:26 PM), https://www.wired.com/2017/04/facebook-live-murder-steve-stephens/.

Facebook should take pains to remain neutral parties to content posted on their sites.

As previously noted, Facebook has made recent, very public efforts to establish that it is reconfiguring the information users see.[163] Again, its motivations become less egalitarian considered in light of this judicial current. Facebook's all-star legal team clearly has its ear to the ground, and would do well to continue observing a quote on the wall of its Menlo Park office: "If you have a good tool, build a shed over it."[164]

IV. WHAT LAWMAKERS CAN DO: PROTECTING USERS WITHOUT SACRIFICING FREE SPEECH OR INTERNET COMPETITION

A. Look to European Models to Tailor Solutions

The relationship between free speech and online platforms has an understandably contentious history.[165] The situation begets the larger question of how governments and massive online platforms should peaceably and civically coexist.[166] Do lawmakers bear the burden for making sure tech giants behave responsibly? Or, perhaps, is the horse already out of the barn?[167]

One potential solution exists in examining a recently implemented German bill, which mandates that online platforms remove "obviously illegal hate speech" twenty-four hours after receiving a notification.[168] The bill, referred to as NetzDG (a shortened version of its full German name—which translates to 'Enforcement on Social Networks'), sets a schedule wherein social media companies must monitor and remove hate speech, and provide the government with documentation of their efforts.[169] The up-to-50 million Euro fines, which are imposed after multiple violations, "represent the largest financial penalties for [hate

163. Zuckerberg, *supra* note 107.

164. Rebekah Mintzer, *Networking with Facebook's In-House Legal Team*, CORP. COUNS. (Jan. 21, 2014, 12:00 AM), https://www.law.com/corpcounsel/almID/1390305711347/Networking-With-Facebooks-InHouse-Legal-Team/.

165. *See, e.g.*, Brett G. Johnson, *Facebook's Free Speech Balancing Act: Corporate Social Responsibility and Norms of Online Discourse*, 5 U. BALT. SCH. L. J. MEDIA L. & ETHICS 17 (2016).

166. *See generally* Herrman, *supra* note 138.

167. *See* Khan, *supra* note 102 (arguing Amazon.com has grown so large and powerful as to be beyond the scope of the current framework of antitrust law); *see also* Herrman, *supra* note 138 (suggesting that successful regulation of large social platforms like Uber or Facebook "will look more like diplomacy than anything else").

168. *Germany Approves Plans to Fine Social Media Firms up to €50m*, *supra* note 32.

169. Natasha Lomas, *Germany's Social Media Hate Speech Law is Now in Effect*, TECHCRUNCH, https://techcrunch.com/2017/10/02/germanys-social-media-hate-speech-law-is-now-in-effect/ (last visited May 9, 2019).

speech] anywhere in the Western world."[170] Facebook has publicly criticized the bill, stating: "This law as it stands now will not improve efforts to tackle this important societal problem."[171]

While Germany's laws on defamation and threats of violence are severe, and the bill has faced intense public scrutiny across the political spectrum,[172] it marks a significant first in that a major Western power is drawing a line in the sand to check the accountability of tech giants. German officials justify the bill by claiming "[s]ocial networks are no charity organizations that guarantee freedom of speech in their terms of service."[173] Tech companies like Facebook, on the other hand, argue that the German bill overreaches and imposes strict time limits to enforce arbitrary standards.[174] Other critics, such as the NGO Reporters Without Borders, argue that the practical result of the bill is for platforms to be overly censorious, a result that satisfies no one.[175]

France has also passed a law to strike back against "fake news."[176] In a 2018 public statement on the topic, President Emmanuel Macron, though sparse on details, articulated his unambiguous conclusion that "to protect liberal democracies, we must have strong legislation."[177] Together, these measures could be indicative of growing worldwide momentum to hold tech giants more accountable.

While it is unlikely a bill similar to Germany's would come to fruition in the United States, or that it would even be advisable (or possible[178]) to

170. Katy O'Donnell, Joanna Plucinska & Mark Scott, *Germany's New Online Hate Speech Code Pushes Big Fines and Debate*, POLITICO (Oct. 3, 2017, 11:19 PM), http://www.politico.eu/article/hate-speech-germany-twitter-facebook-google-fines/.

171. *Germany Approves Plans to Fine Social Media Firms up to €50m, supra* note 32 (reporting that Facebook also said in a statement: "We feel that the lack of scrutiny and consultation do not do justice to the importance of the subject.").

172. *See id.*

173. Rick Noack, *Can Social Media Become Less Hateful by Law? Germany is Trying it—and Failing, Critics Say,* WASH. POST (Jan. 13, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/01/13/can-social-media-become-less-hateful-by-law-germany-is-trying-it-and-failing-critics-say/?utm_term=.b58cad1d5d32.

174. *Id.*

175. *Id.*

176. Michael-Ross Fiorentino, *France Passes Controversial 'Fake News' Law*, EURONEWS (Nov. 22, 2018), https://www.euronews.com/2018/11/22/france-passes-controversial-fake-news-law. Sebastian Shukla & Melissa Bell, *France to Crack Down on "Fake News"*, CNN WORLD (Jan. 3, 2018, 4:24 PM), https://www.cnn.com/2018/01/03/europe/macron-france-fake-news-law/index.html.

177. *Id.*

178. Though largely beyond the scope of this paper, censorship would pose constitutional prior restraint issues in conflict with First Amendment rights. For a discussion of prior restraint and free speech in the context of the Internet, see United States v. Carmichael, 326 F. Supp. 2d 1267, 1270 (M.D. Ala. 2004) (holding that a website is a form of protected speech afforded First Amendment considerations). Courts are also unlikely to impose

pass one, examining the German bill could provide a helpful prototype for American lawmakers. For example, the bill specifically applies to companies with over "two million registered users in . . . Germany," and imposes a reporting obligation, but largely allows the companies to determine their own methods for monitoring offensive content.[179] It also provides a schedule for imposing fines, where multiple offenses must occur first.[180]

While the Act has only been in force since October 1, 2017 (a trial compliance period ended January 1, 2018)[181] and time will further place the most (and least) effective measures into relief, preliminary mechanisms like this might be more effectively tailored to suit the needs of the constituents of American legislators.

For example, a 2016 Pew Research Poll found that 74% of American said it was "very important" for them to control who can access information about them;[182] the same poll found 68% of Americans believed there was a need for increased laws to protect privacy online.[183] These statistics indicate a conscientiousness and willingness on the part of Americans to reconsider current regulations related to the Internet and tech companies. Any new potential laws could also peaceably co-exist with § 230 immunity by imposing a reporting requirement, like the German bill, and thus circumvent a speaker/third-party analysis by placing the onus of responsibility primarily on the actions of tech companies like Facebook.[184]

Another potential model for regulation exists in the European Union's broader General Data Protection Regulation (GDPR) initiative. The newly passed law gives users more agency over their digital

injunctions on forms of Internet speech for the First Amendment conflicts they cause. *See* Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980, 985 (N.D. Cal. 2008) ("[I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech . . . is impermissible."). Due process considerations would also likely come into play; for a more comprehensive discussion of this topic, see Kent Walker, *Digital Security and Due Process: A New Legal Framework for the Cloud Era*, THE KEYWORD (June 22, 2017), https://www.blog.google/topics/public-policy/digital-security-and-due-process-new-legal-framework-cloud-era/.

179. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Oct. 1, 2017, BUNDESGESETZBLATT, Teil I [BGBL I] at 3352, §§ 1–2, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=4587A8344E8EE9A7EA6F43436B3B7D77.2_cid289?__blob=publicationFile&v=2.

180. *Id.* § 4.

181. *Id.* at art. III; Lomas, *supra* note 169.

182. *The State of Privacy in Post-Snowden America*, PEW RES. CTR. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/.

183. *See id.*

184. Noack, *supra* note 173; *see also* Airbnb, Inc. v. City of S.F., 217 F. Supp. 3d 1066, 1080 (N.D. Cal. 2016).

footprints and intends to provide unanimity to data laws across Europe, while still allowing individual states margin for tailoring.[185] Germany's law is an example, as is the United Kingdom's Data Protection Act, which contains specific provisions protecting cybersecurity researchers working to uncover personal data abuses.[186]

More generally, the GDPR requires companies collecting data to report confidentiality breaches within 72 hours, and mandates companies with over 250 employees provide documentation explaining why user information is being collected and processed, including how long the company intends to retain the information, and what security measures are in place to protect it.[187] Companies that systematically and regularly monitor sensitive user information must also employ a data protection officer.[188] Users can also initiate a Subject Access Request free of cost, which must be made available from companies within a month.[189] Users can also request their data be expunged.[190]

These measures, with their focus on user agency and increased data collection transparency, have been praised by Apple CEO Tim Cook.[191] In fact, California has already passed a law, set to go into effect in 2020, that will allow users to stop the collection and sale of their personal data upon their request.[192] Colorado has also passed regulations that govern the specific use of personal identifying information.[193]

However, there are still no federal data privacy laws in the U.S. Adopting consumer protection regulations that specifically target data collection would allow the interests of the public to be served while still keeping the broad protections of § 230, intended to protect free speech and the growth of the Internet, intact. Though such a law would inevitably entail extensive compliance work, which might seem less than ideal for technology's rapacious metabolic rate of change and massive

185. Matt Burgess, *What is GDPR? The Summary Guide to GDPR Compliance in the UK*, WIRED (Jan. 21, 2019), https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Expert Panel, Forbes Commc'ns Council, *Adopting EU Data Protection Guidelines: Five Communications Experts Offer Ideas*, FORBES (Jan. 4, 2019, 7:30 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2019/01/04/adopting-eu-data-protection-guidelines-five-communications-experts-offer-ideas/#7b705893b7f7.

192. Laura Hautala, *California's New Data Privacy Law the Toughest in the US*, CNET (June 29, 2018, 1:57 PM), https://www.cnet.com/news/californias-new-data-privacy-law-the-toughest-in-the-us/.

193. *Colorado's Consumer Data Protection Laws: FAQ's for Businesses*, OFF. ATT'Y GEN., COLO. DEP'T L., https://coag.gov/resources/data-protection-laws (last visited Jan. 6, 2018).

scope, companies can win too by engendering trust and ensuring integrity in their operations through the promotion of transparency. Arguably, Facebook's woes have made Internet companies acutely aware of this fact; spending on cybersecurity is projected to reach $124 billion in 2019, representing an 8.7% increase in growth from 2018.[194]

B. Draft a Law that Specifically Criminalizes Profiting Off of a Crime on Social Media

Another problematic intersection of freedom of speech and online platforms became visible in April 2017, when 37-year-old Steve Stephens posted a video on Facebook of himself fatally shooting an elderly man.[195] Actions such as these, where perpetrators use social media platforms to broadcast their crimes, are, unfortunately, not isolated incidents.[196] How should these bad actors be deterred?

One possible solution legislators can explore is to specifically add penalties to crimes that are intentionally recorded and placed on social media platforms.[197] While prohibiting services like Facebook's live streaming feature entirely would likely be an abrogation of free speech, more narrowly imposed penalties like these would be unlikely to face constitutional hurdles and provide a workable solution.

For example, an anti-notoriety law in New York that penalized profiting from crimes,[198] known as the "Son of Sam" law after the "notorious serial killer," aimed to provide victims the "opportunity to sue for a judgment" in light of any profits realized from a publicized crime.[199] Though that specific law was held unconstitutional, the federal government passed 18 U.S.C. § 3681 and forty-seven states passed similar laws, which allow a victim to collect any "proceeds received" from

194. Kim S. Nash, *Good Privacy Requires Tech, Cultural Change*, WALL ST. J.: CIO BLOG (Jan. 3, 2019, 10:50 AM), https://www.wsj.com/amp/articles/good-privacy-requires-tech-cultural-change-01546530652?responsive=y&tesla=y.

195. Melissa Chan, *What to Know About Cleveland Facebook Murder Suspect Steve Stephens*, TIME (Apr. 17, 2017, 3:27 PM), http://time.com/4742204/steve-stephens-cleveland-shooting-facebook/.

196. *See* Rossalyn Warren, *When Rape is Broadcast Live on the Internet*, BUZZFEED NEWS (Apr. 20, 2016, 10:40 AM), https://www.buzzfeed.com/rossalynwarren/when-rape-is-broadcast-live-on-the-internet?utm_term=.mtp4X5al4#.ameJr8ORJ (detailing incidents of domestic abuse, sexual assault, and attempted murder being broadcast—sometimes in real time—over the internet).

197. Danny Cevallos, *Make It a Crime to Show Killing on Facebook*, CNN (Apr. 17, 2017, 10:00 PM), http://www.cnn.com/2017/04/17/opinions/facebook-shooting-death-cevallos/.

198. N.Y. EXEC. LAW § 632-a (McKinney 1977).

199. Jessica Yager, *Investigating New York's 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. SCH. L. REV. 433, 434 (2003).

a crime, whether through a "movie, book . . . or live entertainment of any kind . . . ."[200] These laws impose additional liability to already existing crimes. Could a similar model exist for crimes publicized on social media platforms?

It is possible to "provide increased penalties for crimes in which the perpetrator intentionally causes the acts to be recorded, and then additionally places them into the social media public forum," as legal analyst Denny Cevallos has suggested.[201] Again, these provisions would not run afoul of existing § 230 protections since the onus would be on the criminal, and not the platforms themselves. The additional penalties could impose a deterrent effect that would help mollify the potential of platforms like Facebook to act as a megaphone for criminals and would-be criminals, while still allowing tech companies § 230 protections that would prevent onerous censorship or content monitoring.

C. Draft a Legal Definition of Hate Speech

Of all the options available to legislators to ebb the growing tide of digital titan-ism, legislating a definition of hate speech is perhaps the thorniest. While the question of what constitutes hate speech is an ontological investigation onto itself, making that definition align with the protections of the First Amendment is an even more complicated issue.[202] This is also a problem Germany's social media law is grappling with,[203] and one that the GDPR appears to sidestep entirely.[204]

The problem of hate speech and verbal harassment online is widespread.[205] A 2016 study demonstrated that 46% of adults between the ages of 18 and 29 experienced physical threats online, while 41% experienced sexual harassment.[206] More troublingly (for legislators and for victims), these attacks are often executed by "cyber mobs," and thus "the crowd-sourced character of the annihilation dissipates attitudes of blameworthiness."[207] This means that identifying a single post, or even set of posts, attributable to an individual places a further dimension of

200. 18 U.S.C. § 3681(a) (2003).

201. Cevallos, *supra* note 197.

202. *See generally* Argyro P. Karanasiou, *On Balancing Free Speech in a Digital Context*, 6 MASARYK U. J.L. & TECH. 247 (2012).

203. *See* Noack, *supra* note 173.

204. *The EU General Data Protection Regulation*, HUM. RTS. WATCH (June 6, 2018, 5:00 AM), https://www.hrw.org/news/2018/06/06/eu-general-data-protection-regulation.

205. Raluca Balica, *The Criminalization of Online Hate Speech: It's Complicated*, 9 CONTEMP. READINGS L. & SOC. JUST. 184, 184 (2017).

206. *Id.* at 186.

207. *Id.* at 188.

difficulty atop identifying offensive material, which can be frustratingly difficult to objectively pin down.[208]

Currently, Facebook deletes content targeted at "'protected categories'—based on race, sex, gender, identity, religious affiliation, national origin, ethnicity, sexual orientation, and serious disability/disease," while "subsets of protected categories" (i.e. "female drivers and black children") remain fair game.[209] This can lead to arbitrary and seemingly contradictory results.[210] Algorithms and teams of censors are also problematic mechanisms for policing such vast arrays of content. What can legislators do?

Anti-discrimination laws currently afford safeguards to members of specific protected classes, such as race, color, religion, sex, or national origin.[211] Would it be possible to draft legislation that extends those same protections digitally without infringing on rights to free speech? Though constitutional safeguards currently in place are outmoded in a digital context generally, a balance remains contentious, making this option unlikely.[212]

A solution is not impossible, however. A more narrowly tailored solution potentially exists in drafting a definition of hate speech that could be applied uniformly across digital platforms to provide objectivity, accountability, and ensure a modicum of fairness to both users and tech companies. Germany's social media bill, for example, outlines twenty definitions of comments that are "clearly illegal," including "inciting hatred" or displaying a swastika.[213] Though it would certainly be a difficult undertaking, this is still an available option to motivated

208. Noack, *supra* note 173 (noting an author whose posts accusing authorities of failing to adequately investigate an "alleged xenophobic murder" were removed as offensive).

209. Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017, 5:00 AM), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms.

210. *Id.* (describing a post inciting violence against Islamic extremists as passing muster while another denouncing white men as racist was flagged and deleted). You can also take a quiz on the NYT's website about the confusing categorizations of hate speech. Audrey Carlsen & Fahima Haque, *What Does Facebook Consider Hate Speech? Take Our Quiz*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/interactive/2017/10/13/technology/facebook-hate-speech-quiz.html.

211. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 254 ("[I]t shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin.").

212. *See* Karanasiou, *supra* note 202, at 257.

213. *Germany is Silencing "Hate Speech," but Cannot Define It*, THE ECONOMIST (Jan. 13, 2018), https://www.economist.com/news/europe/21734410-new-social-media-law-causing-disquiet-germany-silencing-hate-speech-cannot-define-it.

lawmakers. It would also pose no challenge to § 230 protections, since it would hold sites like Facebook accountable for their own actions (i.e. failure to remove the speech), rather than imposing liability upon them as the speaker or publisher of the content.

D. Implement Media Literacy Educational Programs

An October 2017 report indicated that 67% of Americans look to social media for at least some form of news.[214] The same report also found that 64% of adults felt misleading information caused "a great deal of confusion about the basic facts of current issues and events."[215] Considering the prevalence of problematic information and reporting on social media sites, it is fair to consider a more grassroots-level approach rather than dictating solutions from the top down. This could mean civically-minded media literacy education that encourages students to critically evaluate and contextually consider information they encounter in a digital context.[216]

In fact, eleven states have either adopted or are in the process of adopting laws that mandate media literacy education.[217] Organizations like Common Sense Kids Action, National Association for Media Literacy Education (NAMLE), and the Digital Citizenship Institute have paired together to advocate for these types of educational programs.[218] On its website, Media Literacy Now provides a "Legislative Action Toolkit" available to download that includes detailed templates for phone calls, emails, and letters aimed at promoting community advocacy and

214. Bialik, *supra* note 100.

215. *Id.*

216. *See generally* Steven Seidenberg, *Lies and Libel: Fake News Lacks Straightforward Cure*, ABA JOURNAL (July 2017), http://www.abajournal.com/magazine/article/fake_news_libel_law. (quoting R. Kelly Garrett, an associate professor of communications at Ohio State University: "One strategy Americans can use is to be aware of this: Recognize that if your emotional buttons are hit, you are less likely to deploy your critical-thinking skills. . . . [b]efore you share a link . . . think carefully.").

217. Erin McNeill, *We Are Following 14 New Bills This Legislative Season*, MEDIA LITERACY NOW (Feb. 12, 2019), https://medialiteracynow.org/bills-we-are-following-this-legislative-season/.

218. *Legislation*, *supra* note 34.

legislative dialogue.[219] It also provides a detailed Model Bill for consideration by state legislators.[220]

While the correlation between cause and effect might be more difficult to chart in regard to educational measures, encouraging media literacy presents a low-cost, easily modified, more flexible solution to the dangers posed by the Internet's rapidly evolving and constantly changing dynamics. Equipping students with mutable tools to decode the unprecedented amount of digital information they encounter is inarguably an educational imperative.

This more adaptable solution becomes even more appealing in light of the fact that legislation is unable to keep pace with the Internet. While Facebook occupies the majority of this article's analysis, there are clear signs already that the platform is on the wane; in the last quarter of 2017, Facebook saw a decrease in use that amounted to 50 million fewer user hours.[221] 2018 saw that trend continue, with commentators calling it the platform's "worst year ever" after it lost over $100 billion in the wake of scandals and missteps.[222] Digital cycles metabolize tech companies into obsolescence with ever-increasing rapidity. Media literacy programs have the potential to equip students with a set of critical thinking tools that can be applied across a wide range of platforms and technologies. They can impart awareness about how data is collected, used, and stored, as well as create a more holistic understanding of whom is sharing what information and why. Further, curriculum that is dependent on consensuses from educators, parents, and administrators can change with much greater ease than legislative ordinances, government regulations, or judicial interpretations. It would seem, from a practical vantage point, that ordinances mandating media literacy education might be a sensible, if less immediate or dramatic, solution.

219. *Take Action Today!,* MEDIA LITERACY NOW, https://medialiteracynow.org/become-an-advocate/ (last visited Feb. 24, 2019) ("Over and over, we see that grassroots, local and state-level advocacy is the engine that moves Media Literacy education forward. . . . Start a chapter in your own state and coordinate activity there with our Toolkit. . . . Media Literacy Now can help you with any materials you need.").

220. *Id.* The bill encourages a community-based model for identifying best practices that involves teachers, parents, and administrators. It also encourages media literacy and Internet safety policies to be reviewed annually. *Id.*

221. Jake Swearingen, *Mark Zuckerberg: People are Using Facebook Less, Just as We Planned*, INTELLIGENCER. (Jan. 31, 2018), http://nymag.com/selectall/2018/01/people-are-using-facebook-less-just-as-zuckerberg-planned.html.

222. Lauren Feiner, *Facebook's Worst Year Ever is Now Over. Here's How Its Scandals Affected the Stock*, CNBC (Dec. 31, 2018, 4:01 PM), https://www.cnbc.com/2018/12/31/how-facebooks-stocked-fared-through-privacy-scandals-in-2018.html.

V. CONCLUSION

In April of 2018, President Trump signed FOSTA, an amendment to § 230 intended to combat sex trafficking on the Internet, into law.[223] Though the law makes § 230 protections unavailable to sites publishing information that facilitates sex trafficking, a topic that is largely outside the activity of major Internet sites, Facebook should be put on notice that the momentum of public discourse is shifting irrevocably toward more accountability.[224]

As previously noted, and likely with this zeitgeist in mind, Facebook has changed the way it prioritizes the posts users see in a major way.[225] In a January 11, 2018 post, Facebook CEO Mark Zuckerberg stated, "[w]e feel a responsibility to make sure our services aren't just fun to use, but also good for people's well-being."[226] Facebook now prioritizes more "meaningful interactions between people[,]"[227] like family and friends.[228]

Again, from a legal vantage point, it would seem Facebook is interested in removing itself from the bright glare of so much public scrutiny. In the wake of decreased public pressure, it is more likely that legislators will leave § 230 untouched, and judges will find less cause to reexamine case law. Perhaps this is the best solution, moving forward: companies acting symbiotically in response to public pressure to change policies before legislators and the judiciary are compelled to act. Legislative response is notoriously slow; the pace of the Internet's growth is not.[229] The judiciary's opinions on the Internet remain generally pensive (and even obtuse),[230] making it another imperfect mechanism for regulating the quicksilver nature of the technology's scope.

223. Jackman, *supra* note 18; Jackman, *supra* note 24.

224. Jack Corrigan, *Controversial Anti-Sex Trafficking Bill Could Get Vote This Month*, NEXTGOV (Jan. 11, 2018), http://www.nextgov.com/policy/2018/01/controversial-anti-sex-trafficking-could-get-vote-month/145147/.

225. Jonah Engel Bromwich & Matthew Haag, *Facebook is Changing. What Does that Mean for Your News Feed?*, N.Y. TIMES (Jan. 12, 2018), https://www.nytimes.com/2018/01/12/technology/facebook-news-feed-changes.html.

226. Zuckerberg, *supra* note 107.

227. *Id.*

228. Bromwich & Haag, *supra* note 225.

229. Kevin Maney, *The Law Can't Keep Up with Technology . . . and That's a Very Good Thing*, NEWSWEEK (Oct. 31, 2015, 2:27 PM), http://www.newsweek.com/2015/11/13/government-gets-slower-tech-gets-faster-389073.html.

230. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017). In this recently decided Supreme Court case, Justice Kennedy, writing for the majority, stated, "For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example . . . and the telephone another[.]" *Id.*

Consideration of these facts makes the most likely scenario that consumer-minded data protection laws will win the day, leaving the remarkably Teflon and relevant-yet-anachronistic § 230 intact for the foreseeable future. Finally, perhaps relevant to consider is the fact that there will likely come a time where the problems posed by Facebook seem quaint. This is the fate of all technology. What will not change, however, is the interdependent nature of the work that will need to transpire for all parties, including the tech sector, the government, the judiciary, and of course, the public, to coexist peaceably and civically in the digital future.