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# The Indecency of the Communications Decency Act § 230: Unjust Immunity for Monstrous Social Media Platforms

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**The Indecency of the  
Communications Decency Act § 230:  
Unjust Immunity for Monstrous  
Social Media Platforms**

**Natalie Annette Pagano\***

*Abstract*

*The line between First Amendment protection and the innovation of social media platforms is hazy at best. Not only do these platforms increasingly encompass the lives of many individuals, but they provide incredible new opportunities to interact from near and far, through sharing photographs, videos, and memories. The Internet provides countless outlets that are available at the tip of users' fingers: thriving forums to communicate nearly whenever and wherever desired. Users effortlessly interact on these platforms and are consistently exposed to numerous forms of speech, including messages through posts, chat room discussions, videos, polls, and shared statements. From 2010 to 2017, the number of social media users worldwide has increased from 0.97 billion to 2.46 billion, respectively.<sup>1</sup> These numbers are expected to grow as high as 3.02 billion in the year 2021.<sup>2</sup> Undoubtedly, an unbelievably large number of individuals are exposed daily to these leading-edge speech forums—many of whom are unaware of the inadequacy of Section 230 of the Communications Decency Act (“Section 230”).<sup>3</sup> This Article will address its history of creation and past case law,*

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1. *Number of Social Network Users Worldwide from 2010 to 2021 (In Billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Feb. 16, 2019).

2. *Id.*

3. 47 U.S.C. § 230.

*and provide a thorough analysis of its need to be revised. Moreover, this Article will specifically speak to the manner in which it should be revised in order to ensure protection to users of social media platforms who encounter situations in which they seek legal remedies for the need to remove unlawful material.*

Introduction .....	512
I. Legislative History of Section 230 of the Communications Decency Act .....	514
II. History of Social Media Platforms .....	516
A. AOL (America Online).....	517
B. Myspace .....	518
C. Facebook .....	519
D. Twitter.....	520
III. Indecency of the Communications Decency Act § 230 Coinciding with Social Media Growth.....	520
A. AOL (America Online).....	521
B. Myspace .....	523
C. Facebook .....	525
D. Twitter.....	528
IV. Legislative Intent .....	532
V. Section 230: Egregious Impact and Revisions Needed .....	535
A. Legislation in Action .....	536
B. Suggested Revisions .....	537
Conclusion .....	538

## Introduction

Social media platforms provide users with readily available outlets to conduct or engage in some form of speech with ease and efficiency, as well as nearly instantaneously. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>4</sup> First Amendment protection is not absolute. It does not extend to all forms of speech, and not all places are protected equally.<sup>5</sup> Today, approximately seven of

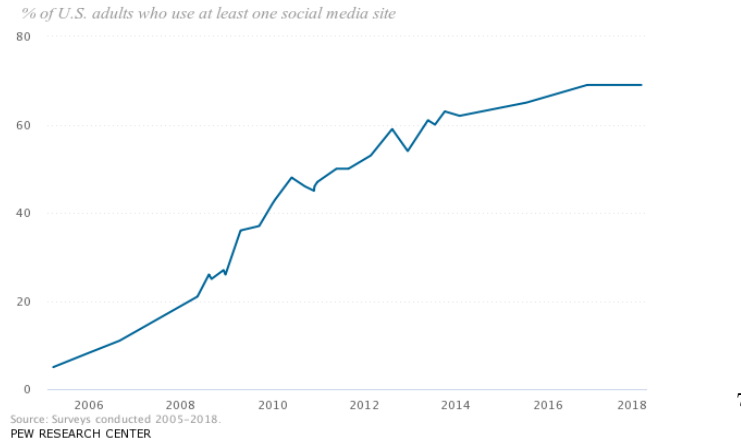
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4. U.S. CONST. amend. I.

5. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

2018      *COMMUNICATIONS DECENCY ACT § 230*      513

every ten Americans use social media to connect with individuals, keep up with the news, share content, and entertain themselves.<sup>6</sup>



While these platforms provide wonderful opportunities to share or receive information, there is increasing worry in light of Section 230; specifically, the growing clash between the First Amendment and these new speech outlets. As it currently stands, this Section's response to who should be considered the publisher or speaker of this information is blatantly inequitable.

Section 230, as it is currently drafted, protects social media platforms from nearly all lawsuits regarding content posted by third parties.<sup>8</sup> Users of these platforms across the country are unaware of this, and many are ignorant of the truth: that they will likely be left with no legal remedy when a situation arises where the removal of unlawful material is desired. Unfortunately, as it stands, Section 230 shields Internet Service Providers from nearly all lawsuits that involve third-party

6. *Social Media Fact Sheet*, PEW RESEARCH CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/>.

7. *Id.* (stating that "when Pew Research Center began tracking social media adoption in 2005, just 5% of American adults used at least one of these platforms. By 2011 that share had risen to half of all Americans, and today 69% of the public uses some type of social media.").

8. § 230.

material on these social media platforms. While Section 230 has received considerable attention in popular press sources over the years,<sup>9</sup> its need to be revised is still extraordinarily necessary and foreseeable.

### I. Legislative History of Section 230 of the Communications Decency Act

The Commerce Clause gives authority to Congress over state laws to regulate the Internet.<sup>10</sup> The Communications Decency Act was signed into law and became effective on February 8, 1996.<sup>11</sup> Senator James Exon introduced the Communications Decency Act in 1995 with the goal of regulating obscenity and indecency online.<sup>12</sup> This was a first attempt at regulating speech on the Internet.<sup>13</sup> Motivation arose from concern for indecency on the Internet and the accessibility of it by all individuals, including children. In fact, the Senator determined that 83.5 percent of computerized photographs that were available on the Internet were pornographic.<sup>14</sup> This study was published on the front page of *Time* magazine, and exploited the need for this issue to be addressed.<sup>15</sup> This Act made it illegal

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9. See, e.g., Editorial Board, *Political Sex-Trafficking Exploitation*, WALL ST. JOURNAL (Mar. 2, 2018, 7:01 PM), <https://www.wsj.com/articles/political-sex-trafficking-exploitation-1520035315>; Cecilia Kang, *House Passes Online Sex-Trafficking Bill After Big Tech Companies Back Off*, N.Y. TIMES (Feb. 27, 2018), <https://www.nytimes.com/2018/02/27/business/online-sex-trafficking-bill.html>; see also Brian Baxter, *Tormented by Cyber-Stalker, Ropes Partner Drafts New Legislation*, AMLAW DAILY (Apr. 17, 2009, 4:16 PM), <https://amlawdaily.typepad.com/amlawdaily/2009/04/ropes-gray-partner-fights-cyberstalker.html>.

10. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

11. *Zeran v. Am. Online, Inc.*, 958 F. Supp. 1124, 1129 (E.D. Va. 1997).

12. See generally *CDA 230: The Most Important Law Protecting Internet Speech*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> [hereinafter *CDA 230*].

13. See Mike Mills, *Congress Nearing Passage of Rules Curbing On-Line Smut*, WASH. POST, Dec. 7, 1995, at A1. 140 CONG. REC. S9745 (daily ed. July 26, 1994) (statement of Sen. Exon).

14. See also 141 CONG. REC. S9017-02 (daily ed. June 26, 1995) (statement of Sen. Grassley) (stating that, “83.5 percent of all computerized photographs available on the Internet are pornographic”).

15. Philip Elmer-DeWitt, *Cyberporn: On a Screen Near You*, TIME, July 3, 1995, at 38 reprinted in 141 CONG. REC. S9019 (daily ed. June 26, 1995).

2018      *COMMUNICATIONS DECENCY ACT § 230*      515

to knowingly send to or show minors obscene or indecent content online.<sup>16</sup> Subsequently, with concern of free speech and the availability of online platforms, Representatives Chris Cox and Ron Wyden amended the Communications Decency Act with what became Section 230.<sup>17</sup>

Section 230, titled “Protection for private blocking and screening of offensive material,” represents a first effort to set forth the appropriate level of federal regulation of the Internet.<sup>18</sup> Section 230(c)(1) states that “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.”<sup>19</sup> Significant attention has been given to Section 230 since its enactment, with notice given to the exemption from punishment it has favored for websites with third-party content available on them.<sup>20</sup> Section 230 supporters sought to remedy these issues with the following objectives in mind:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) 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;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict

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16. *CDA 230*, *supra* note 12.

17. *Id.*

18. 47 U.S.C. § 230 (1996).

19. *Id.* § 230(c)(1).

20. See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 410–12 (2010).

their children's access to objectionable or inappropriate online material; and  
(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.<sup>21</sup>

While supporters argue that 47 U.S.C. § 230(c)(1) “does not create immunity of any kind,” but rather “limits who may be called [a] publisher of information that appears online,”<sup>22</sup> notable case law in this area of conflict between speech and these platforms strongly supports that this is certainly not the case.

## II. History of Social Media Platforms

America Online (“AOL”), Myspace, Facebook, and Twitter are four monstrous social media platforms that have encompassed and gravely refined society's way of communicating both near and afar, but always behind a computer, phone, or tablet screen. These four outlets have been involved with major cases revolving around Section 230, bringing light to unjust immunity that social media platforms have been benefiting from in terms of speech published through their outlets. With AOL created in 1985, Myspace created in 2003, Facebook created in 2004, and Twitter created in 2006, these platforms, along with the potential of new and upcoming future platforms, are revamping our entire way of life and speech with each passing year.<sup>23</sup> Along with these continuous arising platforms on the Internet comes the need to revise

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21. § 230(b).

22. Brief for Appellant at 23–24, *Albert v. Yelp, Inc.*, No. G051607, 2015 WL 4640633 (Cal. Ct. App. 2015).

23. Lily Rothman, *A Brief Guide to the Tumultuous 30-Year History of AOL*, TIME (May 22, 2015), <http://time.com/3857628/aol-1985-history/>; Nicholas Carlson, *At Last—The Full Story of How Facebook Was Founded*, BUS. INSIDER (Mar. 5, 2010, 4:10 AM), <http://www.businessinsider.com/how-facebook-was-founded-2010-3>; *Our Company*, TWITTER, [https://about.twitter.com/en\\_us/company.html](https://about.twitter.com/en_us/company.html) (last visited Feb. 16, 2019); *Then and Now: A History of Social Networking Sites*, CBS NEWS, <https://www.cbsnews.com/pictures/then-and-now-a-history-of-social-networking-sites/7/> (last visited Feb. 16, 2019).

2018      *COMMUNICATIONS DECENCY ACT § 230*      517

Section 230. Specifically, it must be revised in a manner that balances the First Amendment, the innovation of these platforms, and the just outcome that is necessary in our legal system as to who should carry liability in terms of publishing or speaking through these platforms.

## A. AOL (America Online)

AOL, formerly known as America Online, is one of the largest Internet-access providers in the United States, and one of the first companies to provide a sense of community to society through the Internet.<sup>24</sup> The company was founded in 1989 in Dulles, Virginia, where it started out serving as a user of “Apple Computer’s Macintosh and Apple II machines, expanding to include personal computers running Microsoft Corporation’s Windows OS (operating system) in 1993.”<sup>25</sup> In 2000, AOL and Time Warner Inc. merged.<sup>26</sup> On April 3, 2006, the company changed its name to AOL, and in December 2009 it became an independent company.<sup>27</sup> The platform offers its users services such as e-mail (commonly known for its *You’ve Got Mail* alert), AOL Instant Messenger software, AOL Video, video searches, sports, weather, stock quotes, news, and MapQuest.<sup>28</sup> With such a substantive history behind it, the company is global, covering areas including France, Britain, Germany, the Netherlands, Austria, Japan, Australia, India, Canada, Mexico, Argentina, and Puerto Rico.<sup>29</sup> With this global coverage, approximately 2.1 million people used dial-up Internet from AOL in 2015.<sup>30</sup> As of March 31, 2015, the company’s market value was \$3,106 million.<sup>31</sup>

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24. AOL, ENCYC. BRITANNICA, <https://www.britannica.com/topic/AOL> (last visited Feb. 16, 2019).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. AOL, *supra* note 24.

30. John-Michael Bond, *2.1 Million People Still Use Dial-Up Internet From AOL, and Other Mind-Boggling Facts*, DAILY DOT (Jan. 8, 2017, 8:26 AM), <https://www.dailydot.com/debug/dvd-rental-windows-3-aol-2017/>.

31. *858: AOL*, FORTUNE 500, <http://fortune.com/fortune500/2015/aol> (last visited Feb. 16, 2019).



## B. Myspace

Myspace, founded in 2003 by Tom Anderson and Chris Dewolfe, succeeded AOL, creating a new outlet for users to connect and share messages and stories: a new platform for speech to be conducted.<sup>32</sup> After its launch in 2006, it was considered the most popular website in the United States.<sup>33</sup> Myspace was the world's most visited domain for American users as of July 11, 2006.<sup>34</sup> Initially, Myspace users created profiles, tending to include personal information such as age, gender, interests, lifestyle, and schooling. Today, the company states that, "[t]hrough an open design, compelling editorial features, and analytics-based recommendations, MySpace creates a creative community of people who connect around mutual affinity and inspiration for the purpose of shaping, sharing, and discovering what's next."<sup>35</sup> In 2011, Tim Vanderhook, Chris Vanderhook, and Justin Timberlake acquired the Myspace site.<sup>36</sup> This acquisition created a great change in the platform, and allowed for a revival of its success and desired use by individuals. In November of 2014, approximately 50 million individuals in the United States visited the site.<sup>37</sup> Today, the company has an electric team of 150 engineers, designers, writers, and strategists "who live and breathe Myspace."<sup>38</sup> The platform today is more heavily focused

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32. Timothy Stenovec, *Myspace History: A Timeline of the Social Network's Biggest Moments*, HUFFPOST (Aug. 29, 2011), [https://www.huffingtonpost.com/2011/06/29/myspace-history-timeline\\_n\\_887059.html](https://www.huffingtonpost.com/2011/06/29/myspace-history-timeline_n_887059.html).

33. Alexis Kleinman, *Sad but True: People Are Actually Going on Myspace in Search of #TBT Pics*, HUFFPOST (Dec. 6, 2017), [https://www.huffingtonpost.com/2015/01/14/myspace-is-back-from-the-dead-to-haunt-you\\_n\\_6472868.html](https://www.huffingtonpost.com/2015/01/14/myspace-is-back-from-the-dead-to-haunt-you_n_6472868.html).

34. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 151 (Cal. Ct. App. 2009).

35. *Pressroom*, MYSPACE, <https://myspace.com/pressroom/aboutmyspace> (last visited Feb. 16, 2019) [hereinafter *About Myspace*].

36. *Id.*

37. Geoff Desreumaux, *Remember Myspace? Its Alive and Kicking!*, WERSM, (Jan. 19, 2015), <http://wersm.com/remember-myspace-its-alive-and-kicking/>.

38. *About Myspace*, *supra* note 35.

2018      *COMMUNICATIONS DECENCY ACT § 230*      519

on music than its original focus during its creation and upbringing, which had a blog-like feel.<sup>39</sup>

### C. Facebook

Facebook was launched by 19-year-old Mark Zuckerberg as a Harvard sophomore on February 4, 2004.<sup>40</sup> In August 2005, the site became Facebook.com after the address was purchased for \$200,000.<sup>41</sup> The site then spread worldwide, reaching as far as United Kingdom universities.<sup>42</sup> Today, Facebook holds the mission of “giv[ing] people the power to build [a] community and bring the world closer together.”<sup>43</sup> According to Facebook, users utilize the platform “to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.”<sup>44</sup> With approximately 23,000 employees as of September 30, 2017, this site has the ability to provide an unbelievably large platform of interaction and speech to its users.<sup>45</sup> Approximately one year later, in December 2018, the site had 1.52 billion daily active users on average, and 2.32 billion monthly active users.<sup>46</sup> Today, with international offices in areas such as New York, Amsterdam, Milan, and Tokyo, along with leadership including its Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, Chief Technology Officer, Chief Product Officer, and Board of Directors, Facebook is able to provide society with a cutting-edge outlet for sharing posts, videos, photographs, news stories, statuses, advertisements, and new life-changing events.<sup>47</sup>

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39. *Id.*

40. Carlson, *supra* note 23.

41. Sarah Phillips, *A Brief History of Facebook*, *GUARDIAN* (July 25, 2007, 5:29 AM), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

42. *Id.*

43. *Company Info*, FACEBOOK: NEWS ROOM, <https://newsroom.fb.com/company-info/> (last visited Feb. 16, 2019).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

## D. Twitter

Twitter was founded on March 21, 2006 in San Francisco, California.<sup>48</sup> The company holds the mission that “everyone should have the power to create and share ideas and information instantly, without barriers.”<sup>49</sup> Twitter is a large social networking service that allows users to post brief 280-character messages, referred to as tweets.<sup>50</sup> It has commonly been named as one of the most popular social media sites for teenagers in the United States.<sup>51</sup> Twitter is headquartered in San Francisco and has over thirty-five offices across the world, allowing it to offer an outlet for individuals worldwide.<sup>52</sup> The company’s website states that it “believe[s] in free expression and think[ing] every voice has the power to impact the world.”<sup>53</sup> With this belief, along with its executive team and board of directors, the company has been able to create and provide an enormous platform for its users to engage in voicing opinions, beliefs, and messages worldwide. In fact, as of the first quarter of 2017, Twitter had 328 million monthly active users.<sup>54</sup> Most prominently, Twitter is utilized not only for personal brief posts and statements, but also for political statements, sports updates, music and entertainment updates, and world news.

### III. Indecency of the Communications Decency Act § 230 Coinciding with Social Media Growth

While AOL, Myspace, Facebook, and Twitter are four

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48. André Picard, *The History of Twitter, 140 Characters at a Time*, GLOBE & MAIL (Mar. 28, 2018), <https://www.theglobeandmail.com/technology/digital-culture/the-history-of-twitter-140-characters-at-a-time/article573416/>.

49. *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Feb. 16, 2019).

50. *Twitter - Statistics & Facts*, STATISTA, <https://www.statista.com/topics/737/twitter/> (last visited Feb. 16, 2019).

51. *Id.*

52. *See Careers*, TWITTER, <https://careers.twitter.com/en/locations.html> (last visited Feb. 16, 2019).

53. *Our Values*, TWITTER, [https://about.twitter.com/en\\_us/values.html](https://about.twitter.com/en_us/values.html) (last visited Feb. 16, 2019).

54. *See Twitter - Statistics & Facts*, *supra* note 50.

2018      *COMMUNICATIONS DECENCY ACT § 230*      521

prominent, successful, and commonly used social media sites, the arising issue of these companies continuously escaping liability under Section 230 of the Communications Decency Act is extremely worrisome. Specifically, six notable cases are foundational proof of this: for AOL: *Zeran v. America Online, Inc.*;<sup>55</sup> for Myspace: *Doe II v. MySpace, Inc.*;<sup>56</sup> for Facebook: *Caraccioli v. Facebook, Inc.*<sup>57</sup> and *Cohen v. Facebook, Inc.*;<sup>58</sup> and for Twitter: *Nunes v. Twitter, Inc.*<sup>59</sup> and *Fields v. Twitter, Inc.*<sup>60</sup> These cases represent the growing concern for the need to amend Section 230. These monstrous corporations unfairly benefitted from the provisions of this Section, creating unjust results with each closed case. The holdings, along with the reasoning used in each case, must be known, analyzed, and acknowledged in order for it to be revised in a manner that balances the First Amendment, the innovation of these platforms, and the just outcome that is necessary in our legal system.

## A. AOL (America Online)

The first significant case interpreting Section 230, *Zeran v. America Online*, involved Plaintiff Kenneth M. Zeran (“Zeran”), who was the victim of a malicious prank that occurred on the Internet services provided by the Defendant, AOL.<sup>61</sup> An unknown individual, or group of individuals, acted without Zeran’s knowledge or approval, and posted private information on multiple notices on AOL’s electronic bulletin board; specifically, his name and telephone number.<sup>62</sup> These bulletin boards advertised t-shirts and other items with slogans that promoted and praised the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.<sup>63</sup> This tragedy

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55. *See generally* 129 F.3d 327 (4th Cir. 1997).

56. *See generally* 96 Cal. Rptr. 3d 148 (Cal. Ct. App. 2009).

57. *See generally* 167 F. Supp. 3d 1056 (N.D.Cal. 2016), *aff’d* 700 F. App’x 588 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1027 (2018), *reh’g denied*, 138 S. Ct. 2021 (2018).

58. *See generally* 252 F. Supp. 3d 140 (E.D.N.Y. 2017).

59. *See generally* 194 F. Supp. 3d 959 (N.D. Cal. 2016).

60. *See generally* 881 F.3d 739 (9th Cir. 2018).

61. *Zeran*, 129 F.3d at 328.

62. *Id.*

63. *Id.* at 329.

unfortunately killed 168 people.<sup>64</sup> Subsequently, Zeran received numerous threatening telephone calls from individuals who were angered by these advertisements.<sup>65</sup> From the consistency of these calls, Zeran sued AOL.<sup>66</sup>

Even after the harassment that Zeran endured, the case was not decided in his favor.<sup>67</sup> With an unfavorable outcome for Zeran on behalf of the United States District Court for the Eastern District of Virginia, Zeran appealed.<sup>68</sup> Zeran sought to hold AOL liable for the defamatory speech of the third parties on the bulletin boards.<sup>69</sup> He argued that Section 230 “leaves intact liability for interactive computer service providers who possess notice of defamatory material posted through their services.”<sup>70</sup> Moreover, Zeran argued that because his claims arose from AOL’s negligence prior to the enactment of the Communications Decency Act, it rendered Section 230 inapplicable.<sup>71</sup> Unfortunately, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court.<sup>72</sup> The Court reasoned that Section 230 “plainly immunizes computer service providers like AOL from liability for information that originates with third parties,” and that “Congress clearly expressed its intent that § 230 apply to

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64. *Id.*; see also CNN Library, *Oklahoma City Bombing Fast Facts*, CNN (Mar. 25, 2018, 6:53 PM), <https://www.cnn.com/2013/09/18/us/oklahoma-city-bombing-fast-facts/index.html> (reporting that “[t]he blast killed 168 people, including 19 children. More than 500 people were injured.” Moreover, today, “[t]he Oklahoma City National Memorial and Museum has 168 stone and glass chairs placed in rows on a lawn, one for each victim.”).

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

66. *Zeran v. Am. Online, Inc*, 958 F. Supp. 1124, 1126 (E.D. Va. 1997).

67. *Id.* at 1137 (holding that, “[i]n sum, the CDA preempts a negligence cause of action against an interactive computer service provider arising from that provider’s distribution of allegedly defamatory material provided via its electronic bulletin board. This preemption is applicable to Zeran’s cause of action, brought after the enactment of the CDA, even though the events giving rise to his claim were completed before the CDA became effective. Thus, Zeran can prove no set of facts entitling him to relief against AOL, and AOL’s motion for judgment on the pleadings, pursuant to Rule 12(c), Fed. R. Civ. P., must be granted.”).

68. *Zeran*, 129 F.3d at 328.

69. *Id.* at 330.

70. *Id.* at 328.

71. *Id.*

72. *Id.* at 335.

2018      *COMMUNICATIONS DECENCY ACT § 230*      523

lawsuits, like [this one].”<sup>73</sup> Congress has noted that the Internet is flourishing to the benefit of all citizens, with *minimum government regulation*.<sup>74</sup> The Court further boldly reasoned that:

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. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.<sup>75</sup>

Lastly, the Court further reasoned that Zeran could not focus on action that he took in reliance on the law prior to the enactment of Section 230, because it has “no untoward retroactive effect.”<sup>76</sup> In fact, “even the presumption against statutory retroactivity absent an express directive from Congress” did not help Zeran.<sup>77</sup>

## B. Myspace

Myspace, another leading-edge speech platform, underwent a similar lawsuit in which it escaped liability under Section 230.<sup>78</sup> In *Doe II v. MySpace, Inc.*, Appellants, girls between the ages of thirteen to fifteen, were sexually assaulted by adults that

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73. *Id.* at 328.

74. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); *see also* 47 U.S.C. § 230(a)(4) (emphasis added).

75. *Zeran*, 129 F.3d at 331.

76. *Id.* at 335.

77. *Id.*

78. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 150 (Cal. Ct. App. 2009).

they met through Myspace.<sup>79</sup> Julie Doe II created a Myspace profile in 2005 at fifteen years old.<sup>80</sup> Subsequently, she met a twenty-two-year-old man through Myspace.<sup>81</sup> He sexually assaulted her when they met in person.<sup>82</sup> Julie Doe III was also fifteen years old when she created her profile on Myspace.<sup>83</sup> She met a twenty-five-year-old man on Myspace.<sup>84</sup> He lured her out of her home, drugged her, and sexually assaulted her.<sup>85</sup> Moreover, Julie Doe IV was thirteen years old when she made her Myspace profile.<sup>86</sup> At the age of fourteen years, she met an eighteen-year-old male.<sup>87</sup> He met Julie Doe IV in person, drugged her, and took turns sexually assaulting her with a friend.<sup>88</sup> In 2006, fourteen-year-old Julie Doe V and fifteen-year-old Julie Doe VI both met eighteen-year-old and nineteen-year-old men on Myspace, and were subsequently sexually assaulted by the men at in-person meetings.<sup>89</sup> These individuals brought four separate cases, through either parents or guardians, against Myspace, asserting claims for gross negligence, negligence, and strict product liability.<sup>90</sup> Together, they urged that Myspace failed to “implement reasonable, basic safety precautions with regard to protecting young children from sexual predators.”<sup>91</sup> Appellants’ claims advanced that Myspace failed to implement reasonable measures to prevent situations such as these—to prevent older users from searching, finding, and communicating with minors.<sup>92</sup>

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79. *Id.*

80. *Id.*

81. *Id.* at 150 (noting that “[a]s a result, he is currently serving 10 years in prison”).

82. *Id.* at 154.

83. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 150 (Cal. Ct. App. 2009).

84. *Id.* at 150–51.

85. *Id.* (stating that “Julie Doe III’s attacker pled guilty to charges stemming from the incident and is currently serving 10 years in prison.”).

86. *Id.*

87. *Id.*

88. *Id.* (“As of August 2007, the 18-year-old user is awaiting trial while his friend pled guilty to second degree felony rape and was sentenced to 4 and one-half years in prison.”). *Id.*

89. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 150 (Cal. Ct. App. 2009) (noting that, “[a]s of August 2007, both men were awaiting trial”).

90. *Id.* at 151.

91. *Id.*

92. *Id.*

2018      *COMMUNICATIONS DECENCY ACT § 230*      525

Four separate appeals were filed that were consolidated by the Court of Appeals on May 9, 2008.<sup>93</sup> Once again, unfortunately, the Court determined that Myspace was shielded from immunity in accordance with Section 230, noting the “general consensus” to interpret this Section broadly.<sup>94</sup> At the center of this effort to resolve this dispute, Appellants wanted Myspace to regulate what appears on its site.<sup>95</sup> While the Appellants alleged that Myspace was not liable under a “publisher’s traditional editorial functions,” the Court disagreed, finding that this logic was precisely what was being alleged.<sup>96</sup> The Court reasoned that the Appellants wanted Myspace to take steps for assurance that sexual predators would not be able to access minors on its platform, and relied on the fact that to “restrict or make available certain material—is expressly covered by [S]ection 230.”<sup>97</sup> Ultimately, the Court found that Myspace was not an information content provider, and was therefore not subject to liability under Section 230.<sup>98</sup>

## C. Facebook

*Caraccioli v. Facebook, Inc.* is a lawsuit in which Facebook escaped liability under Section 230.<sup>99</sup> The Plaintiff, Franco Caraccioli, argued that in September of 2014 an unknown individual created a Facebook account with the name of “Franco Caracciolijerkingman.”<sup>100</sup> The account published videos and photographs of the Plaintiff “sexually arousing or pleasuring

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93. *Id.*

94. *Id.* at 156.

95. *Doe II v. MySpace Inc.*, 96 Cal. Rptr. 3d 148, 156 (Cal. Ct. App. 2009) (stating that “[a]ppellants argue they do not ‘allege liability on account of MySpace’s exercise of a publisher’s traditional editorial functions, such as editing, altering, or deciding whether or not to publish certain material, which is the test for whether a claim treats a website as a publisher under *Barrett*” (citation omitted)).

96. *Id.*

97. *Id.* at 157.

98. *Id.* at 158.

99. *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016), *aff’d* 700 F. App’x 588 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1027 (2018), *reh’g denied*, 138 S. Ct. 2021 (2018).

100. *Caraccioli*, 167 F. Supp. 3d at 1060.



himself.”<sup>101</sup> The Plaintiff believed that a friend request was sent to all of his friends within his community due to the amount of messages and calls he received regarding this incident.<sup>102</sup> The Plaintiff reported the account to Facebook requesting that it be removed due to “the humiliating sexual nature of the content.”<sup>103</sup> The next day, Facebook sent the Plaintiff an email stating it received notifications regarding the account, and that after reviewing the account it “determined that Franco Caraccioli is a person who’s using Facebook in a way that follows the Facebook Community Standards.”<sup>104</sup> Plaintiff followed up with an email in response to Facebook, stating that he would take legal action.<sup>105</sup> The next day, Facebook deleted the account.<sup>106</sup>

After an unfavorable ruling on behalf of the United States District Court for the Northern District of California, Plaintiff-Appellant appealed “pro se from the district court’s judgment dismissing his diversity action alleging various state law claims arising from Facebook, Inc.’s refusal to remove private images and videos . . . posted on Facebook’s website by a third party” to the United States Court of Appeals for the Ninth Circuit.<sup>107</sup> The Appellate Court declared that the Plaintiff-Appellant’s claims were barred by the Communications Decency Act.<sup>108</sup> The Court reasoned that, pursuant to Section 230(c)(1), Facebook was not

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 1061.

105. *Id.*

106. *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056 (N.D. Cal. 2016).

107. *Caraccioli v. Facebook, Inc.*, 700 F. App’x 588, 589–90 (9th Cir. 2017).

108. *Id.* at 590 (holding “the district court properly dismissed Caraccioli’s defamation, libel, false light, public disclosure of private facts, intrusion upon seclusion, intentional and negligent infliction of emotional distress, negligent supervision and retention, and California’s Unfair Competition Law (“UCL”) claims because the basis for each of these claims is Facebook’s role as a ‘republisher’ of material posted by a third party, and the claims are, therefore, barred by the Communications Decency Act (“CDA”). *See* 47 U.S.C. § 230(c)(1); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009) (§ 230(c)(1) of the CDA ‘protects from liability (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.’”).

2018      *COMMUNICATIONS DECENCY ACT § 230*      527

the information content provider.<sup>109</sup> Moreover, it reasoned that Section 230(c)(1) of the Communications Decency Act “protects from liability (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.”<sup>110</sup> Contrary to Caraccioli’s argument, Facebook did not become the “information content provider” under Section 230(c)(1) merely by virtue of reviewing the contents of the suspect account and deciding not to remove it. The Court also rejected Plaintiff-Appellant’s claim that Facebook’s terms of service are “unconscionable.”<sup>111</sup>

Facebook also escaped liability under the Communications Decency Act in *Cohen v. Facebook, Inc.*<sup>112</sup> Plaintiffs in this case brought multiple claims against Facebook, Inc., asserting that Facebook “supported terrorist organizations by allowing those groups and their members to use its social media platform to further their aims.”<sup>113</sup> In the first action, the Plaintiffs consisted of approximately 20,000 Israeli citizens, and the Plaintiffs in the second action were victims, estates, and family members of victims of terrorist attacks in Israel.<sup>114</sup> The Plaintiffs in both of these actions argued that Palestinian terrorists “use Facebook’s social media platform and Communications services to incite, enlist, organize, and dispatch would-be killers to ‘slaughter Jews,” and that Palestinian terrorist groups use pages on Facebook to incite violence and glorify past terrorist attacks.<sup>115</sup> The Plaintiffs argued that Facebook deserves responsibility for allowing this content to be distributed and available.<sup>116</sup>

These Plaintiffs urged that their causes of action were not barred by Section 230(c)(1).<sup>117</sup> Unfortunately, once again in favor of Facebook, the company escaped liability under this

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140 (E.D.N.Y. 2017).

113. *Id.* at 145.

114. *Id.*

115. *Id.* at 146.

116. *Id.*

117. *Id.* at 148.

Act.<sup>118</sup> “The court . . . conclude[d] that the activity alleged [fell] within the immunity granted by Section 230(c)(1).”<sup>119</sup> The Court reasoned that the decision regarding who is protected from liability is based on the traditional editorial functions of a publisher, including the decision “to publish, withdraw, postpone, or alter content” that they did not themselves create.<sup>120</sup> Moreover, the Court believed that placing liability based on Facebook’s actions to not remove users would equally “derive[] from [Facebook’s] status or conduct as a ‘publisher or speaker.’”<sup>121</sup> At its core, the Court found that Section 230(c)(1) holds the purpose of averting courts from “entertaining civil actions” that exist to place liability on companies such as Facebook for allowing third parties to display or post, content that is harmful, or failing to remove such content.<sup>122</sup> Overall, the Court found that Facebook sufficiently made an affirmative defense of falling under Section 230(c)(1) of the Communications Decency Act, allowing it to escape liability in this situation.<sup>123</sup>

#### D. Twitter

In addition to these three social network providers, Twitter has attempted to rely on Section 230 to escape liability. Specifically, in *Nunes v. Twitter, Inc.*, the Plaintiff, Beverly Nunes, had a recycled cell phone number.<sup>124</sup> She did not use Twitter often, but the prior owner of her recycled cell phone did.<sup>125</sup> Nunes began receiving tweets via text messages from the

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118. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 155 (E.D.N.Y. 2017).

119. *Id.*

120. *Id.* at 156 (finding that “[t]he Second Circuit’s most recent opinion on the subject provided the following guidance as to when a defendant is shielded: [W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant’s status or conduct as a ‘publisher or speaker.’” (quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016))).

121. *Id.* at 156–57 (quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016) (internal quotation marks and citations omitted)).

122. *Id.* at 157 (footnote omitted).

123. *Id.* at 148.

124. 194 F. Supp. 3d 959, 961 (N.D. Cal. 2016).

125. *Id.*

2018      *COMMUNICATIONS DECENCY ACT § 230*      529

prior owner's Twitter, and could not get the text messages to stop.<sup>126</sup> She filed a class action that included "other people in the United States who received unwanted text messages from Twitter," urging that Twitter violated the Telephone Consumer Protection Act of 1991.<sup>127</sup>

Twitter argued that the "lawsuit s[ought] to treat [Twitter] as 'the publisher . . . of any information provided by another information content provider'" (namely, the author of the tweet).<sup>128</sup> However, as the Ninth Circuit stated in *Barnes v. Yahoo!, Inc.*, "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content."<sup>129</sup> The Court noted that Twitter does not *review* the substance of tweets, *edit* the substance of tweets, nor decide what tweets are sent, and, therefore, could not rely so heavily on Section 230.<sup>130</sup> The Court further analogized this attempt to be shielded by Section 230 to newspaper deliveries:

[I]f someone delivers newspapers containing false gossip, and the person who is the subject of the gossip sues the delivery person for defamation, that lawsuit seeks to treat the delivery person as a publisher. But if the delivery person throws an unwanted newspaper noisily at a door early in the morning, and the homeowner sues the delivery person for nuisance, that suit doesn't seek to treat the delivery person as a publisher. The suit doesn't care whether the delivery person is throwing a newspaper or a rock, and the suit certainly doesn't care about the content of the newspaper. It does not involve the delivery person's "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." . . . Nor is the lawsuit asking a court to impose "liability arising from content." . . . It merely seeks to stop the

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126. *Id.*

127. *Id.*

128. *Id.* at 967

129. *Id.* (quoting 570 F.3d 1096, 1102 (9th Cir. 2009)).

130. *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 967 (N.D. Cal. 2016).

nuisance. The same is true of this lawsuit regarding unwanted tweets sent by text to the owners of recycled numbers.<sup>131</sup>

The Court decided that this claim under the Telephone Consumer Protection Act of 1991 did not depend on the content of tweets, and that Twitter should not need to sift through content to ensure that the content is not bad.<sup>132</sup> Furthermore, the Court determined that if Twitter was liable under the Telephone Consumer Protection Act of 1991, “it would be liable whether the content of the unwanted tweets is bad or good, harmful or harmless.”<sup>133</sup> Although this decision was heavily reliant on the Telephone Consumer Protection Act, Twitter vigorously attempted to be shielded by Section 230.

In *Fields v. Twitter, Inc.*, Twitter also unjustly escaped liability under Section 230 for its published content.<sup>134</sup> In that case, Lloyd “Carl” Fields, Jr. and James Damon Creach were unfortunately killed while working in their capacity as government contractors in Jordan during an attack that ISIS took credit for.<sup>135</sup> Plaintiffs-Appellants sued Defendant-Appellee, Twitter, pursuant to 18 U.S.C. § 2333(a), which is the civil remedies provision of the Anti-Terrorism Act (“ATA”).<sup>136</sup> Plaintiffs-Appellants alleged that they were injured due to “Twitter’s knowing provision of material support to ISIS.”<sup>137</sup> Plaintiffs-Appellants identified three ISIS-affiliated Twitter accounts with large numbers of followers.<sup>138</sup> Plaintiffs-Appellants contended that Twitter provided ISIS with dozens of accounts since 2010.<sup>139</sup> Moreover, Plaintiffs-Appellants indicated that ISIS used Twitter’s Direct Messaging feature to reach out to and communicate with potential recruits,

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131. *Id.* (quoting *Barnes*, 570 F.3d at 1102; *Roomate.com*, 521 F.3d at 1162).

132. *Id.* at 967–68.

133. *Id.* at 968.

134. *See generally* 881 F.3d 739 (9th Cir. 2018).

135. *Id.* at 741–42.

136. *Id.*

137. *Id.* at 741.

138. *Id.* at 742.

139. *Id.*

2018      *COMMUNICATIONS DECENCY ACT § 230*      531

as well as to operate and fundraise.<sup>140</sup> They further argued that ISIS used Twitter to recruit publicly by posting guidelines and promotional videos.<sup>141</sup> Plaintiffs-Appellants also argued “that within the year preceding August 2016 alone, Twitter allowed ISIS to attract ‘more than 30,000 foreign recruits,’ and that ISIS used Twitter to fundraise and to ‘spread propaganda and incite fear by posting graphic photos and videos of its terrorist feats.’”<sup>142</sup> Twitter moved to dismiss the case, and its motion was granted.<sup>143</sup> The District Court held that liability on behalf of Twitter was precluded by Section 230 because the claims attempted to treat Twitter as the publisher of the content from ISIS.<sup>144</sup>

Subsequently, on appeal, the United States Court of Appeals for the Ninth Circuit affirmed this decision, holding that Plaintiffs-Appellants “failed to adequately plead proximate causation.”<sup>145</sup> The Appellate Court declined to reach the District Court’s additional holding that Twitter’s liability was precluded by Section 230 because Plaintiffs-Appellants’ claims were treating Twitter as the publisher of ISIS’s content because their pleading alone was found to be insufficient.<sup>146</sup> Lloyd “Carl” Fields, Jr. and James Damon Creach were killed, following this surprisingly appalling use of Twitter,<sup>147</sup> and yet Plaintiffs-Appellants were still left with no justice. The Court noted that “[c]ommunication services and equipment are highly interconnected with modern economic and social life, such that the provision of these services and equipment to terrorists could be expected to cause ripples of harm to flow far beyond the defendant’s misconduct.”<sup>148</sup>

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140. *Fields v. Twitter, Inc.*, 881 F.3d 739, 742 (9th Cir. 2018).

141. *Id.* at 743.

142. *Id.*

143. *Id.* at 741.

144. *Id.*

145. *Id.*

146. *Fields v. Twitter, Inc.*, 881 F.3d 739, 750 (9th Cir. 2018).

147. *Id.* at 741.

148. *Id.* at 748–49.

## IV. Legislative Intent

Unfortunately, the outcomes of these lawsuits, and many others, do not accurately portray the legislature's intentions that led to the creation of Section 230. The overall understanding of what the Internet was when this legislation adopted Section 230 is gravely different from society's general awareness of what the Internet is today. This prominent change in the Internet's being today amounts to the unjust results that have resulted. Congress acted to promote development of the Internet, recognizing it as a platform for expression and speech in the mid-1900s.<sup>149</sup> To allow continued development of the Internet, Congress used its authority to provide interactive content providers with broad immunity pertaining to content generated by users of Internet platforms, and did not treat them like other information providers such as newspapers or radio stations.<sup>150</sup> Congress intended to allow the growth of the Internet for the benefit of society—to impose a flourishing source of communication; specifically:

When Congress passed Section 230 it didn't intend to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users *neutral* tools to post content online to police that content without fear that through their 'good samaritan . . . screening of offensive material,' 47 U.S.C. § 230(c), they would become liable for every single message posted by third parties on their website.<sup>151</sup>

To society's dismay, the ability to post "without fear"<sup>152</sup> has

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149. 47 U.S.C. § 230(a) (2006) (expressing that the Internet allows mass communication).

150. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003), *superseded by statute*, CAL. CIV. PROC. CODE § 425.17(e), *as recognized in Breazeale v. Victim Services, Inc.*, 878 F.3d 759 (9th Cir. 2017).

151. *Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (citation omitted).

152. *Id.*

2018      *COMMUNICATIONS DECENCY ACT § 230*      533

been met, and too far exceeded. Users of the Internet, to this day, are still feeling the impact of the overbroad protection that Section 230 has provided to many companies. Section 230 compels social media platforms “to neither restrict content nor bury their heads in the sand in order to avoid liability.”<sup>153</sup> Through this, “a trillion-dollar industry centered around user-generated content” was created.<sup>154</sup>

Most recently, Google escaped liability under Section 230 in a decision from February of 2018 in *Bennett v. Google, LLC*.<sup>155</sup> There, Bennett, who owns DJ Bennett, a retailer of high-end sports apparel, hired Scott Pierson, the founder of The Executive SEO Agency, which provides search engine optimization and marketing (“SEO”) services in an effort to increase its sales.<sup>156</sup> Their relationship deteriorated after a few months and a disagreement arose regarding DJ Bennett’s payments.<sup>157</sup> Pierson threatened DJ Bennett, declaring “I know things, I can do things, and I will shut down your website.”<sup>158</sup> After their fallout, Pierson wrote “DJ Bennett-think-twice-bad business ethics,” a blog that was published through Google on the Internet.<sup>159</sup> It stated that:

“DJ Bennett, the luxury sporting goods company, did not pay its employees or contractors”; (2) DJ Bennett was “ruthlessly run by Dawn Bennett who also operated Bennett Group Financial Services”; (3) Bennett falsely stated that Pierson had agreed to reduce his hours “as justification for reducing his final invoice by \$3,200”; (4) Pierson’s counsel described Bennett as “judgment proof”; and (5) “DJ Bennett owes thousands and thousands to many people.” The blog concluded: “I urge you to think twice before giving your

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153. *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018).

154. *Id.*; Eric Goldman & Jeff Koseff, *Commemorating the 20th Anniversary of Internet Law’s Most Important Judicial Decision*, RECORDER (Nov. 10, 2017, 4:00 AM), <https://perma.cc/RR2M-UZ2M>.

155. *Bennett*, 882 F.3d at 1164.

156. *Id.*

157. *Id.*

158. *Id.* at 1164.

159. *Id.*



patronage to DJ Bennett.com . . . . The website is pretty, but the person running the show is quite contemptible.”<sup>160</sup>

Pierson refused to remove the post.<sup>161</sup> Bennett’s counsel also requested Google to “drop Pierson’s blog because it violated Google’s guidelines of what is appropriate material for inclusion in blogs.”<sup>162</sup> Notwithstanding Bennett’s complaints, Google continued to publish the blog.<sup>163</sup> Google’s “Blogger Content Policy” regulates “adult content, child safety, hate speech, crude content, violence, harassment, copyright infringement, and malware and viruses.”<sup>164</sup> Users can flag policy violations, and if Google finds that the blog violates its policies, it can limit, delete, or disable access to the blog, or report the user to law enforcement.<sup>165</sup>

The United States Court of Appeals for the D.C. Circuit reviewed the appeal of Google’s claim dismissal *de novo*.<sup>166</sup> The Court noted “The CDA [Communications Decency Act] recognizes that the internet offers ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’”<sup>167</sup> Further, “the Act . . . (1) . . . promote[s] the continued development of the Internet and other interactive computer services . . . [and] (2) preserve[s] the vibrant and competitive free market that presently exists for the InternetFalse.”<sup>168</sup> The Court reasoned that immunity from Section 230 applies if the Defendant can meet the following requirements from *Zeran v. America Online, Inc.*:<sup>169</sup> (1) that it is a “provider or user of an

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160. *Id.* at 1162–65 (citations omitted).

161. *Bennett v. Google, LLC*, 882 F.3d 1163, 1165 (D.C. Cir. 2018).

162. *Id.* (citation omitted).

163. *Id.*

164. *Id.* (footnote omitted).

165. *Id.*

166. *Id.*

167. *Bennet v. Google, LLC*, 882 F.3d 1163, 1165 (D.C. Cir. 2018) (footnote omitted) (citing 47 U.S.C. § 230(a)(3) (2012)).

168. *Id.* (citing § 230(b)).

169. *See generally Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997); Goldman & Kosseff, *supra* note 154 (showing that *Zeran* has been called the “internet law’s most important judicial decision”).

2018      *COMMUNICATIONS DECENCY ACT § 230*      535

interactive computer service;” (2) the post at issue includes “information provided by another information content provider;” and (3) the complaint’s purpose is to hold the defendants accountable as the “publisher or speaker” of the post.<sup>170</sup> The Court found the argument that Google should have been liable as a “publisher of the content” because of its “Blogger Content Policy,” arguably influencing the content it published, to be insufficient.<sup>171</sup> The Court shut down this argument, insisting “the very essence of publishing is making the decision whether to print or retract a given piece of content.”<sup>172</sup>

The decision of *Bennett* “reinforces the applicability of CDA immunity for website operators who host user-generated content, even when the website has established its own standards of decency to guide the person who authors and publishes the post.”<sup>173</sup> The judgment of dismissal was affirmed.<sup>174</sup> The Court urged that this decision does not insist the culpable party will escape liability; however, that can only be half true when analyzing the totality of this lawsuit, and others similar to it. Google, who failed to remove the posts while having the authority and ability to do so, or to take any action for that matter, escaped liability: an unjust result for Bennett.

#### V. Section 230: Egregious Impact and Revisions Needed

With Section 230’s broad immunity consistently at play throughout lawsuits, websites are free to display defamatory and harassing content.<sup>175</sup> As Section 230 currently stands, victims of this content have limited remedies to attack or remove

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170. *Bennett*, 882 F.3d at 1165–66.

171. *Id.* at 1167.

172. *Id.* (quoting *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014)).

173. Adam R. Bialek, *Communications Decency Act Protects Website Operators from Liability Despite Blogger Content Policy*, MONDAQ: WILSON ELSEER (March 6, 2018), <http://www.mondaq.com/unitedstates/x/679326/Social+Media/Communications+Decency+Act+Protects+Website+Operators+from+Liability+Despite+Blogger+Content+Policy>.

174. *Bennett*, 882 F.3d at 1168.

175. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 171–72 (Harvard Univ. Press 2014).

this content.<sup>176</sup> Harassment online “is a common part of online life that colors the experiences of many web users.”<sup>177</sup> In fact, the Pew Research Center has reported that in 2017 approximately “41% of Americans have been personally subjected to harassing behavior online, and an even larger share (66%) has witnessed these behaviors directed at others.”<sup>178</sup> In 2017, a shocking, or perhaps not-so-shocking (in light of unjustified case law results) 79% of individuals in the United States urged that online services “have a responsibility to step in when harassing behavior occurs.”<sup>179</sup> Moreover, in this same year, 26% of Americans have had false information posted about them online.<sup>180</sup> With Section 230 drafted as it currently stands, these numbers are not likely to decrease.

#### A. Legislation in Action

While attempts to amend Section 230 have been made, they are blatantly unsatisfactory. In March of 2018, Congress passed “a mashup of the Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Traffickers Act (SESTA), which is commonly referred to as the latter.”<sup>181</sup> This has been “hailed by advocates as a victory for sex trafficking victims.”<sup>182</sup> FOSTA-SESTA has created an exception to the impact of Section 230.<sup>183</sup>

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176. *See generally id.*

177. Maeve Duggan, *Online Harassment*, PEW RESEARCH CTR. (Oct. 22, 2014), <http://www.pewinternet.org/2014/10/22/online-harassment/>.

178. Maeve Duggan, *Online Harassment 2017*, PEW RESEARCH CTR. (July 11, 2017), <http://www.pewinternet.org/2017/07/11/online-harassment-2017/> (stating that 62% of United States adults agree that people being harassed or bullied online is a major problem).

179. Maeve Duggan, *The Broader Context of Online Harassment*, PEW RESEARCH CTR. (July 11, 2017), <http://www.pewinternet.org/2017/07/11/the-broader-context-of-online-harassment/>.

180. *Id.*

181. Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them* MOTHERBOARD, (Apr. 11, 2018, 11:31 AM), [https://motherboard.vice.com/en\\_us/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work](https://motherboard.vice.com/en_us/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work).

182. Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX (last updated July 2, 2018, 1:08 PM EDT), <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom>.

183. *Id.*

2018      *COMMUNICATIONS DECENCY ACT § 230*      537

Specifically, “publishers *would* be responsible if third parties are found to be posting ads for prostitution — including consensual sex work — on their platforms.”<sup>184</sup> The question still hovers: What about harassment, unwanted content, defamatory material, threatening material, posted on online platforms?

#### B. Suggested Revisions

While Section 230 is insufficient and inadequate as it is currently drafted, rather than blatantly revoking it, it can be revised in order for similar lawsuits to those previously mentioned to endure more just and equitable outcomes. This should undoubtedly be a major priority for Congress, businesses, and individuals. Solutions that involve narrowing the scope of its immunity would be most effective. Ryan J.P. Dyer in *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, convincingly argues a solution involving an objective bad faith exception.<sup>185</sup> Using this, a court can conduct an objective analysis of the conduct from the social media platform or website, finding any bad faith, and broadening or narrowing the immunity scope of Section 230 when justifiable. According to Dyer, the “bad faith exception would seriously limit the application of [S]ection 230 immunity to websites engaged in unlawful activity and allow states to employ more proactive measures targeting these intermediaries.”<sup>186</sup> Merely revising Section 230 with language to apply this bad faith exception could gravely impact the results of future litigation. Having courts analyzing each case and seeking out this bad faith could allow for future change in lawsuits involving Section 230.

Moreover, a stricter case-by-case analysis could be conducted by the court in each lawsuit involving Section 230. Certainly, each lawsuit, and each social media platform or

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184. *Id.*

185. See Ryan J.P. Dyer, *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE UNIV. L. REV. 837, 860–61 (2014) (referring to David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 407–11 (2010)).

186. Dyer, *supra* note 185, at 861.

website involved in a lawsuit, has a very different story to tell. With that being said, Section 230 could easily be revised from “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,”<sup>187</sup> to language similar to *a provider or user of an interactive computer service may be treated as the publisher or speaker of any information provided by another information content provider if the totality of the circumstances gives justifiable reasons*. By using language that allows for a case-by-case analysis, companies such as AOL, Myspace, Facebook, Twitter, and Google would not be able to consistently escape liability when individuals have been harmed by content posted within their realm. Courts would have more leeway to analyze the actions taken on behalf of both the plaintiff and the website or social media platform, as well as all other pertinent circumstances, undoubtedly allowing for greater equity in these lawsuits.

### Conclusion

At the time of the creation of Section 230, the robust, expansive, life changing qualities of the Internet could not have been predicted or foreseen. The broad immunity of Section 230 that leaves many individuals with no remedies to unwanted postings online must be reexamined by Congress. Now twenty-three years after its enactment, it is time for Section 230 to be rightfully amended to mirror the growth of the Internet and all of the social media platforms that it encompasses. Section 230 must change along with the ever-changing Internet. The indecency of the Communications Decency Act § 230 must become decent: it must grow alongside with the Internet, a continuously changing and thriving speech forum.

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187. 47 U.S.C. § 230(c)(1) (2018).