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The Ohio State Technology Law Journal

## **HOW THE INTERNET UNMAKES LAW**

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In 1996, at a conference on the “Law of Cyberspace” held at the University of Chicago, Judge Frank Easterbrook famously asserted that the very concept of the “Law of Cyberspace” was as absurd as the “Law of the Horse.” In Easterbrook’s colorful account,

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on ‘The Law of the Horse’ is doomed to be shallow and to miss unifying principles.<sup>1</sup>

Similarly, Easterbrook opined, it is misguided to treat cases involving the Internet as a distinct field of study. He offered the example of intellectual property in cyberspace, which, he said, is just the law of intellectual property applied to cyberspace. Instead of trying to “tailor the law to the subject,” Easterbrook advised the audience to concentrate on assessing whether our underlying legal principles are generally sound.<sup>2</sup>

Congress, at least, did not heed Judge Easterbrook’s warning. In the same year that Judge Easterbrook delivered these remarks, Congress passed the Communications Decency Act, which attempted to regulate pornographic content on the Internet. While nearly all of the Act was struck down<sup>3</sup> by the Supreme Court for violating the First Amendment, one part, now popularly known as Section 230, remained.

Section 230 limits how and when online intermediaries (“interactive computer services”) can be held legally accountable for the actions of those who use their platforms and services.<sup>4</sup> Subject to exceptions for violations of federal criminal law and intellectual property law, “providers or users of an interactive computer service,” as the statute

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<sup>1</sup> Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996).

<sup>2</sup> *Id.* at 208.

<sup>3</sup> See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

<sup>4</sup> 47 U.S.C. § 230 (1996).

called them, are not liable for content created by other users.<sup>5</sup> This is the law that protects social media giants like Facebook and Twitter from being sued for posts on their platforms and ensures that media outlets aren't legally responsible for content in their comments sections. In the view of Section 230 enthusiasts, it is the law that makes the Internet the most powerful medium of free expression.

Section 230 is considered so central to the development of the Internet and so essential to its continued operation that it has been called the "Magna Carta of the Internet,"<sup>6</sup> the "foundation of the Internet," "the First Amendment of the Internet,"<sup>7</sup> and the "cornerstone of Internet freedom."<sup>8</sup> It has also been called "The One Law That's The Cause Of Everything Good And Terrible About The Internet"<sup>9</sup> as well as "the most dangerous law on the books right now."<sup>10</sup> For better or for worse, Section 230 is, quite literally, the Law of Cyberspace.

While intense support by powerful entities ensured that the law remained unchanged for more than twenty years, the tide has recently begun to turn. In 2018, Congress amended the law for the first time, curtailing its protections with regard to online content relating to sex trafficking. This amendment was severely criticized by Section 230 advocates, who maintain that further tinkering may spell the end of

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<sup>5</sup> *Id.*

<sup>6</sup> Noa Yachot, *The 'Magna Carta' of Cyberspace Turns 20: An Interview With the ACLU Lawyer Who Helped Save the Internet*, ACLU (June 23, 2017, 12:45 PM), <https://www.aclu.org/blog/free-speech/internet-speech/magna-carta-cyberspace-turns-20-interview-aclu-lawyer-who-helped> [https://perma.cc/72VC-FDCX].

<sup>7</sup> Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, REASON (July 29, 2019, 8:01 AM), <https://reason.com/2019/07/29/section-230-is-the-internets-first-amendment-now-both-republicans-and-democrats-want-to-take-it-away/> [https://perma.cc/2KXL-QPFG].

<sup>8</sup> Berin Szoka, *Section 230: The Cornerstone of Internet Freedom*, TECH. LIBERATION FRONT (Aug. 18, 2009), <https://techliberation.com/2009/08/18/section-230-the-cornerstone-of-internet-freedom/> [https://perma.cc/R3YU-QL9P].

<sup>9</sup> Paul Blumenthal, *The One Law That's The Cause Of Everything Good And Terrible About The Internet*, HUFFINGTON POST (Aug. 6, 2018, 10:01 AM), [https://www.huffpost.com/entry/online-harassment-section230\\_n\\_5b4f5cc1e4b0de86f488df86](https://www.huffpost.com/entry/online-harassment-section230_n_5b4f5cc1e4b0de86f488df86) [https://perma.cc/XL7X-TEGM].

<sup>10</sup> Clare Duffy, *Marc Benioff Says It's Time to Break Up Facebook*, CNN BUS. (Oct. 17, 2019, 7:33 AM), <https://www.cnn.com/2019/10/16/tech/salesforce-marc-benioff-break-up-facebook-boss-files/index.html> [https://perma.cc/U9US-5MAX].

free speech, democracy, and the Internet itself. Critics counter that Section 230 has led to a dysfunctional marketplace of ideas and the erosion of democratic values. Calls to amend the law, from across the political spectrum, have increased in the last few years and have been met with vociferous opposition.<sup>11</sup> As Professor Jeff Kosseff, author of a book on Section 230 titled *The Twenty-Six Words That Created the Internet*, noted in August of 2019, “[t]here is definitely more attention being paid to Section 230 than at any time in its history.”<sup>12</sup>

Some of this attention has been in patently bad faith. A number of high-profile politicians have claimed, for example, that the law requires online intermediaries to be “neutral platforms” or lose their immunity,<sup>13</sup> a claim unsupported by the text of the statute or case law interpreting it.<sup>14</sup> Such willful misreading for political gain, however, should not distract from the legitimate scrutiny being applied to the influential law two decades after its passage.

In creating the Law of Cyberspace, Congress did the opposite of what Judge Easterbook had urged: rather than clarifying existing legal principles—in particular, principles of immunity, complicity, free speech, criminal law, or tort—in light of technological advances and applying those principles to Internet cases, Congress effectively upended all those principles in order to accommodate the supposedly exceptional nature of the Internet.

Of particular concern is how Section 230 has been interpreted to eradicate the concept of collective responsibility, to obliterate the distinction between speech and conduct, and to provide a boon to

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<sup>11</sup> Cristiano Lima, *How a Widening Political Rift Over Online Liability is Splitting Washington*, POLITICO (July 9, 2019, 5:04 AM), <https://www.politico.com/story/2019/07/9/online-industry-immunity-section-230-1552241> [<https://perma.cc/USB3-TW3Z>].

<sup>12</sup> Daisuke Wakabayashi, *Legal Shield for Websites Rattles Under Onslaught of Hate Speech*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html>.

<sup>13</sup> Sarah Jeong, *Politicians Want to Change the Internet’s Most Important Law. They Should Read It First.*, N.Y. TIMES: OPINION (July 26, 2019), <https://www.nytimes.com/2019/07/26/opinion/section-230-political-neutrality.html> [<https://perma.cc/D3WL-ZC35>].

<sup>14</sup> Jeff Kosseff, *Correcting a Persistent Myth About the Law that Created the Internet*, REG. REV. (July 15, 2019), <https://www.theregreview.org/2019/07/15/kosseff-correcting-persistent-myth-about-law-that-created-the-internet/> [<https://perma.cc/H8JS-J9UU>].

online entities over their offline counterparts. Courts have interpreted Section 230 to protect online classifieds sites from responsibility for advertising sex trafficking,<sup>15</sup> online firearms sellers from responsibility for facilitating unlawful gun sales,<sup>16</sup> and online marketplaces from responsibility for putting defective products into the stream of commerce.<sup>17</sup>

The law of cyberspace, in other words, has unmade the law of real space. But careful consideration of Section 230's history, evolution, and application demonstrate that this dystopian state of affairs is neither inevitable nor irremediable. The sweeping, destabilizing interpretation of Section 230 promoted by so many courts is not a faithful reflection of the text, goals, or intention of the statute. A better vision is both possible and necessary.

The Internet of 1996 was markedly different than the Internet of 2019. In 1996, the World Wide Web had been in existence for only seven years, online commercial activity had only been allowed for four, and web browsers had become capable of displaying images for only three. Only 20 million American adults had Internet access, and these users spent less than 30 minutes a month online. “[W]hat’s striking about the old Web,” writes technology journalist Farhad Manjoo, “is how unsure everyone seemed to be about what the new medium was for.”<sup>18</sup>

Compare that to July 2019, when more than 4 billion people—56% of the global population—were active Internet users.<sup>19</sup> The United States has the third-highest number of Internet users in the world: 293 million

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<sup>15</sup> *E.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).

<sup>16</sup> *E.g.*, *Daniel v. Armslist, LLC*, 2019 WI 47, 386 Wis. 2d 449 N.W.2d 710, *cert. denied*, No. 19-153, 2019 WL 6257416 (U.S. Nov. 25, 2019).

<sup>17</sup> *E.g.*, *Oberdorf v. Amazon.com, Inc.*, 295 F. Supp. 3d 496 (M.D. Pa. 2017), *aff'd in part, vacated in part*, 930 F.3d 136 (3d Cir. 2019), *vacated en banc*, 936 F.3d 182 (3d Cir. 2019).

<sup>18</sup> Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009, 5:33 PM), <https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html> [<https://perma.cc/X9SY-L3EF>].

<sup>19</sup> J. Clement, *Global Digital Population as of July 2019 (in millions)*, STATISTA, <https://www.statista.com/statistics/617136/digital-population-worldwide/> [<https://perma.cc/EML5-J4AA>].

users, or 87% of its population.<sup>20</sup> People now use the Internet not only to communicate, including via email, text message, and social media networks, but also to buy and sell merchandise, deposit checks, make restaurant reservations, watch videos, read books, stream music, and look for employment.<sup>21</sup> Today, there is almost no aspect of most people's daily lives that does not have an online component. "Cyberspace" is no longer a realm distinct or separable from physical space; the offline and online worlds are inextricably linked.

Section 230 played a key role in the explosion of the Internet's influence. Section 230's operative clause, subsection (c), is titled "Protection for 'Good Samaritan' blocking and screening of offensive material."<sup>22</sup> This title suggests that Section 230 is meant to provide "Good Samaritan" immunity in much the same sense as offline "Good Samaritan" laws. Such laws do not create a duty to aid—unlike the law of many other countries, there is no general obligation under U.S. law to render assistance to strangers in distress, subject to a few exceptions—but instead provide immunity to people who, despite having no legal obligation to do so, attempt to aid others in distress.<sup>23</sup> These laws, which exist in every state, recognize that the lack of legal requirement to offer assistance combined with potential punishment for offering such punishment creates serious disincentives to offer such aid.<sup>24</sup> While Good Samaritan laws cannot require people to offer assistance, they can encourage people to assist by removing the threat of liability for doing so.

Why did Congress think that the Internet needed a Good Samaritan law? Two early Internet cases help explain Congress's concerns. In a

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<sup>20</sup> J. Clement, *Internet Usage in the United States - Statistics & Facts*, STATISTA (Aug. 20, 2019), <https://www.statista.com/topics/2237/internet-usage-in-the-united-states/> [<https://perma.cc/NMM2-ANLC>].

<sup>21</sup> J. Clement, *Most Popular Online Activities of Adult Internet Users in the United States as of November 2017*, STATISTA (last edited Nov. 7, 2018), <https://www.statista.com/statistics/183910/internet-activities-of-us-users/> [<https://perma.cc/76A4-G8Q6>].

<sup>22</sup> 47 U.S.C. § 230 (2018).

<sup>23</sup> See, e.g., *Mueller v. McMillian Warner Ins. Co.*, 290 Wis. 2d 571, 714 N.W.2d 183 (Wis. 2006).

<sup>24</sup> See *id.* at 191-92; see also Danny R. Veilleux, *Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R.4th 294, § 2[a] (1989).

1991 case, a federal New York court found that an online communications service called CompuServe was not responsible for defamatory posts that appeared on one of its discussion forums.<sup>25</sup> In defamation law, liability can be imposed on publishers as well as authors of libelous speech on the theory that publishers have knowledge of the content they publish. The court declined to treat CompuServe as a publisher because the communications service did not review the content it hosted.<sup>26</sup> Therefore, the court found, the service was not responsible for unlawful content.<sup>27</sup>

The web service Prodigy took a different approach to content posted by users than CompuServe. Prodigy marketed itself as a family-friendly service, and made attempts to review and remove objectionable posts made to its message boards. In 1995, “wolf of Wall Street” Jordan Belfort sued Prodigy over allegedly libelous remarks made on online bulletin boards hosted by Prodigy. A state New York court found Prodigy liable for the defamatory content on the grounds that it, unlike CompuServe, had made an effort to review material posted to its services.<sup>28</sup>

The two cases, taken together, seemed to stand for the proposition that online services that did nothing to address objectionable content would be rewarded, while those who attempted to intervene would be punished. Congress was concerned that rulings like this created a disincentive for online services to make efforts to moderate content—a worrisome result that could lead to the Internet becoming a cesspool of objectionable content.

Accordingly, one clear purpose of Section 230 is simply to remove that disincentive. Subsection (c)(2) assures providers and users of interactive computer services that they will not be held liable with regard to any action “voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be

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<sup>25</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 141 (S.D.N.Y. 1991).

<sup>26</sup> *Id.* at 142-43.

<sup>27</sup> *Id.*

<sup>28</sup> *Stratton Oakmont Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, 4-5 (N.Y. Sup. Ct. May 24, 1995).



obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” or “taken to enable or make available to information content providers or others the technical means to restrict access” to such material.<sup>29</sup> Given that it tracks the familiar legal principles of its namesake, subsection (c)(2) is the relatively uncontroversial portion of Section 230. Standing alone, this subsection of this “Good Samaritan” law does little more than apply an existing legal concept to the Internet.<sup>30</sup>

Subsection 230(c)(1), on the other hand, has been interpreted in ways that not only are at odds with Good Samaritan laws, but also with a host of other legal principles and settled law. It is also the section that has proven most influential in the development of the Internet, “the twenty-six words that created the Internet,”<sup>31</sup> to use Professor Kosseff’s phrase: “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>32</sup>

To parse the meaning of this subsection, it is useful to recall, as mentioned above, that while U.S. law does not impose a general duty to aid, it does recognize a limited concept of shared responsibility for harm. In the physical world, third parties can sometimes be held criminally or civilly liable for other people’s actions. Many harmful acts are only possible with the participation of multiple actors with various motivations. The doctrines of aiding and abetting, complicity, and conspiracy all reflect the insight that third parties who assist,

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<sup>29</sup> 47 U.S.C. § 230(c)(2) (2018).

<sup>30</sup> Indeed, Subsection (c)(2) could be read as merely expressing a basic principle of First Amendment law. Most online intermediaries are private, as opposed to state, actors. As such, they have First Amendment rights that allow them to refuse to carry or promote speech against their will. *See, e.g.,* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (“[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum.”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

<sup>31</sup> Kosseff, *supra* note 14.

<sup>32</sup> 47 U.S.C. § 230(c)(1) (2018).

encourage, ignore, or contribute to the illegal actions of another person can and should be held responsible for their contributions to the harms that result, particularly if those third parties benefited in some material way from that contribution.

Among the justifications for third-party liability in criminal and civil law is that this liability incentivizes responsible behavior. For example, it is a central tenet of tort law that the possibility of such liability incentivizes individuals and industries to act responsibly and reasonably. Conversely, granting of immunity from such liability risks encouraging negligent and reckless behavior.

In sharp contrast to laws governing offline behavior, online intermediaries have been granted near-total immunity when their products, services, and platforms have been used to harm.<sup>33</sup> Courts have interpreted Section 230(c)(1)'s prohibition on treating online intermediaries as "publishers or speakers" of content provided by their users very broadly. It has been read to provide sweeping immunity to message boards like 8chan (now 8kun), which provide a platform for mass shooters to spread terrorist propaganda, as well as to online firearms marketplaces such as Armslist, which facilitate the illegal sale of weapons used to murder domestic violence victims. It has even been used by Amazon to attempt to avoid responsibility for facilitating the sale of a defective dog leash that blinded a woman.<sup>34</sup>

These online intermediaries are in no sense "Good Samaritans."<sup>35</sup> They are not individuals who voluntarily intervene to prevent or mitigate harm caused by someone else. They are at best passive bystanders who do nothing to intervene against harm, and at worst,

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<sup>33</sup> See Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES (Oct. 9, 2010), <https://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html> [<https://perma.cc/TC43-SD8P>]; Felix Gillette, *Section 230 Was Supposed to Make the Internet a Better Place. It Failed*, BLOOMBERG BUSINESSWEEK (Aug. 7, 2019, 4:00 AM), <https://www.bloomberg.com/news/features/2019-08-07/section-230-was-supposed-to-make-the-internet-a-better-place-it-failed> [<https://perma.cc/8BW4-Q5HD>].

<sup>34</sup> *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 151-52 (3d. Cir.), *vacated*, 936 F.3d 182 (3d. Cir. 2019).

<sup>35</sup> See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 416 (2017).

they are accomplices who profit from harm. If their conduct occurred offline, they could be held accountable for their role in causing harm. Why should the fact that it occurs online change this result?

One answer that is sometimes offered is that the Internet is a medium of speech, and the First Amendment requires that regulations of speech must be much less burdensome than regulations of conduct. References to the importance of free speech in prefatory sections of Section 230 reinforce this point—“[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”<sup>36</sup>—as does the terminology of 230(c)(2) of “publishers” and “speakers.”

But this in some ways raises more questions than it answers. Much speech is not protected, or not fully protected, by the First Amendment. As the Court reiterated in *U.S. v. Stevens*, there are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>37</sup> Even speech that is protected can be regulated in certain ways, including through theories such as distributor liability. It is not clear that Section 230’s prohibition of publisher liability must be read to preclude distributor liability, as the Fourth Circuit did in *Zeran v. AOL*.<sup>38</sup>

But even more fundamentally, it is well past time to question whether the vast array of activities now conducted through the Internet can accurately or meaningfully be described as “speech.” One Section 230 advocate has effusively described how the entire suite of products we think of as the Internet—search engines, social media, online publications with comments sections, Wikis, private message boards, matchmaking apps, job search sites, consumer review tools, digital marketplaces, Airbnb, cloud storage companies, podcast distributors, app stores, GIF clearinghouses, crowdsourced funding platforms, chat

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<sup>36</sup> 47 U.S.C. § 230(a)(3) (2018).

<sup>37</sup> *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

<sup>38</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 331-33 (4th Cir. 1997).

tools, email newsletters, online classifieds, video sharing venues, and the vast majority of what makes up our day-to-day digital experience—have benefited from the protections offered by Section 230.<sup>39</sup>

But many of the offline cognates of the activities listed here would not be considered speech at all. While the Supreme Court takes a broad view of what counts as “speech” for the purpose of First Amendment protections,<sup>40</sup> “[I]ike any other rule, the First Amendment does not regulate the full range of human behavior.”<sup>41</sup> The First Amendment protects speech, not conduct. While some actions are sufficiently expressive to be considered speech for First Amendment purposes,<sup>42</sup> conduct is not automatically protected simply because it involves language in some way: “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>43</sup>

If Section 230’s rejection of settled principles of collective responsibility is justified on free speech grounds, then it should not be applied beyond the scope of what the First Amendment protects. But “courts routinely interpret Section 230 to immunize all claims based on third-party content,” including “negligence; deceptive trade practices, unfair competition, and false advertising; the common law privacy torts; tortious interference with contract or business relations; intentional infliction of emotional distress; and dozens of other legal doctrines”<sup>44</sup>—coverage that well exceeds even the capacious boundaries of First Amendment doctrine. As Justice Powell worried in 1978, “[w]hen the coverage of the First Amendment expands ... there

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<sup>39</sup> Brown, *supra* note 7.

<sup>40</sup> See generally MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017).

<sup>41</sup> Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1617–18 (2015).

<sup>42</sup> See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (wearing of black armbands conveyed message regarding a matter of public concern).

<sup>43</sup> *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

<sup>44</sup> Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 36-37 (2019).

is an increased possibility that, out of necessity, some of the existing doctrinal tools developed for a smaller area of coverage will have to be modified, possibly with unfortunate consequences.”<sup>45</sup>

Yet another justification offered for Section 230’s grant of immunity to online intermediaries not available to their offline counterparts is scale. Online social media platforms, for example, deal with millions, sometimes billions, of pieces of content on a regular basis; no brick-and-mortar bookstore approaches the number of transactions occurring on Amazon.com every hour. The sheer volume of this content would turn any duty of moderation into a Herculean effort.

But it is not obvious why the enormity of scale should translate into less, rather than greater, responsibility for online intermediaries. For one, more activity means more potential for harm, and secondly, it is precisely the extraordinary scale of Internet activity that helps generate multi-billion-dollar profits—profits that could be put towards ensuring that this activity is reasonably regulated.<sup>46</sup>

Section 230 establishes a dual regime of law, with one rule for offline conduct and another for online conduct. But once Section 230’s expansive immunity has been embraced, there is no clear reason to continue to restrict it to online activity. Offline entities can plausibly complain that the differential treatment afforded by broad interpretations of Section 230 violates principles of fairness and equal protection, or to put it more bluntly: if they can do it, why can’t we?

It is well worth asking how the dystopian state of affairs created by Section 230 lives up to the parable of the Good Samaritan for which it is named? In the Biblical account, a man is set upon by robbers who beat him, steal his possessions, and leave him for dead. A priest comes

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<sup>45</sup> Schauer, *supra* note 41, at 1635 (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978)).

<sup>46</sup> See Mary Anne Franks, *Moral Hazard on Stilts: ‘Zeran’s’ Legacy*, LAW.COM: THE RECORDER (Nov. 10, 2017, 3:30 AM), <https://www.law.com/therecorder/sites/therecorder/2017/11/10/moral-hazard-on-stilts-zerans-legacy/?slreturn=20200117170709>.

across him but “passe[s] by on the other side.”<sup>47</sup> A Levite does the same. But the third man, the Samaritan, stops to help. He tends to the man’s wounds, takes him to an inn, and looks after him.

The moral of the parable is generally understood to be that a “Good Samaritan” means helping another in need, even when one has no obligation to do so. Section 230(c)(2), like offline “Good Samaritan” laws, hews closely to this idea: providing immunity to those who voluntarily take on a duty to aid not demanded by law. But as we have seen, Section 230(c)(1) has been interpreted to ensure that this protection extends not only to bystanders who attempt to help, but also to bystanders who do nothing. Worse yet, it also extends to people who are not bystanders at all, but actual participants in harmful conduct. That is, Section 230 treats the priest, the Levite, and *the robbers* the same as the Good Samaritan. In doing so, Section 230 not only fails to encourage good behavior, but incentivizes evil behavior.

There is another, often overlooked layer to the story of the Good Samaritan that offers even more insight into the gap between the Law of Cyberspace and the Law of the Good Samaritan. The occasion for the parable is a somewhat peculiar exchange between Jesus and a lawyer. The lawyer wishes to know what he must do to attain eternal life. Jesus responds, “What is written in the law? How do you read it?” The lawyer answers, “You shall love the Lord your God with all your heart, with all your soul, with all your strength, with all your mind, and your neighbor as yourself.” Jesus affirms that this is the correct answer, but the lawyer is not satisfied, asking “Who is my neighbor?” It is at that point that Jesus relates the story of the Good Samaritan, which concludes by Jesus asking the lawyer, “Now which of these three do you think seemed to be a neighbor to him who fell among the robbers?” The lawyer replies, “He who showed mercy on him,” and Jesus says, “Go and do likewise.”<sup>48</sup>

The answer to the question “Who is my neighbor?” is not, as it is often assumed, the man beaten by robbers. In that conventional reading, the

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<sup>47</sup> *Luke* 10:31 (New International Version).

<sup>48</sup> *Luke* 10:30–37 (New International Version).

moral of the story is that we should have compassion for those in need, even if we are in no way responsible for it. But as Jesus leads the lawyer to conclude, the neighbor—the person whom the lawyer must love as himself—is *the Samaritan*. The significance of this is made apparent by considering the longstanding enmity, recounted in several other New Testament passages, between Jews and Samaritans. By naming a member of a despised group as the neighbor in the parable, Jesus demonstrates the rigor of true compassion.

The deeper insight of the story of the Good Samaritan is that to love one's neighbor is to love the one you have been taught to hate. Whatever you would wish to be done to you, you should wish the same to be done to them—good or ill. This principle of reciprocity can be found in religions that precede Christianity, as well as in philosopher Immanuel Kant's famous "categorical imperative," which he considered to be the one indispensable moral rule: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."<sup>49</sup> A version of it can be found as well in the equal protection clause of the Fourteenth Amendment to the Constitution.<sup>50</sup>

It is worthwhile to ponder what the Internet might look like if it were truly governed by the Law of the Good Samaritan. It is possible to imagine an online world that rewards compassion and responsibility, that harnesses technology's tremendous powers of communication and connection to enlarge our humanity, and that urges us to take care of not only our own tribe but of anyone in need.

But instead of encouraging the noblest goals of the law, the Law of Cyberspace fundamentally unmakes the law. There is no obvious stopping point to the Internet's erosion, and in some cases eradication, of settled legal principles of immunity, complicity, free speech, criminal law, and tort.

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<sup>49</sup> IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (1982).

<sup>50</sup> See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 199-204 (2019).

Back in 1996, Judge Easterbrook warned that the “Law of Cyberspace” lacked the capacity to illuminate the entire law.<sup>51</sup> More than two decades later, we must reckon with its capacity to destroy it.

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<sup>51</sup> See Easterbrook, *supra* note 1.