Fox Rothschild Podcast

The Presumption of Innocence

Episode 83: Section 230 at 30: Can the Law That Built the Internet Survive?

Featuring Matt Adams of Fox Rothschild and Eric Goldman of Santa Clara University School of Law

The views expressed in this podcast are those of the participants and should not be considered the views of Fox Rothschild LLP or its attorneys. This podcast is for informational purposes only, is not legal advice, and does not create an attorney-client relationship.

Matt: Welcome back to The Presumption of Innocence, a podcast brought to you by the White Collar Criminal Defense & Government Investigations collar criminal defense and government investigations practice at Fox Rothchild. I'm your host Matt, and today we're diving into one of the most litigated and perhaps most misunderstood statutes in modern law, Section 230 of the Communications Decency Act.

It's often described as the law that built the internet. Section 230 provides broad immunity to online platforms from civil liability arising out of third-party content. But that immunity has limits, especially when we start talking about criminal enforcement. But it is very real and very prevalent in the civil claims that arise out of criminality.

In the instance of, for example, Ponzi scheme, we often see Section 230 liability litigated. In receivership actions and where exactly is that line? Can platforms ever face criminal exposure for user-generated content? And what does AI bring to this calculus that is ever changing our technology landscape?

To help us unpack this, we're joined by one of the leading scholars in internet law and in particular, Section 230, liability and immunity under the Communications Decency Act. Professor Eric of Santa Clara University. He's the Associate Dean for Research at Santa Clara. He also co-directs the school's Data Center for High Tech Law and co-supervises the school's Privacy Law Certificate Program. Before joining Santa Clara University in 2026, he was an assistant professor at Marquette University

The views expressed in this podcast are those of the participants and should not be considered the views of Fox Rothschild LLP or its attorneys. This podcast is for informational purposes only, is not legal advice, and does not create an attorney-client relationship.

Law School, general counsel of Epinions.com and an internet transactional attorney at Cooley Godward, LLP. Professor Goldman, welcome to the Presumption of Innocence.

Eric: Yeah, thank you for having me.

Matt: So let's start at the 30,000-foot level and really just unpack what the Communications Decency Act is, and in particular, Section 230 of the Communications Decency Act.

Eric: Okay, why don't we go 30,000-foot level. In 1996, Congress enacted a law called the Telecommunications Act of 1996. It was a major law that restructured telecommunications law, and one that we're still dealing with the impact and aftermath of 30 years later. One corner of the Telecommunications Act of 1996 was the Communications Decency Act.

It was Congress's first effort to regulate the internet. And the basic model that Congress pursued was to impose criminal liability for web publishers who allowed minors to access material that was indecent or harmful to minors. As one corner of the Communications Decency Act was Section 230, the law, as you described it, and I'll summarize in my own words, says that websites aren't liable for third-party content. So there was a whole lot going on in the Telecommunications Act and a big chunk of activity in the Communications Decency Act. And then there was this little corner of the law that proved to be among the most important things that Congress did, not only in the Telecommunications Act of 1996, but in its entire history of regulating technology.

Matt: And you call it the corner of the Communications Decency Act. And it, and it really is just as a small provision of a very large act of Congress. So was it intentional for it to play as prominent a role as it has since its enactment in the mid-'90s at the height of the dot-com bubble?

Or was this something, that sort of evolved with the technology?

Eric: Maybe a little bit of both. So the Communications Decency Act was a response to the perception, at the time fueled by media coverage in 1995 that children had unrestricted and ubiquitous access to online pornography and Congress wanted to protect the children from having access to this material they considered to be harmful for them to view. The main approach was the Communications Decency Act, which was to impose criminal liability on part of web publishers so that they would stop children from having access. But in parallel with that effort, there was other potential solutions to the perceived problem, and Section 230 was one of the alternatives to a criminalization model.

Section 230 took the view that if we provide some legal protection for web publishers for trying to clean up the content on their service, in this particular case, maybe trying to remove or restrict access to online pornography, that by creating that legal incentive to moderate content, then we would get the same outcome, but with a lighter regulatory touch without all the baggage of criminal impositions.

So Section 230 was designed to be an alternative to the criminal provisions of the Communications Decency Act. And one of the great moments of congressional history, one of those things that was celebrated in the Hamilton play, where they talked about the room where it happened, where things happened that magically changed the course of our history.

Congress took those two competing provisions, the criminal provisions of the CDA and the immunity-style approaches of Section 230 and just put them together and said, how about this? Let's do both.

Matt: Right.

Eric: And so we got this law that has two different prongs to it that didn't make sense together and that it's kind of hard to tease out Congress's intent when its solutions were nonsensical when combined with each other.

Matt: And from there it has genuinely taken on a life of its own. Professor, when lawyers talk about Section 230 immunity, what are the core doctrinal elements that we're talking about?

Eric: So Section 230 has several provisions, but we're going to focus on one in particular, Section 230 (c)(1), and it has three elements of a prima fascia defense.

So if the defendant establishes these three elements, it wins. It has to show that it is a quote, "provider or user of an interactive computer service." It has to show that the claim would treat it as the publisher or speaker, and it has to show that it would be treated as a publisher or speaker of information provided by another information content provider.

Now, these words don't make a lot of sense in 2026. They didn't really make a lot of sense in 1996. What is an interactive computer service? What's an information content provider? But let me summarize those three elements, saying the first element is, are you connected to the internet? The second element is, does a claim treat you as a publisher or speaker?

And then the third element is of third-party content. And so when you combine it all together, that's how I reached the conclusion. It says websites aren't liable for third-party content. I'm applying those three elements in order. There are a bunch of exclusions, both statutory and common law, that we'll get to.

But for now, the simple, broad principle is websites aren't responsible for the content. The authors who submit that content are.

Matt: And as you pointed out, when it comes to the statutory text, there is an express exception that does not impair enforcement of federal criminal statutes. In fact, the whole basis of the CDA to begin with was to criminalize certain activity on the internet, right.

Eric: Yes. So, the provision you're referring to says that the law doesn't preclude federal criminal prosecutions. It does, however, just to be clear, preclude civil claims that are predicated on federal crimes, of which there are many such statutes throughout the Federal Code. And it also precludes state criminal prosecutions a nd civil claims based on state criminal law. So what it did in practice, and this was all by design, this was something that the drafters expressly intended. They wanted to create a single federal standard for all of the services to comply with. They did not want the variability and heterogeneity of state criminal law to be regulating how internet services were making their content moderation decisions. So it only excluded federal criminal prosecutions, which included by implication, it would've excluded any prosecutions for the Communications Decency Act.

Matt: And, and, and we are after all a white collar, criminal and regulatory enforcement podcast.

So we're going to focus on that angle for a bit. In practice this immunity under Section 230 has really been interpreted quite expansively and is b roadly applicable across a number of settings under the established a nd in particular, some of these civil settings that arise as a result of broader criminality. And I, I used at the outset the example of frequently seeing this type of argument presented in a receivership that follows a Ponzi scheme, a financial broad financial crime scheme where the receivership attends to go back in and claw back all the money in a civil action and uses broad tools and broad theories of recovery to try to go after anyone and everyone who's ever touched the offending conduct.

But when it comes to Section 230, where is the limit under the established case law at this point? Does, how broad does that immunity go? We talked about the, the elements. Let's talk the practical implications. Are some of our decisional law has extended 230 immunity because this is a hotly litigated issue and it is widely applied or not in, in a number of the, the cases in the last 30 years.

Eric: Yeah. So in general, Section 230 is treated quite broadly as a, a shield against liability, both criminal and civil to the extent that the criminal provisions aren't in the expressly excluded. So what we see on the civil side is often a plaintiff will file a lawsuit. A defendant will file a 12(b)(6) motion to dismiss.

The court will see on the face of the complaint that the service qualifies for the three elements of the Section 230 of defense, case dismissed. No discovery. No summary judgment motions required. Nothing even remotely resembling a trial. And as a result, the, the plaintiff's lawyers have generally gotten the message that you don't do that, you don't bring in a case that's going to be covered squarely by Section 230, because you're just going to lose and you've wasted your time and money.

So, what we're seeing, however, is that there's a lot of different vectors of attack that plaintiffs are taking across the entire ecosystem to get around Section 230 and they're making a lot of progress. So what used to be a relatively difficult to avoid liability shield has really taken on a lot of holes, and has plaintiffs are finding ways around it. And I know we'll talk about that in more detail in a bit. On the criminal side, as you can imagine, the law basically sidelines state attorneys general and they do not appreciate being sidelined. They really don't like that.

So for over a dozen years, the state attorneys general have been targeting Section 230 for reform, because of the fact that it basically hinders their ability to decide who to prosecute and how widely they can expand the list of defendants. So, they're definitely unhappy about the scope of Section 230 and the U.S. government, the U.S. Department of Justice, Section 230 is irrelevant to them. They're the one enforcer who always gets a free pass against Section 230, and that's one of the weird things in my field. A lot of people will say that Section 230 is like a get-out-of-jail-free card, or it creates some kind of lawless land, and those people obviously don't know what they're talking about because the DOJ can always avoid Section 230.

It always has a free pass against it. That's been in the statute since 1996. So the DOJ is actually among the people who are least knowledgeable about Section 230, because, so they're the one entity that never runs into it.

Matt: Is DOJ immune from 230, even on the civil side?

Eric: Not on the civil side. And, of course, then one of the things that the DOJ has to consider is how they frame a case.

They know that if they can frame it as a criminal prosecution, then they're good to go. And so it's only a matter of how they decide to structure their case.

Matt: What types of theories allow DOJ to come in and avoid 230 liability? Is willful ignorance, for example, enough on the part of a interactive computer service to go ahead and determine that?

Eric: So, here's the, one of the things that really catches a lot of people by surprise was Section 230. Section 230 doesn't turn at all on the defendant's scienter. So, with respect to the civil cases, if you recall, remember I mentioned, it's are you a provider or user of interactive computer service?

Does the claim treat you as a publisher or speaker of third-party content, and there's no scienter element in any of those three elements at all. So, a plaintiff can have absolutely smoking-gun evidence that the defendant knew exactly what was going to happen, maybe even intended for it to happen, and that has zero bearing on Section 230.

Now if the DOJ has evidence of knowledge or intent, that's going to be highly relevant to its criminal prosecution, but it's not going to affect whether Section 230 is in play. It might very well affect how much the DOJ is concerned about a First Amendment defense.

Matt: So professor, we're effectively celebrating the 30th anniversary of the Communications Decency Act. And if we're tracking the statutory history, there was a major amendment in 2018. It started to hold internet platforms liable for user-posted content related to a specific area, aiming to curb a widely prevalent problem on the internet.

What happened there?

Eric: So, you're referring to the laws that are sometimes called FOSTA or SESTA, F-O-S-T-A or S-E-S-T-A. It's another example where Congress took two competing bills and put them together just like Section 230, major amendment to Section 230 was done, born through the exact same process, two competing bills smooshed together. And the basic target of FOSTA, that's how I'm going to call it, the basic target FOSTA was commercial sex promotions online. And the law deployed a whole range of different regulatory interventions to try to reduce or suppress the availability of commercial sex promotions online. In some cases, those commercial sex promotions were adult sex workers, voluntarily offering commercial sex, uh, what we might call in the old days, prostitution.

And if you feel the prostitution's a crime, then you would understand why you'd want to regulate its promotion. If you don't feel that it's a crime, then those particular provisions don't make a lot of sense. Subsumed within the target of the commercial sex promotions was promotions specifically of victims of sex trafficking.

And the law adds additional penalties and regulations related to protecting victims of sex trafficking. And so, that's how there's like a lot going on in, in FOSTA. For purposes of this conversation, I will

note that we've seen almost no prosecutions, criminal prosecutions under FOSTA's provisions. Almost the entire payload from a regulatory standpoint has been on the civil side and there are many cases on the civil side that have been brought and that are working their way through the courts today trying to establish very basic principles about what exactly FOSTA said.

Matt: Is this the type of thing that led to really high-profile headlines like the seizure by the FBI of websites like Backpage, where we read headlines of, you know, the FBI coming in and overtaking, this third-party website that was trying to argue that they were not responsible because they were posting content that was not their originally generated content.

Eric: Backpage was the poster child of the perceived problems that Congress sought to address in FOSTA. And a few things about Backpage. They won a string of civil lawsuits in their history, including First Amendment and Section 230 defenses. So, the courts had already opined upon Backpage's legitimacy.

But Congress didn't like that answer. So Backpage was absolutely targeted by the law. The seizure of Backpage's website and in combination with a settlement from some of Backpage's principles, was all done before FOSTA was signed by then-President Trump, Trump One. So, the FOSTA law wasn't the legal basis on which the FBI seized the website or any settlement was obtained by the DOJ.

And so this is actually one of the, it's so critical to understand that because the target of the law was Backpage, but before the FOSTA became law, Backpage was already out of business. And so the FOSTA law has been searching for raison d'etre ever since because it was never needed to solve the problem it was designed to solve by the time it was even signed into law.

Matt: And so, you touched on this a bit earlier, but we have seen in recent years this proliferation of trying to criminalize conduct on the internet. We see it mostly by state law. And, and I think you alluded to this earlier with your discussion of state attorneys general hating Section 230, we, we see things like prohibitions on internet harassment, internet drug sales. On this very program we had the author of the story of Silk Road, which was the biggest online drug marketplace in the history of the world. Online gambling is another one that that comes to mind. How exactly are the boundaries of Section 230 being tested by this proliferation of state criminal laws attacking conduct on the internet?

Eric: So I'm going to step back for a moment. States have been enacting a slew of internet regulations, whether they view it as a criminal sanction or a civil statute, honestly, it doesn't really matter to me. I understand why it matters a lot to your audience. But it doesn't matter if Section 230 applies.

In other words, Section 230 is always applied to state criminal laws that are based on third-party content, just like it would apply to a civil claim, based on those laws. And so whether the state legislatures enact as a criminal or civil restriction doesn't really matter for the Section 230 analysis. This is one of the reasons why the state AGs have, have been pushing back on Section 230.

As I mentioned, that's been an effort they've been doing for more than a, a dozen years. So long as Section 230's integrity applies to state criminal enforcement based on third-party content, doesn't really matter what the states say. The states aren't supposed to say it. What's happened in the past few years is that states are coming up with ways of trying to get around Section 230.

They definitely know about it. They're aware of it. They just don't like it, so they're constantly trying to innovate their regulatory approaches to bypass it. And the most successful bypass that's developing today is to try to argue that the regulation doesn't target third-party content. It targets some other aspect of the services operational choices.

So, the most obvious one are the efforts to say that the service is designed defectively, or it's designed in a way that promotes criminality or whatever legal standard you want to apply. And so the fact that the service is publishing third-party content is not the base liability. It's based on how that third party is being presented, and the presentation is subject to restrictions that Section 230 doesn't apply to. I don't see that distinction at all. That distinction to me seems completely illusory. But some plaintiffs and some state AGs have had some success wielding that particular theory, dividing between the content and the design of how the content's presented and saying that the latter is not covered by Section 230 and is fully fair game for regulation.

Matt: Sure. Sounds like splitting hairs to me.

Eric: I, I mean, look, if you're a plaintiff and if it works, then keep doing it, but yes, and this will ultimately be something I think the Supreme Court is going to have to weigh in on. And even if we felt like the states had come up with some kind of clever way of cleaving Section 230, they still have a First Amendment problem. And I think a significant one, whether it's the content or the method and manner of presenting that content, that's still publication decisions that the First Amendment ought to fully protect. And so from my perspective, all of this seems like a rhetorical move that has no substantive support.

But if judges are buying it, then it seems like it's working.

Matt: We're going to get to some of the emerging arguments at the Supreme Court, and we're also going to dive into some of the ways that Section 230 really interacts with emerging technologies like

algorithms and artificial intelligence. But before we get there, to sort of put a pin in our discussion of the broader contours of this very impactful provision.

What are the limits of Section 230? Are there any? Is it a question of one's ability to make an argument to fit the square peg into the round hole? Are there clear limits at all about Section 230's implications?

Eric: So there are some clear limits. The statute has some expressed statutory provisions, and we've already discussed two.

We've discussed the exclusion for federal criminal prosecutions, which has been there since the beginning. We've also discussed the FOSTA exception that was added in 2018. That excludes both some criminal and some civil enforcements related to commercial sex online. There are a couple others I just want to mention.

There's an exclusion for the Electronic Communications Privacy Act, the ECPA, and related state laws, that generally is a null set because of the fact that it's very hard to state a claim based on third-party content that also satisfies the standard of the ECPA. So, we don't see much litigation related to that.

And the other major statutory solution is that the law expressly excludes intellectual property claims. Now what is an intellectual property claim has actually become the subject of heated litigation. But take for example, federal copyright and federal trademark claims. Those are categorically suited from Section 230, have been since day one under the IP claim.

So, I mentioned four statutory solutions, ECPA, FOSTA, federal criminal prosecutions and IP. In addition to that, there is an ever-expanding list of common law exclusions to Section 230. These might vary by jurisdiction, by federal circuit, for example. But there are at least a dozen that I can enumerate today.

And in fact, depending on how you want to come, there might be substantially more than that. So Section 230's broad immunity, the shield that has been relied upon always had these for statutory exceptions that were fairly narrowly crafted, very targeted about what they're trying to do, and then the courts keep opening up new common law exceptions.

It seems like almost every Section 230 case nowadays, and that's where all the action is taking place today.

Matt: So, let's shift gears for a moment, Professor Goldman. Obviously in 1996, I was around then, presumably you were as well, we saw probably one of the most significant periods of technological growth at around the time when this statute was enacted.

Ironically enough, 30 years later, with the advent of things like algorithms on the internet and artificial intelligence, we are perhaps seeing the next wave of rapid technological growth. I would dare say that what we're experiencing here in 2026 with AI, for example, is outpacing what we saw in 1996 with the rapid development of personal computers and prolific internet access from virtually anywhere. We couple that with the fact that we walk around today with mobile devices that have more computing power than the computers that launched the first moon landing, as the Supreme Court has acknowledged in cases like *Carpenter* and others. What impact do you see at these dramatic, rapid technological advancements that are unfolding in front of our eyes having on the future of Section 230 or the implications to court decisions deploying reasoning rooted in Section 230, which was a statute that predates the evolution of any of these things.

Eric: One of the common critiques of Section 230 is that it was written for a different era, like you described. The computer environment was different. The network was different. Maybe even society was different, back in the day.

But the drafters of Section 230 have expressly addressed their vision of how they thought it would grow over time. They filed 20 comments in 2020 with a rulemaking at the Federal Communications Commission, the FCC, where they said that their vision always was that Section 230 would apply to any efforts that services would adopt to try to moderate content, including algorithmic presentation and screenings. And the fact that now there's these mega giants that existed that had no an analog back in the 1990s, didn't change their assessment at all. They, this is what they thought was going to happen according to what they said in 2020 with FCC comments.

So, there's been a lot of critiques about, you know, the proliferation of algorithms and how they reshape, how we are engaging with each other and what they do to us psychologically. From the drafters of Section 230, just two votes in Congress, not the whole Congress, but the people who were telling us what they thought they were trying to accomplish, everything that's going on with the algorithms is exactly what they thought Section 230 was supposed to be doing. They don't see that as a problem. Generative AI is a little bit different because generative AI often involves similar processes of gathering, organizing and disseminating third-party content, but it does so in a novel way.

It usually tries not to reproduce the third-party content verbatim, but it remixes that content in a way to ideally produce things that are not quite like the precedents. And Section 230 doesn't really apply

to that very cleanly. And so Senator Wyden has said he doesn't believe that Section 230 applies to generative AI.

Again, Wyden being one of the drafters, he's told us where he stands on that question. I think the question's more nuanced. We can get into why I think it's not a black or white, yes or no, binary outcome when it comes to Section 230 and generative AI. But certainly there are many circumstances where Section 230 would not apply to generative AI outputs, even though the generative AI might be gathering, organizing and disseminating third-party content.

The one thing that I will note is, is really quite different is the way in which we've received the technology. Back in the mid-1990s when the internet first became commercialized, there was just this wide-eyed optimism about what the technology would do. And that created the preconditions for things like Section 230 that says, let's see where this technology's going to take us.

Let's give it some runway and figure out what it's capable of. And in contrast, when generative AI really reached its moment, which I date to 2022, the instant reaction was widely, if not uniformly negative. Everyone's like, this is scary, this is going to end humanity. And we need to regulate the crap out of it.

And so, we're seeing a completely different reception to generative AI today than what we saw at Section 230 and the internet back in the mid-1990s. I think that's going to have substantial bearing on how the technology iterates.

Matt: We're talking with Professor Eric of Santa Clara University Law School.

He's an expert on Section 230 immunity of the Communications Decency Act of 1996. We're 30 years out, and technology is rapidly emerging. We're at the intersection of the law and that rapidly emerging technology, and we're really talking about when technology, particularly the internet is, is used to do wrong. There's a lot of good that the internet provides for, but there's a lot of ways it can be misused and a lot of ways that law enforcement and other agencies can claim that it has been misused, to the detriment of society. And this 230 discussion is right there central to that paradigm.

Professor, let's take another shift and talk about the Supreme Court's role in the scope, breadth and application of Section 230 of the Communications Decency Act. We've seen the Supreme Court engage with these issues, but my personal experience has been that circuit courts of appeals across the country have really avoided these issues like the plague. In particular,

I have one instance where, I had a, a District Court dismiss a technology company that provided a financial, a fintech product essentially, a passive computer interface for online trading, misused by third-party actors, a District Court grant them blanket immunity under Section 230, the case go up on appeal to the 11th Circuit Court of Appeals.

And the court really did twist itself in a pretzel to avoid touching the 230 issue. We've seen some of that at the circuit courts. What's your take on the way that the circuit court is treating 230 and the way that the Supreme Court is treating Section 230?

Eric: Yeah, you know, I wouldn't have, uh, characterized it the way you did, although I haven't lived your experience.

I don't see the circuit courts avoiding Section 230 systematically. They're treating it as they should like a statement from Congress and their job is to effectuate Congress's goals. If Congress has given them a, a doctrinal tool, they ought to use it and take it where they, wherever it leads them.

And we've seen many cases from circuit courts where the judge has said, I don't like this result, but Congress said otherwise. And if Congress thinks that its law's not doing what it wants, it needs to fix the law. But I can't do that for it. So, I feel like Section 230 has actually, caused a number of judges to reach conclusions they would've not reached otherwise, because Congress told them to, and that's their job.

I will say that we've seen just the wackiest outcome in the 3rd Circuit Court of Appeals where in a case called *Anderson v. TikTok*. The 3rd Circuit said, if you are qualified as a defendant for the First Amendment, you are a publisher. If you are a publisher, then you cannot simultaneously claim to not be a publisher for Section 230 purposes.

So either you qualify for the First Amendment or you don't. If you do, you are disqualified categorically from Section 230 protection. This makes no sense. It is absolutely crazy. And that's an example where a court just somehow got off the rails and completely lost the plot. And yet the 3rd Circuit did not take that case en banc.

The appeal was ultimately dismissed by the defendant, TikTok, and they decided to deal with the case in other ways. So we have this ruling in the 3rd Circuit that says, essentially if you qualify for the First Amendment, which every company that is going to care about Section 230 will, Section 230 is a dead letter in the 3rd Circuit.

So that's an example of where we're seeing circuit courts not only expressly address Section 230, but, but actually basically try to bury it. The Supreme Court took a case on Section 230, the *Gonzalez v. Google* case, they took it as a, with a companion case that, that *Taamneh* case and the court disposed of the *Taamneh* case in a way that essentially resolved the *Gonzalez* case.

Without addressing Section 230. So the court had a chance to upon on Section 230, didn't, and at the moment I don't believe it has any pending docketed appeals you know that it's granted where it's going to opine on Section 230. But it will opine on Section 230. There's no doubt that the Supreme Court is aware of it.

They are interested in it. The right case just hasn't gotten through their filter.

Matt: Is that sidestepping of the 230 issue? I think many of us that were watching this case, myself included, thought this was going to be the grand reckoning we were waiting for. In fact, I was closely watching it for applicability to a number of cases on my own personal litigation docket, but they sidestepped the issue entirely.

As many court watchers have noted, was this a suggestion by the court that there is in fact stability and 230 has withstood the test of time, or are they simply waiting for a bigger reckoning with better facts? Is, is it the old paradigm of bad facts, bad law? And the Supreme Court is ever mindful of those types of developments.

Eric: I don't know what the Supreme Court is, what games they're playing anymore. I, you know, all the old rules I think are out. You know, this idea that they were waiting for the right case, they realized this was the wrong case. So, they're, you know, playing a strategic, multi-iteration game. Like, I don't buy that at all.

I, I honestly think they would have trouble coming to consensus about what to order for lunch. So anytime that they sidestep something, it's probably because there was some backend complexity that was causing enough friction that they looked for a simpler path just to move forward. But there is no doubt, as I said that the court's aware of Section 230. So, it just seems a matter of time before we're going to get a case. I would take issue with your phrasing of it as a grand reckoning. That's not what I'm looking for in, from the Supreme Court. I'm looking for the Supreme Court to give us some guidance on some of the places where Congress's drafting may have been ambiguous or the courts have read it different ways.

If that's what you meant by grand reckoning, I would welcome that. But if it's some kind of idea that the, the Supreme Court should take away the scope of immunity that Congress enacted, I would, I would hope it doesn't do that.

Matt: No, I, I, I meant the clarification. I think that has emerged because of a disparate application of the statute over the course of the last 30 years is really what I was referring to, and some of these pigeonhole ways that plaintiff's lawyers have actually gotten into the statute and started to carve out these creative arguments that we were talking about a bit ago. Let's shift to enforcement trends.

Professor, if you were advising federal prosecutors, if the Attorney General of the United States called you up today and said, professor, we're going to hire you, probably a pretty good consulting gig for you, on ways to teach the Department of Justice on how to hold platforms on the internet accountable for criminality and other regulatory violations, what would your advice be?

Eric: So, this is not a hypothetical, though you might have meant it as such. During Trump One in the last year, the DOJ opened up an inquiry into Section 230, held an event where I spoke, about the future of Section 230 and issued a set of amendments that they thought were necessary for Section 230.

I mentioned before that the DOJ is the least qualified entity to actually do that work for the reason that they have though guaranteed free pass around Section 230 that no other plaintiff in the world has. So from my perspective, all of that seemed completely out of their swim lane.

It was not their area of expertise. It was in fact at the time and remains another one of the moves that the political moves that the Department of Justice makes. Not to advance interests of the American people, but to advance the interests of particular segments of the political power base.

So, I don't want the DOJ talking about this at all. Frankly, I don't think they have the expertise and I don't trust that they would do so in a way that was designed to, benefit, uh, the American people. Having said that, I think that there's an important conversation that DOJ ought to have about the scope of criminal liability by online actors, and when, the DOJ thinks that online actors should be responsible for third-party content. They can have that conversation under the existing federal criminal laws that they are enforced. That's completely fair game for them. And my concern is that they will use that power to advance other agendas other than actually enforcing laws as written.

So, I would be worried about it, but that is something that the DOJ has I don't think really ever come to grips with. I don't ever think they've had the discussion outside the scope of Section 230 because

they're not bound by it. But more generally, what do they think are the appropriate allocation of responsibilities online?

Matt: All right. Well, I'm going to ask you to switch hats and I'm going to go to the defense side. Your same consulting arrangement, and from that defense perspective, how are you keeping internet service providers within the scope of 230 such that they can enjoy the immunity that, that flows from it?

Eric: Section 230 says websites aren't liable for third-party content.

And when we see a case that just squarely tries to challenge that basic paradigm, the case fails. Section 230 for that general-use case works really well. What we've seen is the expansion of scenarios where Section 230 is being invoked as a defense to circumstances where it's a lot harder to connect the dots to say that the claim is based on third-party content.

So I mentioned the plaintiff's series about design-fee defects as a way of saying that it's not about the content, but it's about some other set of choices that the service made. I don't feel like that's a meaningful distinction, but it's an illustration of how the conversation is moving, where now we're no longer talking about, third-party content and, you know, a defamation claim based on it.

We're talking about something else. So, for example, we've seen Section 230 invoked in some tax cases. And I think that's a really hard argument to make. It's pretty hard to establish that the tax obligations that are being imposed are being triggered by liability for third-party content. And so even when it's like a digital tax on advertising or something like that, Section 230 is not really designed for that purpose.

It might work, but we can start to see some of its limits, and I think that's where a lot of the frontiers are today. Instead, we're seeing, you know, a wide-ranging expansion of legal liability that's being imposed on internet services. And Section 230 is being invoked as a catchall for all of them and including some cases where maybe it was never meant to apply.

Matt: Where does failure to act after notice stand in terms of the 230 immunity. You know, an internet service provider is made aware of the existence of some prohibited act or in this instance, prohibited content and does not take any affirmative measure. Where, where does that conduct stand? Is it somewhere in the middle?

Is it a case-by-case basis or is there a bright line?

Eric: More complicated than that even. So, let's start with the basic paradigm. Failure to act upon notice is a form of scienter. It's basically that you now were put on notice, and now you had some responsibility. And as I mentioned earlier, Section 230 doesn't turn on the defendant's scienter.

So in general, notification of some liability creating content online. If it's third-party content, it's still squarely covered by Section 230, even post notice. Now, let me mention some exclusions to that. The federal criminal, prosecutions not covered by Section 230, receiving notice of criminal activity and not taking action, that could potentially be the basis of a criminal prosecution, though things like *Taamneh* actually have something to say about that. The FOSTA exceptions include some circumstances where knowledge of the offending commercial sex promotions creates liability. So under FOSTA, some kind of takedown notice might actually trigger liability that didn't exist previously.

And, last year, Congress enacted a law called the Take It Down Act, which created a new takedown provision for nonconsented depictions, of nudity and sex and some other things. And it basically creates a takedown notice for online pornography. Whether or not it's legitimate, it can even, it could be synthetic content that's AI generated and it might still be covered by that takedown notice.

Or so called

Matt: Deep, deepfake paradigm perhaps.

Eric: So, I don't like the term deepfakes, but yes. Synthetic content and authentic content are treated identically under the statute, essentially. So, the Take It Down Act is an example of how Congress might create a notice and takedown liability provision that seemingly conflicts with what Section 230 otherwise says. Section 230. Otherwise, it would have said if it's third-party content, no liability. And therefore, the service could ignore the takedown notice. Now I will say that one of the pending ambiguities is that the Take It Down Act doesn't reference Section 230 at all.

And so one possibility is that a defendant will still be able to invoke Section 230 because it wasn't expressly precluded or preempted by the statute. I don't think that's likely outcome, but just to note that ambiguity, because Congress wasn't clear enough about what it was trying to do, someone's going to have to answer that question.

Matt: So, in our waning moments together today, professor, I'm going to posit a question to you that I ask of almost all of my guests, and it's to take out your crystal ball and project into the future. This time I'm looking to any policy reforms or future amendments, perhaps court rulings that

reshape Section 230 of the Communications Decency Act, the subject of our discussion over the last hour or so.

What do you see coming down the pike, if anything? Or is it just should we expect the status quo?

Eric: So, I'm going to go 30,000 foot here. Let's start with the hypothesis that we have passed the peak of free speech online. I'm going to date that peak at 2017. And things like FOSTA were an example of how we now are post-peak.

But we are on a decline of free speech online. We're going to see conversations that we have taken for granted for decades turning off because of the liability regime and other structural changes to the industry that are driven by it. So, for me the debate about Section 230 feels so 2020, this is like Trump One, last year-type conversations.

And it doesn't really matter what happens to Section 230, whether Section 230 remains in existence as it's currently drafted today with no further changes, we're still past the peak of free speech and we are on the decline. So what we're seeing across the board are things like mandatory age-authentication requirements are being imposed across the country and across the globe. And these act as checkpoints or borders that screen out people, prevent them from gaining access to content that they're constitutionally entitled to access. And that imposes substantial costs on publishers that makes it harder for them to remain in business. So, age-authentication mandates are a hard shove away from free speech online, and they are taking root across the country, across the globe.

In addition, regulators across the country and across the globe have decided that they know how to run the internet better than the services that are currently in the industry do. And so they are micromanaging the internet services functionality and operations without any concern about Section 230, without any concern about the First Amendment.

And some of those laws will be unconstitutional and some of them won't. And anyone that isn't becomes another chink in the overall trajectory of the free speech online. Another hard shoved downward. So for me, Section 230 is more like the canary in the coal mine. It's a warning sign that all these debates about its reform are really a sign that the censors want the opportunity to win on the internet. And they are going to win unless we find a way to rally back and they are, have momentum and are on a roll.

So, for me, the, the eye on the prize is does the internet remain free from censorship? And the answer today is increasingly no. And Section 230 reform is, is only a data point or a, a metaphor for that broader discussion.

Matt: Professor Goldman, this has been incredibly insightful and quite fascinating.

Section 230 truly sits at the intersection of technology, constitutional rights and enforcement. It's understanding its limits. It's relevant for prosecutors, defense counsel, and just about anyone who uses the internet to conduct any form of speech or business in our modern, technologically driven world.

Thank you so much for joining us. That's all the time we have on this episode of The Presumption of Innocence. I'm your host, Matt. Until next time, take care.