Collateral Censorship and the Limits of Intermediary Immunity
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Abstract

The Internet and modern communications technologies have led to a proliferation of media intermediaries, which must agree to, or at least acquiesce in, the content they carry. The gatekeeping function that these intermediaries play could be either beneficial or harmful to society. On the one hand, such intermediaries may be in the best position to control the flow of harmful speech, despite the explosion of speech and speakers. On the other hand, such control may come at the cost of losing beneficial speech. In particular, imposing liability on intermediaries for the speech they carry could be an attractive way to create a decentralized mechanism for enforcing limits on speech, for example, against defamation or fraud, that might otherwise be difficult to enforce. But liability could also lead to the problem of collateral censorship, if intermediaries also restrict lawful speech in their attempts to avoid liability.

Whether one favors greater intermediary liability or greater immunity depends on which of the two competing interests loom larger. In Section 230 of the Communications Decency Act, Congress has supposedly made a choice in favor of greater immunity. Whether such a choice is wise, or whether this was in fact the choice Congress made, has been much debated. However one views that debate, though, it should not be seen as resolving every question in favor of immunity. Immunity is an answer to the problem of collateral censorship, but that problem is not implicated in every situation involving intermediaries. Rather, collateral censorship is the product of indirect liability for disseminating the speech of others. When instead an intermediary should be understood as itself speaking or when the intermediary is performing some other function, collateral censorship does not arise, and any immunity would need a different justification. In recent cases involving questionnaires, republication, contractual rights, and member screening, courts have begun to place limits on intermediary immunity under Section 230, but have done so haphazardly. Focusing on the problem of collateral censorship and the situations in which it arises provides a principled basis on which to analyze these and other issues of when intermediary immunity ought to apply.