LETTER TO THE EDITOR

Social media platforms cannot eat their cake and have it too

Twitter argues it should not be liable for ISIS's acts committed with its Twitter account. ("9th Circuit mulls Anti-Terrorism lawsuit against Twitter," Dec. 7.) This accords with our intuitive understanding of message distribution. The law does not hold the U.S. Postal Service liable when someone mails a threatening letter, or hold Verizon liable when drug dealers use their phones to arrange a transaction. There is thus a natural sympathy with Twitter's position that the network should not be liable when terrorists use it to plan and execute terrorist acts.

Except that is not how Twitter (and Facebook, YouTube et al.) operate. They are not media that transmit messages without examining them, like the Postal Service. To the contrary, they exclude messages they find objectionable. Two months ago, Twitter blocked a pro-life, anti-Planned Parenthood message of Rep. Martha Blackburn (R-Tenn.), deeming it "an inflammatory statement that is likely to evoke a strong negative reaction." There are plenty of comparable examples.

The Blackburn censorship refutes attorney Seth Waxman's characterization of Twitter as "a platform for freedom of expression." If Twitter examines tweets — and rejects those it finds "inflammatory" and "likely to evoke a strong negative reaction," the inescapable conclusion is that ISIS passed muster. *Expressio unius est exclusio alterius.*

As the Daily Journal reported, there has been a growing demand for the law to treat social networks as public fora, like the company town in *Marsh v. Alabama*, 326 U.S. 501 (1946), and the shopping malls in *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979), and *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007). Justice Anthony Kennedy's recent characterization of cyberspace as "a quintessential forum for the exercise of First Amendment rights," has energized this campaign. *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). This language has supported PragerU's challenge to YouTube's practice of viewpoint-discrimination, even though is not a state actor.

California has long enforced free speech principles even on private property. Education Code Section 94367 (the "Leonard Law"), which bars non-religious private universities from punishing students for constitutionally speech, led a court to invalidate Stanford University's speech code in the 1990s. This policy of enforcing the First Amendment on private actors pits two core Lockean values, free speech and private property, in conflict.

There is a sound argument that nongovernmental actors like social media networks should be free to operate according to their own values, and not be forced to present material they consider "inflammatory." But censorship negates the *raison d'etre* of platforms' immunity from liability: The platform presents not its own viewpoint but an open "forum for a true diversity of political discourse." 47 U.S.C. Section 230(a)(3). As Adam Candeub and Mark Epstein asserted in the Wall Street Journal, these platforms cannot eat their cake and have it too. They may open their site to speakers without viewpoint-discrimination, serve as such a public forum for diverse views, and deserve immunity for what their users post.

Or they serve ISIS and block Blackburn. But if they do, it reflects an editorial judgment for which they may — and should — be held accountable.

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