Crypto:
What It Is and Why It Matters

for the Business Section of the

Contra Costa County Bar Association

7 Oct 2021

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Outline

- Cryptocurrencies, including Bitcoin
- Blockchain, distributed ledger backbone
- “Smart” contracts
- Regulatory/Legislative
- Lobbying and Politics
- NFTs- Nonfungible Tokens
- Digital Currencies
- Fundamental Flaws
- How Does Law Adapt?

This is a discussion and not legal advice.

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Cryptocurrencies/Bitcoin

- A "currency" independent of any government
  - Many currencies, e.g., BTC on many platforms, e.g. Coinbase
  - Stored in digital "wallets" with public and private cryptographic "keys."
  - Proof of work "mining" is energy intensive
    - Other cryptos offering proof of state less energy intensive alternatives
- Wild west
  - Highly volatile pricing
  - Lots of thefts from exchanges
  - Pretty good for money laundering
  - Silk Road on the dark web was the first "killer app"
  - Ransomware hackers prefer it
- Libertarian philosophy; true believer evangelism
- A (bubble) asset class with investment funds and future contracts

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Blockchain/Distributed Ledger

- Cryptocurrency transactions are validated and recorded on a giant public ledger
  - transactions are pseudonymous, not anonymous like cash
  - Majority-rule verified transactions are added to the blockchain
  - Forensic firms are getting better at tracing transactions
    - MasterCard just bought CipherTrace, which had DARPA, DHS and VC funding
    - Chainalysis just raised $100MM on a $4BB valuation
- The key revolution of Bitcoin:
- **Disintermediates trusted parties**
- Financial services industry looking to adapt to not get crushed
  - Kodak/digital photography syndrome
  - Regulated financial system obeying the law and paying taxes competing with an untaxed, scofflaw hidden system

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Smart Contracts

- Using computer instructions and DLT to program contracts for if-then execution
- Meters or measuring devises to create outcomes
- Digital platforms write the contract
  - E.g., iEX
- Industry groups developing modules
  - E.g., https://www.isda.org/2019/10/16/isda-smart-contracts/
- Automated, incorrectly promoted as “no default”
  - E.g., Money wired automatically from the buyer’s account to the seller’s when the cargo ship comes into the harbor
  - But does the ship actually have the cargo and buyer’s account actually have the money?

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Regulatory/Legislative

- "Digital assets" laws and regs vary by state and country
  - Various U.S. states are competing to be lax/tough
- Competing Imperatives
  - Desire for financial innovation
  - Desire to control own national currencies and money supply
  - Desire to protect people from being ripped off
- CFTC commodities; SEC securities
  - "ICOs"- see https://www.howeycoins.com/
  - This is not blind stumbling
    - Gensler taught this at MIT
    - IRS guidances well-informed
  - Developments have implications for other commodities/securities
- OCC in 2020 granted some banks charters for custody services; new admin is putting on brakes
- IRS bringing enforcement actions to identify tax dodgers

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Lobbying and Politics

- Lobbying has been intense
  - e.g., a minor tax provision in the infrastructure bill
- Revolving Door v. Ejector Seat
  - Former SEC Director of Trading and Markets left Coinbase after 4 mos.
  - Former OCC Acting Comptroller left as Binance US CEO after 3 mos.
  - Former CFTC Chair left Blockfi board after 4 mos.
- Cryptos cannot just take a page from Microsoft and Uber
  - Coinbase was belligerent on its loan product and then backed off
  - Communicating w/ regulators is different when probably breaking law
  - Parties to be disintermediated also powerful
- Environmental impact from mining
  - NY bill to outlaw it in NY failed
  - Utilities can provide different rate schedules
- There will be powerful interests behind Web 3.0.

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NFTs- Nonfungible Tokens

- On the Ethereum blockchain
- OpenSea is a popular platform
- Seems silly, but this could be the future
  - someone paid $4MM for a digital image of a dog NFT and the 17BB slices shares in it recently added up to $225MM.
  - Dolce & Gabbana digital jewelry, etc.- https://unxd.com/
    - 10/1/21- 9 NFTs sold for $5.65 million
- Web 3.0
  - allows exclusive ownership of a digital asset and create scarcity
  - move from free digital files to owned and expensive digital
  - E.g., musicians can disintermediate Spotify
  - complete inversion of MP3 sharing and BitTorrent
  - Neuromancer/single blockchain
- Proxi- a new video game to make NFTs from your memories

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Digital Currencies

- National currencies on a blockchain controlled by the nation's central bank
  - US Fed is studying digital dollar policy and technology
  - China has banned BTC as it prepares its digital renminbi
  - Bahamas has introduced it
- On a non-anonymous blockchain for another opposite ending point
- Central banks would not want to put national banks out of business by disintermediating depositors

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Fundamental Flaws

- Immutability of the already leaky and hackable blockchains limits adaption as technology improves
  - It's called "crypto" because of the cryptography
  - Computing power in every pocket is exponential to global capacity 50 years ago
  - The same in 50 or less years from now
  - What type of asset is put on a blockchain that has a fuse
    - Real estate titles- would be like the recorder's office on fire.
    - Some transaction platforms acknowledge the limitation
      - e.g., NV PEC platform (PUCN docket 18-09008),
- When it's no longer worth mining BTC ($/MWh v. $/BTC), there will be no new transactions in BTC.
- Solana outage and restart questions "decentralization."
- "Majority vote" to reallocate to reallocate the coins.

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How Does Law Adapt?

- Much fits or can be stretched into existing legal frameworks
- How Smart is smart contracting?
  - Need an expert witness and trial to prove every smart contract
  - What does a smart contract bankruptcy claim look like?
- Sanction and money laundering
  - Russia as a home to Ransomware hackers
  - Taliban exploring crypto as a way to avoid US sanctions
- How do theft and IP laws apply in Web 3.0, and who has jurisdiction?
- New “digital asset” chapter of the UCC?
  - El Salvador adopted BTC as legal tender- is it a currency under any US (e.g., UCC or tax) law?

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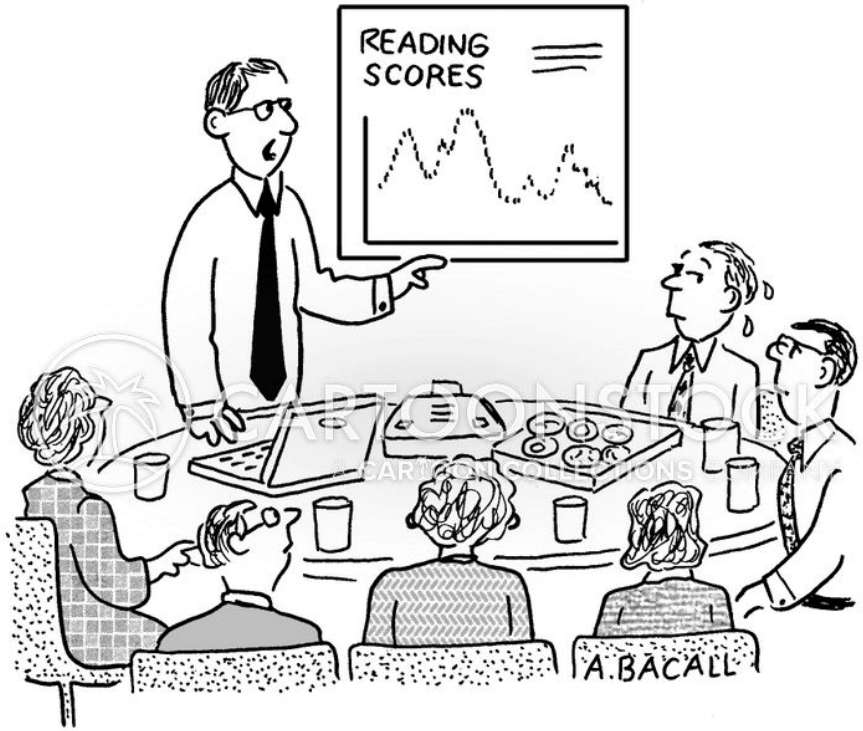
Q&A



"I believe all the donuts are filled with custard.
Are there any other questions?"

NON-FUNGIBLE TOKENS: DEALING WITH NFTS IN YOUR LEGAL PRACTICE

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WHAT ARE THEY?

NFT

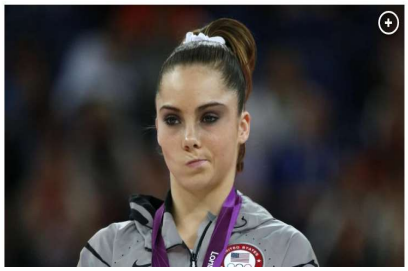
JACK DORSEY

TRYING TO SELL FIRST TWEET AS AN NFT ...

Highest Bid's at $2.5 Mil!!!

McKayla Maroney thinks 'Not Impressed' NFT will sell for over $1 Million

By David Lazar August 10, 2021 | 3:42pm | Updated



FLEETWOOD MAC SKATEBOARDER

SELLING OG VIRAL VID AS AN NFT!!!

With One Major Catch

EXCLUSIVE 6.2K 3/17/2021 12:40 AM PT

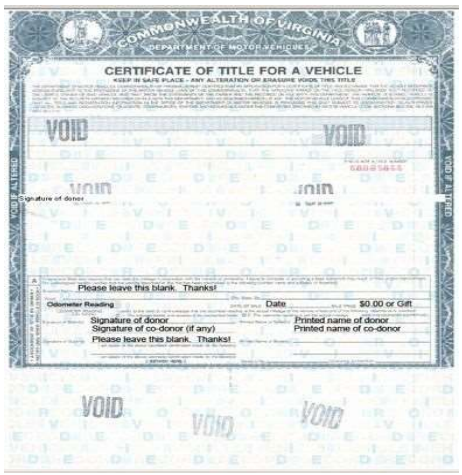
WHAT ARE THEY?

- Non-fungible = Unique asset. Only one.
- Token = Proof of ownership. Title.

FUNGIBLE VS. NON-FUNGIBLE

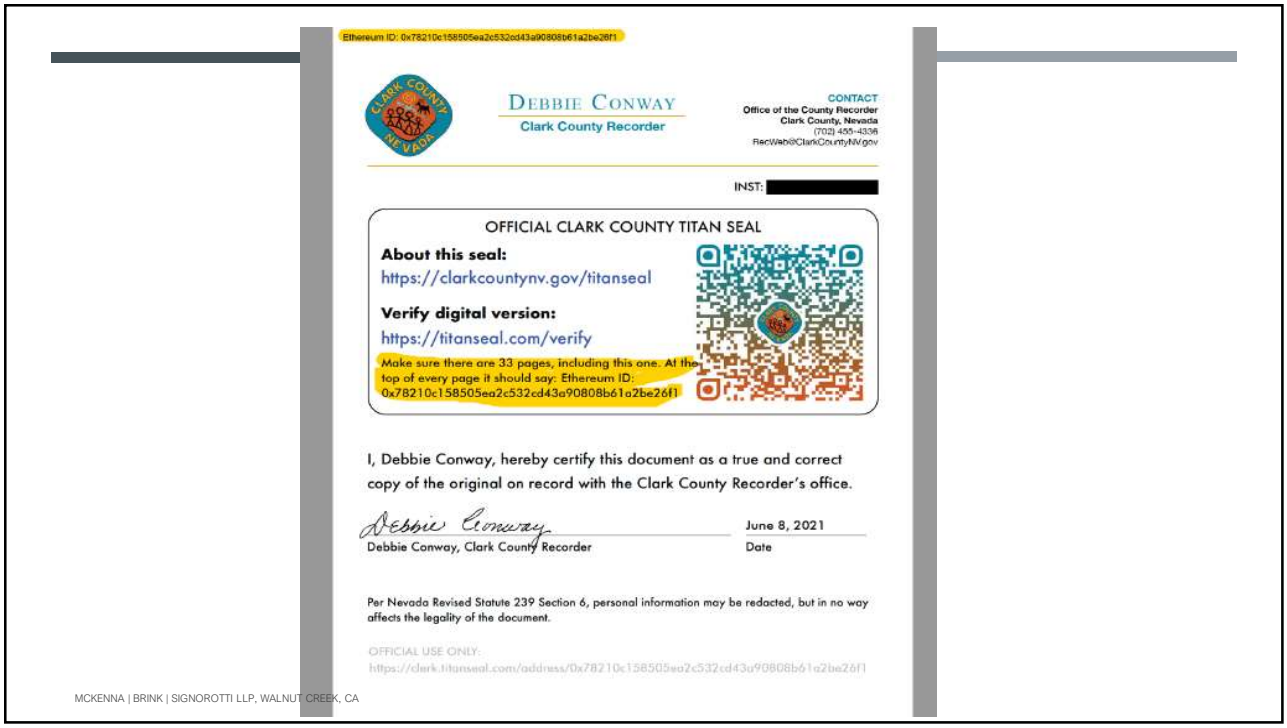
FUNGIBLE VS. NON-FUNGIBLE

TOKEN = EVIDENCE OF OWNERSHIP



BLOCKCHAIN

- NFT ownership is recorded on a BLOCKCHAIN
- Blockchain is **a system of recording information** in a way that makes it difficult or impossible to change, hack, or cheat the system. A blockchain is essentially a decentralized digital ledger of transactions that is duplicated and distributed across the entire network of computer systems on the blockchain. It's not just housed in one place.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June 8, 2021
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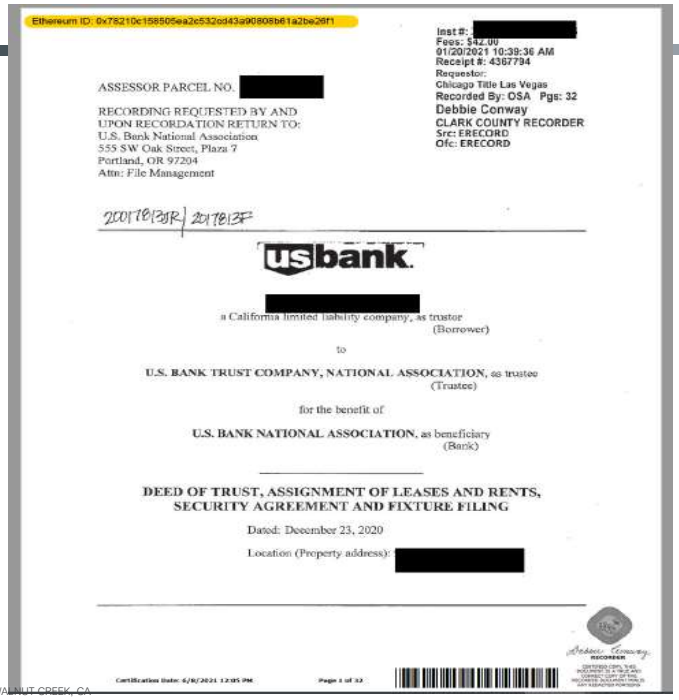

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Dated: December 23, 2020

Location (Property address): [redacted]

Certification Date: 6/8/2021 12:05 PM Page 1 of 32

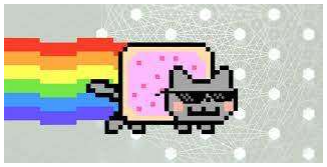
SMART CONTRACTS

- The creation and resale of NFTs is handled by SMART CONTRACTS
- SMART CONTRACT = self-executing
- Smart contracts are digital contracts stored on a blockchain that are automatically executed when predetermined terms and conditions are met

SMART CONTRACTS AND NFTS

- Often upon resale of an NFT, royalties are paid. This is all built into the initial smart contract.

EXAMPLES OF NFTS



NFTS AREN'T ALWAYS DIGITAL

- NFTs and blockchain technology more generally are playing a role in the arena of physical assets.

PHYSICAL ASSETS

Wine & Luxury Goods & Sports Collectables

REAL ESTATE

- Sell real property via an NFT?

04-16-21

This NFT comes with an actual house

A 27-year-old real estate agent is auctioning off an NFT that comes with an IRL duplex in Thousand Oaks, California. Why?

HOW CAN WE AS ATTORNEYS HELP OUR CLIENTS?

- Contacted about NFT deal
- Analyze potential issues
  - Real estate
  - Taxes; Reassessment
  - Securities
  - IP
  - Trust/Estate

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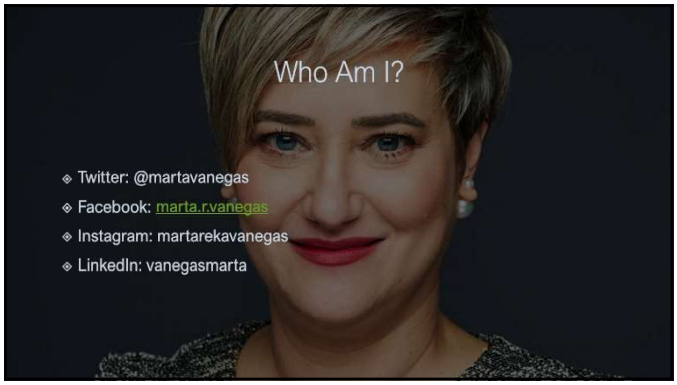
Regulation of Social Media
An Executive Summary on a Thorny Issue

1


Who Am I?
Twitter: @martavanegas
Facebook: marta.r.vanegas
Instagram: martarekavanegas
LinkedIn: vanegasmarta

2

What is Social Media?
According to Section 230 of the Communications Act of 1934 (47 U.S.C. §230), enacted as part of the Communications Decency Act of 1996, social media fits into the definition of "interactive computer service providers."
A useful definition here: "A Social Media Site is an internet-based interface that allows users to develop individual and group profiles; make, share, view, and interact with content; connect with other users; and join affinity groups."
Users post and access content through a website or application on a computer or mobile device.

3

Distinguishing Features

User Created Content

Algorithm Driven

- User Engagement is the Goal
- Extending Time Spent on Site

Users form Networks

- Affinity Groups
- Relational Benefits

4

The Problems with Algorithms

The benefit of "network effect:" the more people use a particular network, the more people will want to join the network.

Most people use multiple social media platforms, so they compete for the users time.

Incentive to prioritize highly engaging content:

Controversial topics ("clickbait")

High engagement begets high engagement, the popular post become "viral" and spread regardless of validity of information.

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The Problems with Algorithms

Social media has a "flattening" effect: All content seems equal.

This sounds democratic and was praised as a democratizing tool.

But all content is NOT equal, all sources are NOT equally trustworthy.

6

The Problems with Algorithms

- We are not talking about the effect of Social Media on its users.
- This was widely discussed this week in the news…
- But it's beyond the scope of this presentation.

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How is Social Media Regulated Now?

Section 230 of the Communications Decency Act of 1996

8

"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."

The "26 words that created the Internet."

Section 230, the only surviving section of the ill-fated Communications Decency Act of 1996 provides broad immunity from liability to social media companies for the content posted by the users of the platform.

9

"Good Samaritan" Protection for Blocking and Screening

Protection from liability for screening or blocking content that "the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected"

The statute has no effect on federal criminal laws, state laws, intellectual property laws, and (other than allowing the blocking/screening of content) on sex trafficking law (i.e., it allows for a civil action for sex trafficking).

10

How is Content Moderated?

Social media policies or standards prohibit graphic violence, child sexual exploitation, and hateful content or speech.	No uniform standard for content moderation	Social media companies are not required to release information on their content moderation.	Identifying content to flag or remove:
• Suspending or banning users who violate policy. • Taking down or blocking the content. • Flagging the content.	• A wide variety of tolerance level for offensive or misleading content	• Some companies voluntarily release how many they have flagged, blocked, suspended	• Users, • Content moderators, and • Artificial intelligence (AI) technologies

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The Misinformation Problem

- Fact-checking and cite-checking are labor intensive
- Information spreads from one service to the next, where it may proliferate even if it was removed from the original site
- Information can be "re-contextualized" – making it impossible for AI to read
  - E.g., text posted as screen shot image

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Proposed Solutions

Agency Level Proposal – originates with Trump Administration

- FCC Rulemaking was requested to clarify the circumstances under which an interactive computer service restricting access to content would **not** receive Section 230 immunity.
- FCC Chairman Ajit Pai declined moving forward with this rulemaking during the remainder of his tenure as FCC Chairman.

Several Legislative Proposals on two aspects

- Restricting access to content (the allegedly "biased" restrictions)
- Covid-19 Misinformation

Antitrust Solution – breaking up "monopolies"

- Facebook owns Instagram and WhatsApp
- Google owns YouTube
- Microsoft owns LinkedIn

13

Justifications for Regulation

"Censorship" Concern

If a huge social media company blocks a viewpoint, their market dominance means they are practically censoring the speaker

- Sen. Ted Cruz: social media throttling conservative voices
- Federalist Society, American Principles Project, The American Conservative, etc.

Online Bullying

Victims of social media bullying have no recourse against the companies that enabled the abuse

- Even moderators have claims of mental health effect of content on these sites
- Danielle Keats Citron and Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017)

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Contraindications

Creating a moderation requirement now would enshrine the larger social media companies' monopoly by increasing the cost of entry

Creating a regulatory agency to moderate would make it cheaper for social media platforms to do business by relieving them of the moderation cost, resulting in monopolies

A change to the protection of Section 230 would result in two extremes:

- Not removing anything posted
- Not allowing anybody to post without pre-publication review

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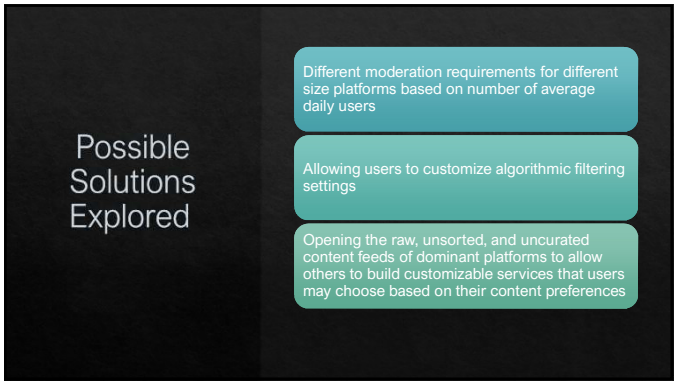
Possible Solutions Explored
Different moderation requirements for different size platforms based on number of average daily users
Allowing users to customize algorithmic filtering settings
Opening the raw, unsorted, and uncurated content feeds of dominant platforms to allow others to build customizable services that users may choose based on their content preferences

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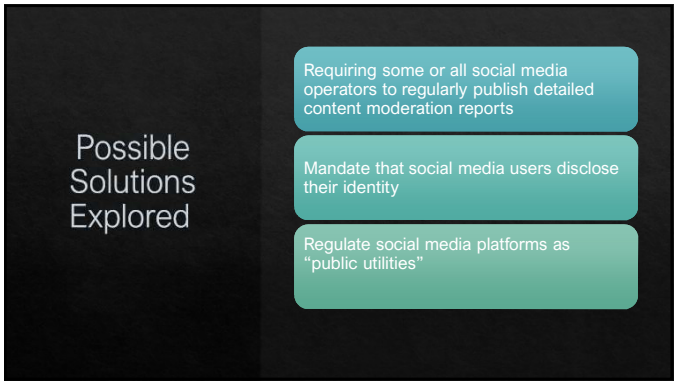
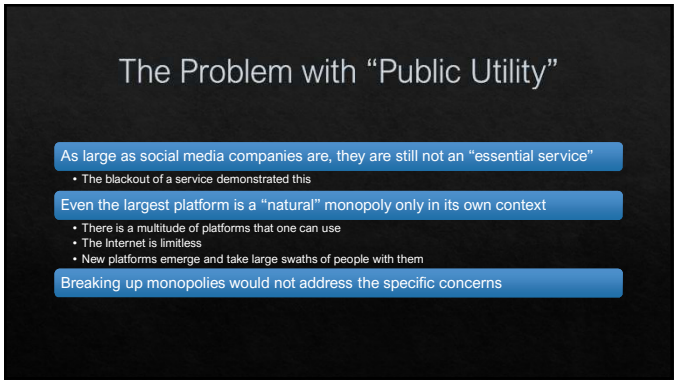

Possible Solutions Explored
Requiring some or all social media operators to regularly publish detailed content moderation reports
Mandate that social media users disclose their identity
Regulate social media platforms as "public utilities"

17


The Problem with "Public Utility"
As large as social media companies are, they are still not an "essential service"
• The blackout of a service demonstrated this
Even the largest platform is a "natural" monopoly only in its own context
• There is a multitude of platforms that one can use
• The Internet is limitless
• New platforms emerge and take large swaths of people with them
Breaking up monopolies would not address the specific concerns

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Questions?
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