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Can You Be Charged for Others' Online Speech? European Court Says Yes.



Picture this: you're a politician in the 21st century. You're running for election, and like all engaged, modern pols, you reach your voting base by being active on a variety of social media platforms (or, at least, you have someone do social media for you). On one of your social media profiles, someone else makes racist and bigoted comments about your electoral opponent. Can you face *criminal charges* for *their* comments?

Blending complex questions of electoral politics, hate speech, free speech, content liability, criminal culpability, and proper online stewardship, this is a question tailor-made for hot takes on tech policy. It's also a question the European Court of Human Rights (ECtHR) recently addressed in [Sanchez v. France](#): The court said yes; you can be held criminally liable (at least in Europe).

*Sanchez* could be a consequential decision, and not just in Europe. The internet is global and the ECtHR's ruling is not limited to French politicians. So, if you have a social media presence (or even an early-aughts-style blog) and someone else posts something that is illegal in Europe, you could potentially face criminal liability in the EU. It's not likely unless you're both prominent and careless (more on that below), but it's now *possible*. Casual social media users in the United States might be unbothered, thinking, "I have nothing to worry about, I have a right to be careless online, something something Section 230 and the First Amendment. Besides, Europe can't touch me, the U.S. Court of Appeals for the Ninth Circuit's decision in *de Fontbrune v. Wofsy* held that "[t]he Courts of no country execute the penal laws of another."<sup>[1]</sup> While this may indeed limit your liability in the United States, it won't get you very far if you have plans to post enviable photos from the best *boulangerie* in Paris or go wine tasting in the Loire Valley.

Below, we'll take a look at what happened in *Sanchez*, explore its intersection with U.S. law, and some key takeaways.

### **What Happened?**

The events leading up to *Sanchez v. France* began in 2011. Julien Sanchez, who at the time was seeking election to the French Parliament as a member of the far-right National Front party, published a post on his own Facebook "wall"<sup>[2]</sup> about the website of one of his political opponents. Two other Facebook users posted anti-Muslim comments in response.

Rather than removing the offending comments, Sanchez published another post that generally asked all commenters to "be careful with the content of [their] comments." One of the commenters removed their own anti-Muslim response within 24 hours, but the second commenter's anti-Muslim responses remained visible on Sanchez's public profile for more than a month. For this, French authorities charged Sanchez and the two commenters with incitement to anti-Muslim hatred or violence. In 2013, all three were found guilty in the lower court, with Sanchez facing criminal fines of €1,000 and the commenters facing fines of €4,000.

Sanchez sought review in the ECtHR, which is a regional court that considers questions related to the European Convention on Human Rights (Convention). Sanchez argued that his conviction violated Article 10 of the Convention, which protects the right to freedom of expression. In September 2021, a Chamber of the ECtHR rejected Sanchez's application, so he sought review in the Grand Chamber of the ECtHR (which is like the court of final appeals within the ECtHR). On May 15, 2023, the Grand Chamber of the ECtHR ruled against Sanchez.

### **The Grand Chamber's Decision**

As the Grand Chamber explained, Article 10 of the Convention prohibits any interference with the right to free expression unless it: (1) is prescribed by law (i.e., the interference must have a legal basis under the relevant country's law); (2) is in pursuit of one of the "legitimate aims" set forth in Article 10; and (3) is "necessary in a democratic society." While Sanchez disputed all three elements, the Grand Chamber dispensed with the first two rather quickly: the relevant incitement/hate speech offense foreseeably applied to the conduct at issue and pursued the legitimate aims of "protecting the reputation or the rights of others" and "preventing disorder and crime." The Grand Chamber then spent most of its time addressing whether the interference was necessary in a democratic society. Consistent with prior holdings, the Grand Chamber emphasized that France is granted a measure of deference (described as a "margin of appreciation") in determining necessity, and the breadth of that deference depends on the context. Here, the breadth is both narrow and broad: it is narrow to the extent it relates to political speech, but broad to the extent it relates to incitement or integration/immigration policies.

In evaluating this assessment, the Grand Chamber focused on four major issues:

- **The context of the comments, including their nature and the account owner's position in society.** In its review, the Grand Chamber utilized a proportionality analysis to determine Sanchez's degree of liability, taking into account the nature of the racist and xenophobic content at issue. Here, the Grand Chamber stated that the comments were properly characterized as incitement to hatred, considering that they were posted publicly on the profile of a politician running an election campaign. And in the incitement context, the greater a person's societal position, the more weight and authority may be attributed to communications on their social media platform (whether posted by third parties or not). The court therefore found that Sanchez's "duties and responsibilities" as a local politician dictated that he needed to be "all the more vigilant" in moderating unlawful speech.
- **Steps taken by the account owner, including his decision to make his "wall" public and steps taken after the posts.** A "major factual element" in the Grand Chamber's decision was that Sanchez chose to make his Facebook "wall" accessible to the general public. According to the Grand Chamber, this means that Sanchez should have known that this could lead to unlawful or hateful content being visible to the public. Additionally, the Grand Chamber focused heavily on Sanchez's failure to remove the unlawful comments from his Facebook wall in a timely manner. While Sanchez claimed he did not see the comments, the court was skeptical and applied a high standard, given his status as a politician. However,

the Grand Chamber stopped short of articulating a clear rule: instead, it simply said that Sanchez either should have done more to moderate comments on his wall, or should not have had a public Facebook wall.

- **Content creator liability.** The Grand Chamber also considered whether the people who actually posted the racist comments could be held accountable, and whether this impacts Sanchez's liability. In a prior case (discussed below), the Grand Chamber held that a website owner could be held liable for content posted by anonymous third parties, in part because the actual content posters could not be held liable (since they were anonymous). Here, the actual content creators *were* prosecuted, but the Grand Chamber ultimately determined that it didn't make a difference.
- **The rather minor penalty faced by Sanchez.** Finally, the Grand Chamber acknowledged that by holding platforms or profile owners liable for third-party speech, it could create a potential chilling effect on free expression. That risk increases when *criminal* penalties are available. But it noted that *in this case*, the ultimate judgment against Sanchez was a €3,000 criminal fine and a €1,000 payment of costs. Given the context and penalty, the Grand Chamber did not believe that Sanchez's conviction on these specific facts had a chilling effect on his free speech or political career (after all, since 2014 he has been the mayor of Beucaire, a town in the Rhône Valley).

## Dissenters and Intervenors

The decision was not unanimous, with several judges dissenting. One of the dissents pointed to the Grand Chambers' 2015 decision, *Delfi AS v. Estonia*, which established the ECtHR's intermediary liability rules and upheld a judgment against a commercial news organization that failed to delete unlawful comments made by third parties on its platform because those third parties could not be identified, and because the intermediary had more control over the comments once submitted. The dissent in *Sanchez* suggested that the majority did not adequately address this apparent departure from *Delfi*, since the third parties in Sanchez's case were identifiable and Sanchez could not pre-moderate these comments.

*Sanchez* also attracted numerous third-party intervenors (e.g., amici) who, like the dissenters, highlighted several concerns about this decision, including:

- **The potential chilling effect of criminal sanctions, particularly during elections, and the risk of self-censorship.** Article 10 protects not only the right to free expression but also the right to receive information. If prominent people who own websites and other profiles face *criminal liability* for content that others post, it could discourage them from allowing public participation. Or even if public participation is allowed, it could lead website and profile owners to be overly harsh censors out of self-preservation. These owners are not courts, and can't be expected to independently determine when someone crosses the line.
- **The disproportionate burden Sanchez places on the account owner.** As even the majority opinion acknowledges, "no regulation required the automatic filtering of comments and there was no practical possibility of prior content moderation on Facebook" at the time. The majority focuses instead on "what steps the applicant ought to have—or could have—reasonably taken." But the Grand Chamber's resulting opinion simply criticizes Sanchez while providing no guidance for website owners. How quickly must comments be removed? Would the result change if, for example, the comments were spam, or from unwanted trolls? Would it change if the website owner disowned the comments or challenged them? And what does this mean for people with limited resources who can't moderate content quickly enough to avoid criminal penalties? Does this preclude them from running for office without a risk of criminal liability?
- **The likelihood of erroneous moderation by intermediaries on digital platforms.** The majority opinion also implies that filtering/moderation could or should be done by the online provider. But as the intervenors note, are major online service providers well-situated to be the primary arbiters of whether comments made by some random person in the course of a local election violate local law, and if so, is that a role society wants providers to play?

The majority opinion acknowledged the intervenors' concerns, but took the position that the context of this case—a National Front politician with a public Facebook profile, who knowingly allowed unlawful hate speech to persist on that profile for weeks — did not implicate these concerns.

### **Would Section 230 and the First Amendment prevent this from happening in the United States?**

Kind of, though mainly because of the First Amendment, not Section 230.

*Sanchez* involved a national French law that criminalizes hate speech. If Congress sought to pass a similar law in the United States, it would almost certainly violate the First Amendment. While hate speech is a recognized concept in international human rights law, it is not a cognizable exception to the First Amendment. To the contrary, the U.S. Supreme Court has made it abundantly clear that the First Amendment tolerates all kinds of hateful or discriminatory speech.

Section 230 would likely give a provider or social media profile a viable defense to most civil claims arising out of the conduct at issue in *Sanchez*. But the law at issue in *Sanchez* is a criminal law that has no parallel in the United States, and Section 230 provides no immunity from federal criminal liability.<sup>[3]</sup> So, if Congress were to pass an analogous criminal hate speech law, Section 230 would provide no protection against criminal charges arising from that law—but, as noted above, the First Amendment likely would (since the law would almost certainly be unconstitutional).<sup>[4]</sup>

### **What's the Takeaway?**

It's difficult to say. Read broadly, *Sanchez* might have opened the door to prosecutions and lawsuits against people with prominent social media platforms in EU member states with similar criminal hate speech laws, if they fail to promptly remove hate speech after some unspecified time period. Given the global focus on content moderation/liability in recent years, it is reasonable to wonder whether *Sanchez* might encourage more prosecutions and lawsuits. If that happens, it's also reasonable to expect people to respond by censoring more content, requiring preapproval or filtering for all submissions, or even moving to one-way communication channels. It is unclear if the Grand Chamber foresaw these consequences for "free expression."

It's also possible that nothing changes: perhaps this is an outlier, premised on the Grand Chamber's (unstated) view that *Sanchez* is a far-right politician who allowed people to post racist hate speech on his page about his opponent, with his tacit approval, during an election, and then used "free speech!" as a disingenuous rallying cry in defense. In future cases, maybe the Grand Chamber will explain the boundaries in ways that discourage (or at least don't encourage) censorship, possibly by limiting the reach of such laws to content that endangers public safety by meeting the international threshold for incitement. For now, though, we've all been left guessing.

What does this mean for social media users in the United States? If you decide to run for office or otherwise garner some sort of prominence, can you face criminal liability for posts that others make on your public social media platforms? Well, U.S. law wouldn't permit criminal liability, but whether a European country's law would apply will depend on the details and whether the underlying law reaches content outside of the country. That's beyond the scope of this post. Even if it does, at least U.S. courts generally won't enforce foreign criminal laws.<sup>[5]</sup>

However, if you're a public figure in this situation, you might want to think carefully before taking that trip to the Loire Valley.

*The authors would like to acknowledge Summer Associate Bo Yan J. Moran's contribution to this blog post.*

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[1] 838 F.3d 992, 1000 (9th Cir. 2016).

[2] For those who may not recall 2010s-era Facebook, a person's Facebook "wall" was akin to what is now known simply as their Facebook Timeline. So, posting on someone's "wall" in 2011 is the same as posting on their profile in 2023.

[3] 47 U.S.C. § 230(e)(1).

[4] Section 230 might also come into play if a state government were to pass a similar criminal law. The exception in Section 230(e)(1) only reaches federal criminal law. *Id.*

[5] To be clear, this post isn't legal advice, and you should consult with a European lawyer if you're concerned about your liability under European law.

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