PART II

Access × Feminism

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Accidental Abolition?

Exploring Section 230 as Non-Reformist Reform

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Depending on who you listen to, Section 230 of the Communications Act is "the closest thing there is to a perfect law"; the "twenty six words that created the Internet"; a "subsidy" to tech platforms; or "a law [from] the 90's that lets tech companies get away [with catastrophic injuries]."[1] But most scholars do not cite Section 230 as an example of abolition of the police state or prison industrial complex, despite the fact that Section 230 may represent the largest single carve-out of people and entities from state criminal liability in US history.

This makes sense facially, because the original proponents of Section 230, Christopher Cox and Ron Wyden, do not have voting or public statement records that suggest that they were trying to get rid of policing. Nor, in 1996, when Section 230 was passed as part of the broader Communications Decency Act, was "abolition feminism" named in the way it is now, although certainly its organizing lineages reach back that far and further. But abolition feminism, a critique that comes out of both work against the prison industrial complex and feminist communities of color advocating against using the criminal legal system to address interpersonal violence, has much to teach us about how to think about Section 230.[2]

With a small number of exceptions created by the Fight Online Sex Trafficking Act of 2018, owners or operators of computer services cannot be held liable under state criminal law for the acts of their users, even when their behavior might otherwise rise to the legal standard of aiding and abetting.[3] This fact is usually framed as negative: "the Internet is lawless!"; "bad people will not be held accountable!" In this chapter, I approach Section 230 differently. I name the possibilities that Section 230 creates and use the tools of abolitionist feminism to explore the failure

of many platforms and people to fully perform the imagining work necessary to make use of those possibilities.

Before I dive in, a caveat: I am not saying that Section 230 *is* abolitionist. Section 230 and most of the advocates who support it do not center the experiences of the formerly incarcerated and those most likely to be targets of the systems of violence of American policing (disabled/queer/trans Black people and people of color). This makes Section 230 a strange fit for the abolitionist framework or an analysis of non-reformist reforms. But yet, my own experience working on Section 230 has taught me that the same arguments that caution against criminal liability for online platforms apply more so to individuals. Thus, I position 230 similarly to how some advocates invoke the suburbs, with a full awareness that such an invocation is contested and appealing primarily to White readers and reinforcing the idea of abolition as absence.[4]

The work of abolition is not solely the elimination of the criminal legal system, policing, jails, or the policing of families. Rather, it requires imagining and creating the things that take the place of those systems. Section 230 has cleared space for such imaginings, and that the failure by major platforms to meaningfully make use of this space reinforces the call to be doing both forms of work at once.

Toward that imagining, this chapter proceeds as follows: I provide a brief background sketch on abolition feminism, and then I use the questions produced by Critical Resistance, an abolitionist organization, to explore whether Section 230 is an example of a non-reformist reform. Through that process, I also explain what it does. I close by reflecting on how tech platforms have generally failed to build meaningful non-carceral solutions in the absence of criminal liability.

WHAT IS ABOLITION FEMINISM?

Abolitionist or abolition feminism takes its name from those who fought against slavery. It is dedicated to rendering obsolete and eliminating the prison industrial complex and policing. As Mariame Kaba argues in her essay published during the George Floyd uprising, "We can't reform the police. The only way to diminish police violence is to reduce contact between the public and the police."[5] In short, abolition names that the problems that prisons attempt to solve are solvable by other means and attempts to build a world such that prisons are no longer necessary, at the same time as mobilizing and organizing for reduction in the power of carceral institutions.[6]

Abolition feminist work does not solely focus on policing. Its analysis has been extended to the child welfare system,[7] institutionalization of people with intellectual and developmental disabilities,[8] and borders.[9]

Although there are many lines to trace abolitionist feminism to, modern organizing that most directly relates to the work being done now started in the early 2000s, with conferences thrown by the anti-prison industrial complex group

Critical Resistance, as well as earlier work by INCITE! Women of Color Against Violence.[10] INCITE!, in particular, was a group of women of color organizing against domestic and intimate partner violence who rejected the move by the mainstream White feminist movements to use policing and carceral apparatus. Abolitionist organizing often focuses on local campaigns, to resist the construction of prisons, for example, or participatory defense, rather than broader legal or regulatory reform strategies.[11] By 2019, the *Harvard Law Review* dedicated an entire issue to prison abolition, after formative work by Amna Akbar, Dean Spade, and Allegra M. McLeod.[12]

Abolitionist feminist thinkers are engaged with technology. Stop LAPD Spying, a group based in Los Angeles, builds community power to abolish surveillance and policing, both methods that use technology and those that don't.[13] Sarah Hamid, an organizer with #8toAbolition and the Carceral Tech Resistance Network, has argued that technological reformers and critics have played a similar role to prison reformers.[14] Likewise, formerly incarcerated activists like James Kilgore have brought abolitionist advocacy to areas like ankle monitors and other forms of digital incarceration.[15]

Of course, it is not just those that explicitly name technology in their work that have something to say about technological developments in policing and surveillance. The idea that abolition feminism that does not explicitly discuss technology is not concerned with it has been rejected by many scholars. Abolition feminists often resist the move to segregate technology from other areas of policing. As an example, the consensus "why" document produced by carceral tech resistance network explains that "the history of carceral tech does not begin with computational policing or risk assessment algorithms. This kind of periodization only services police-adjacent academics, media, and system reformists."[16]

230 AS NON-REFORMIST REFORM?

A fundamental premise of abolition feminism is that reforming prisons is not possible—the system is not broken, it is working as intended.[17] Thus, all efforts at reforming the existing system must be evaluated in terms of their chances of retrenching those systems, ultimately making it harder to dislodge them or to imagine alternatives. The primary frame through which this evaluation is done is the idea of "non-reformist reforms," building on the work of Andre Gorz.[18]

Non-reformist reforms aim to reduce harm without entrenching existing systems. They are "determined not by terms of what can be, but what should be," and are reliant on and in relation to a fundamental modification of the relations of power.[19] But because abolition feminism is not just a theoretical framework but a living way of organizing, Gorz's more abstract idea only serves as a starting point. Organizers have developed tools to determine which steps serve to reinforce the criminal legal system, policing, and prisons, and which

might serve to lessen its impact. In particular, a chart produced by Critical Resistance aims to help a reader evaluate if a particular step is an abolitionist step to end imprisonment.[20]

"Does a particular reform . . .

- reduce the number of people imprisoned, under surveillance, or under other forms of state control?
- reduce the reach of jails, prisons, and surveillance in our everyday lives?
- create resources and infrastructures that are steady, preventative, and accessible without police and prison guard contact?
- strengthen capacities to prevent or address harm and create processes for community accountability?"[21]

Section 230, as mentioned earlier, provides blanket immunity to the provider of an interactive computer service for claims under state criminal law where they would be held liable as the publisher or speaker of information from another content provider.[22] Generally, in order to claim immunity under Section 230, a person must show that (1) they are a provider or user of an interactive computer service, (2) the information for which the state seeks to hold the defendant liable was information provided by another information content provider, and (3) the claim seeks to hold the defendant liable as the publisher or speaker of that information.

This can be quite abstract, so let's take an example. If, for example, North Carolina passed a law making it a crime to aid and abet the sharing of information about self-managed abortion, online service providers whose facilities are used for this information could face criminal liability.[23] An online service provider (say a small forum) who had not banned their users from discussing abortion could be prosecuted under the law after a user self manages an abortion based on information shared by another user. But Section 230 would prevent the online forum from being held criminally liable for the speech of their users, even if it were found to rise to the level of aiding and abetting under state criminal law.[24]

Section 230 may eliminate state criminal liability for the online forum in that case. But is it a non-reformist reform under the Critical Resistance questions?

(1) Does Section 230 reduce the number of people imprisoned, under surveillance, or under other forms of state control, or (2) reduce the reach of jails, prisons, and surveillance in our everyday lives?. Of course, the type of liability involved in our example or in most Section 230 cases is quite different than ordinary arrests based on street level surveillance. But nonetheless, Section 230 greatly reduces the reach of state criminal law online.

In these circumstances, Section 230 may at least partially serve as a non-reformist reform. It does reduce the number of people imprisoned/under surveillance/under other forms of state control by eliminating criminal liability for a particular population.

This risk reduction allows for online platforms to make more nuanced choices about how to handle speech without necessarily focusing on state criminal law as the primary arbiter. There have been instances in which platforms, because of the limits on their legal liability for online materials, have allowed for behavior that would have otherwise potentially been criminalized.[25] This created spaces that focused on harm reduction rather than overenforcement.

(3) Does Section 230 create resources and infrastructures that are steady, preventative, and accessible without police and prison guard contact?. For the third question, the answer is more complicated. It is specious to suggest that the absence of criminal liability for the online speech of others has made internet infrastructure a cop-free zone. Online services are rich in information that leads to criminal prosecutions.

But it is true that many technology companies have built infrastructure for dealing with what would otherwise be criminal behavior that exists separate from that of traditional policing. For example, if Facebook removes a post for discussion of illegal drugs, it does not automatically report such a post to law enforcement.[26] Not so for child sexual abuse material, which earns an automatic referral to the National Center for Missing and Exploited Children (NCMEC), as required by federal law. Although it may not fit within the original imaginings of abolitionists who formulated the question, online platforms can create infrastructure for eliminating or reducing some forms of harm without police.[27]

(4) Does Section 230 strengthen capacities to prevent or address harm and create processes for community accountability?. It is the fourth question posed about non-reformist reforms where Section 230 fails entirely. Although Section 230 may reduce the scope of potential criminal proceedings and thus the risk of state surveillance, those who make use of its benefits often have not meaningfully created alternative structures that allow for thinking beyond the law. It is true that online platforms are often infrastructures that do not depend upon the police. Section 230 fits well into the false imaginary of abolition as absence, like the suburbs.

But even in the absence of criminal law, online platforms engage with the harms they cause through a fundamental conservative and carceral frame. Rarely do we see online service providers devote time and energy to building in processes of meaningful community accountability, or resourcing those harmed by the side effects of the decisions they have made.[28] Section 230 may provide space to do things differently, but as Kate Klonick has articulated, when it comes to speech, platforms have ended up building on the American speech tradition,[29] and then basically speedrunning First Amendment law.[30]

In previous work, I called the role of laws in this space "talismanic," noting that they are evoked not for their actual legal requirements but to hold space for a set of arguments occurring elsewhere.[31] Experts such as Sarah Hamid, Rachel Kuo, and others have called this "carceral content moderation," noting that the binary "keep

up or take down" model often exhibits the same lack of imagination as more carceral apparatuses, to say nothing of the way in which digital surveillance tools feed directly into real world policing.[32] In short, there is an utter failure of imagination to figure out what we could do differently, perhaps partially because of the sheer scale of major platforms content moderation efforts (which, of course, is no one's fault but the platforms and perhaps their investors).[33]

Despite that failure of imagination, or perhaps because of it, a number of scholars have begun to suggest abolitionist approaches to online spaces based on alternative, non-carceral models. In her essay in Logic Magazine, Niloufar Salehi lays out a restorative justice frame to approaching online harassment, centering on the needs of those who have been harmed.[34] Similarly, Sarita Schonenbeck and Lindsey Blackwall conceptualize a move toward accountability and repair, proposing governing principles that align social media platforms with frameworks separate from criminal punishment.[35] And as with abolition more generally, these efforts are not limited to the academy. Tyler Musgrave's work on Black women and Femmes' experiences with harassment show how users, whether platforms facilitate it or not, can transform the harm they experience.[36] These practical efforts and theoretical frames demonstrate Gorz's points that non-reformist reforms both imagine a different world at the same time that they build popular support.

REIMAGINING SECTION 230 AS ABOLITIONIST ARGUMENT GATEWAY

Did Christopher Cox and Ron Wyden accidentally imagine something consistent with the work of Critical Resistance? No. And Section 230 might not even be a non-reformist reform. As it currently stands, its proponents and its primary beneficiaries have done the first part of abolition—the elimination of policing and criminal law; but not the second—the building of alternatives that transform violence and harm.[37]

But perhaps Section 230 can nonetheless serve as a gateway to abolition. Section 230 does have many advocates who would not identify themselves as abolitionists admitting that the imposition of criminal liability creates bad incentives and leads to unworkable solutions. In the context of Section 230, we often see widespread agreement that state criminal law is arbitrary, uneven, holds the wrong people to account, is fundamentally regressive, and does not successfully deal with real problems. Although not all of these are abolitionist arguments, it is fascinating to see critiques that could be crafted to describe the felony murder rule or conspiracy liability used to suggest avoiding online liability for online platforms. What does it mean that in the context of the internet, state criminal law has been accepted as an arbitrary, negative force, that prevents the operators of platforms from dealing with content in ways that genuinely promote harm reduction? How could that analysis be expanded to so many other spaces where criminal liability

eliminates pro-social options? And how can this analysis be re-centered to focus not on platforms, but on those who bear the primary harms of policing?

If we can answer these questions, perhaps Section 230 could be abolitionist. It says, quite clearly, that there are places where criminal liability does harm, not good. It clears space for an imagined alternative. Perhaps, building on the work of feminists, we can imagine online communities that take seriously the responsibility to build non-carceral, community-based solutions to transform harm. Some of them may already exist. And if they do not, Section 230 might help us, if only we moved beyond absence to a politics of care.

NOTES

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1. Preston Byrne, *Section 230 is the Closest Thing There is to a Perfect Law*, @prestonjbyrne (July 26, 2022), https://twitter.com/prestonjbyrne/status/1551891254186745858; David Chavern, *Section 230 Is a Government License to Build Rage Machines*, Wired, https://www.wired.com/story/opinion-section-230-is-a-government-license-to-build-rage-machines (calling Section 230 a subsidy for big tech); Jeff Kosseff, The Twenty-Six Words That Created the Internet (2019), Congressional Testimony from Carrie Goldberg, *Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity: Hearings Before the Subcommittee on Communications and Technology, of the House Committee on Energy and Climate*, 117th Cong. (2021).

2. *See, e.g.*, Angela Y. Davis, Are Prisons Obsolete? (2003); Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (2007); Angela Y. Davis, et al., Abolition. Feminism. Now (2022); Mariame Kaba & Andrea J. Richie, No More Police: A Case for Abolition (2022).

3. Section 230 does not immunize providers or users of online services against federal criminal law, but as well documented elsewhere, most criminal enforcement happens at a state, not a federal level. An additional caveat is that it is also unclear how much user behavior providers or other users would be liable for without 230, but given the fact that criminal law primarily results in plea bargaining rather than trial, 230's impact at eliminating the possibility of liability is profound.

4. josie duffy rice, *Many People in America Already Exist in a World Where Police and Prisons Do Not Exist. Go to Any Middle to Upper Class Suburb in America. Cops Arent Wandering the Streets. People Aren't Being Arrested. Neighbors Aren't Being Sent to Prison. and Generally Everyone is. . . . Fine.*, @jduffyrice (May 28, 2020), https://twitter.com/jduffyrice/status/1265957718260690944. *But see* Tamara K. Nopper, *Abolition Is Not a Suburb*, The New Inquiry (July 16, 2020), https://thenewinquiry.com/abolition-is-not-a-suburb/.

5. Mariame Kaba, *Opinion | Yes, We Mean Literally Abolish the Police*, New York Times (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html.

6. See Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice, 20–22 (2021); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 Harv. L. Rev. 1575, 1577 (2019).

7. *See, e.g.*, Dorothy E. Roberts, *I Have Studied Child Protective Services for Decades. It Needs to Be Abolished*, Mother Jones (Apr. 5, 2022), https://www.motherjones.com/crime-justice/2022/04/abolish-child-protective-services-torn-apart-dorothy-roberts-book-excerpt/.

8. *See, e.g.*, Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition (2020).

9. *See, e.g.*, Anita Yandle, *Open Borders, Then Abolish Them*, Abolition and Democracy 13/13 (Mar. 31, 2021), https://blogs.law.columbia.edu/abolition1313/anita-yandle-open-borders-then-abolish-them/.

10. *See History*, Critical Resistance, http://criticalresistance.org/about/history/. For a more general history, *see* Davis, et al., *supra* note 2.

11. *See Local Chapters*, Critical Resistance, https://criticalresistance.org/local-chapters/; Emily L. Thuma, All Our Trials: Prisons, Policing, and the Feminist Fight to End Violence (2019); see Kaba, *supra* note 6.

12. *Introduction*, 132 Harv. L. Rev. 1568 (2019); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 410 (2018); Dean Spade, *The Only Way to End Racialized Gender Violence in Prisons Is to End Prisons: A Response to Russell Robinson's "Masculinity as Prison,"* 3 Calif. L. Rev. Cir. 184, 186 (2012); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156, 1161 (2015).

13. Stop LAPD Spying Coalition, Stop LAPD Spying Coalition, https://stoplapdspying.org/ (accessed Sep 23, 2022); *see also* Stop LAPD Spying, *Co-optation and Counterinsurgency in Surveillance Reform*, LPE Project (Mar. 15, 2022), https://lpeproject.org/blog/co-optation-and-counterinsurgency-in-surveillance-reform.

14. Sarah T. Hamid, *Community Defense: Sarah T. Hamid on Abolishing Carceral Technologies*, Logic Magazine (Aug. 31, 2020), https://logicmag.io/care/community-defense-sarah-t-hamid-on-abolishing-carceral-technologies/.

15. James Kilgore, *Electronic Monitoring Is Not the Answer: Critical Reflections on a Flawed Alternative* (2015), https://mediajustice.org/wp-content/uploads/2015/10/EM-Report-Kilgore-final-draft-10-4-15.pdf.

16. *why //*, carceral tech resistance network (2020), http://carceral.tech/why.

17. Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice (2021), at 13.

18. André Gorz, Strategy for Labor: A Radical Proposal (1967).

19. *Id.*, at 7–8.

20. *Reformist Reforms vs. Abolitionist Steps to End IMPRISONMENT*, Critical Resistance, https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf. *See also* Mariame Kaba, *Police "Reforms" You Should Always Oppose*, Truthout (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose/.

21. *Reformist Reforms vs. Abolitionist Steps*, see *supra* note 20.

22. 47 U.S.C. § 230.

23. There would likely also be First Amendment challenges to such a law, but as Eric Goldman has argued, Section 230 may provide more procedural protection than the First Amendment. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 Notre Dame L. Rev. Reflection 33 (2019).

24. Reporting by Melissa Gira Grant has noted that as part of the passage of the Communications Decency Act, the bill that contained Section 230, the Comstock Act (a federal law that prohibits the distribution of information related to abortion) was broadened to cover online platforms. *See* Melissa Gira Grant, *A Forgotten 1990s Law Could Make It Illegal to Discuss Abortion Online*, New Republic (Aug. 1, 2022), https://newrepublic.com/article/167178/1990s-law-abortion-online-illegal-cda. Although this unfortunate addition is unlikely to be relevant to Section 230's state law preemptions, it does make the example choice more evocative.

25. *See, e.g.*, Melissa Gira Grant, *7 Sex Workers on What It Means to Lose Backpage*, The Cut (Apr. 10, 2018), https://www.thecut.com/2018/04/7-sex-workers-on-what-it-means-to-lose-backpage.html.

26. Of course, this may be in part because it would be time-consuming or difficult to figure out who the appropriate law enforcement body is.

27. *But see* Rachel Kuo and Sarah T. Hamid, *Towards Collective Safety: Transformative Methodologies, in* First Monday, Special Issue on Online Harm and Abuse, at 12 (forthcoming), noting that many forms of online violence have been turned into policing problems.

28. Facebook's funding of journalists notwithstanding.

29. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harvard Law Review 1598, 1618 (2018).

30. The idea of referring to this process as speedrunning is one I owe to Mike Masnick. *See, e.g.*, Mike Masnick, *Parler Speedruns The Content Moderation Learning Curve; Goes From "We Allow Everything" To "We're The Good Censors" In Days*, Techdirt (July 1, 2020), https://www.techdirt.com/2020/07/01/parler-speedruns-content-moderation-learning-curve-goes-we-allow-everything-to-were-good-censors-days/.

31. Kendra Albert, *Beyond Legal Talismans*, Berkman Klein Center for Internet and Society Lunch Talk Series (2016), https://cyber.harvard.edu/events/luncheons/2016/10/Albert.

32. See Rachel Kuo and Sarah T. Hamid, *supra* note 27, *citing* CTRN Organizers' Working Session: Police Surveillance and Platform Policies Workshop (Feb. 8, 2020), Camarillo, CA.

33. *See* Kuo and Hamid, s*upra* note 27, at 17, explaining how the failure to "scale" is used as critique of transformative justice methodologies; *see also* Amy A. Hasinoff & Nathan Schneider, *From Scalability to Subsidiarity in Addressing Online Harm*, 8 Social Media + Society, no. 3 (2022); Tarleton Gillespie, *The Fact of Content Moderation; Or, Let's Not Solve the Platforms' Problems for Them*, 11 Media and Communication (June 28, 2023), https://www.cogitatiopress.com/mediaandcommunication/article/view/6610.

34. Niloufar Salehi, *Do No Harm*, Logic Magazine (Aug. 31, 2020), https://logicmag.io/care/do-no-harm/.

35. Sarita Schoenebeck and Lindsey Blackwell, *Reimagining Social Media Governance: Harm, Accountability and Repair*, 23 Yale J. of L. & Tech. 113 (2021).

36. Tyler Musgrave, Alia Cummings & Sarita Schoenebeck, *Experiences of Harm, Healing, and Joy among Black Women and Femmes on Social Media, in* Proceedings of the 2022 CHI Conference on Human Factors in Computing Systems 1 (Apr. 2022), https://doi.org/10.1145/3491102.3517608.

37. *Id.* ("Transformative justice is the work of building new models of justice and safety through accountability and harm repair practices that attend to the *root conditions* of violence and harm").