Race, Disability, and Section 230

I am grateful to the BTLJ and BCLT for the opportunity to participate in this symposium's panel on race, Internet platforms and Section 230. It's a fortunate and timely opportunity to discuss Spencer Overton's and Catherine Powell's critical and long-needed piece on *The Implications of Section 230 for Black Communities*. Prof. Overton and Prof. Powell highlight how Internet platforms have invoked Section 230 to avoid complying with traditional civil rights laws that protect against racial discrimination in the contexts of housing, employment, and credit. As Prof. Overton and Prof. Powell note, the potential for Internet platforms that now serve as "key intermediaries for jobs, housing, and financial services" to discriminate against Black consumers risks rolling back the progress made over the course of the civil rights movement.

Section 230 and Disability

In the spirit of Jamelia Morgan's critical work to connect racial and disability discrimination, this is an opportune time to likewise highlight the risks that Section 230 threatens to pose toward the enforcement of civil rights laws intended to protect people with disabilities. In particular, the digital intermediation of important social, cultural, economic, and democratic opportunities likewise positions Section 230 to become a problematic barrier for the enforcement of the Americans with Disabilities Act (ADA).

The best illustration of this looming conflict comes from litigation by the National Association of the Deaf (NAD) against Harvard University and the Massachusetts Institute of Technology. The suits alleged that the universities had failed to caption audio and audiovisual content on their websites and thereby denied the equitable access to deaf visitors in violation of the ADA and the Rehabilitation Act. While web accessibility litigation often is noted for the complex circuit split over whether Title III applies to websites as places of public accommodation, these cases were heard in the federal district court in Massachusetts, governed by First Circuit precedent that supports the application of the ADA to websites.

While the court concluded that the plaintiffs' civil rights claims under the ADA and the Rehab Act ordinarily would apply, Section 230 got in the way. The court concluded that Harvard and MIT served as mere intermediaries for some of the content on their websites provided by third parties and that Section 230 therefore blocked those claims. This conclusion teed up a complex assessment of which content on the sites was properly attributable to third parties, such as students and individual faculty members, rather than Harvard and MIT themselves, and the cases ultimately settled.

Civil Rights Immunity for Digital Shifts

The cases highlight, however, the role that Section 230 can play in shielding discriminatory acts and omissions that deny disabled people equitable access to important societal spaces, including education, that have long been uncontroversially required by disability law. In NAD v. Harvard, Magistrate Judge Katherine Robertson even called NAD's "plea for access to aural content available on the Internet . . . compelling," noting the ADA's and Rehab Act's well-established "acknowledgement of the vital importance of equal access to goods and services for individuals with disabilities." Yet Judge Robertson concluded that prevailing case law simply "d[id] not leave room" for the argument that Section 230 "does not apply to discrimination claims seeking accommodation for the disabled."

Moreover, Section 230 can disrupt civil rights laws even in contexts that have always involved the presence of intermediaries and third parties; it unthinkable that the mere presence of students and teachers might have defeated the application of the ADA and the Rehab Act to schools in an analog age—and yet. Consistent with Prof. Overton's and Prof. Spencer's observations, Section 230 affords an opportunity for entities to deflect responsibility for the discriminatory impacts of their enterprises simply because they have migrated to digital spaces where conduct has become intertwined with speech. And while some have wrongly argued that Section 230 merely rulifies the First Amendment, disability law mandates of the kind foreclosed by Section 230 here routinely survive First Amendment scrutiny.

Reforming Section 230 With Nuance and Caution

While Section 230's role as a barrier for civil rights calls for action, reform efforts demand nuance, caution, and sharp tailoring. As Overton and Powell observe, Section 230 has proven an important boon to Black communities even as it has caused significant problems, empowering platforms to reduce disinformation, prevent discrimination, and remove hate speech and white supremacists. Ensuring the accessibility of user-generated platforms likewise calls for a nuanced approach to avoid unintended consequences to the important work that many platforms undertake to promote the accessibility of content provided by users. Moreover, it is critical for civil-rights-minded Section 230 reform to avoid entanglement with the autocratic branch of tech policy reform that seeks to co-opt content moderation apparatuses toward ends that are antithetical to the goals of the civil rights movement.

It is also critical not to lose track of the substantive foundation of civil rights laws' substantive application to the Internet in haste to address Section 230. To be clear: disability law has been uncontroversially deployed in digital contexts because the Internet's accessibility problems are not limited to intermediaries and user-generated contexts. This advantage comes into sharp relief when comparing disability law to other strains of Section 230 reform that lack clear underlying causes of action that would apply in Section 230's absence. Yet the the internal challenges of applying disability law to Internet spaces, such as the aforementioned circuit split over the ADA's application to the web, must be overcome in tandem. As civil rights advocates have experienced, the legal and political capital needed to circumnavigate Section 230 can be expended for naught if the underlying substantive law lacks sufficient force or reach to achieve civil rights goals in Section 230's absence.

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Nevertheless, it is clear that advocates will need to tend to Section 230 as disability rights continue to evolve in the digital age. It is fortunate that Prof. Overton and Prof. Powell have provided a blueprint of important lessons, values, and traps to avoid in preserving and advancing the civil rights tradition.

The parallel evolution of disability rights in digital spaces highlight an opportunity for intersectional solidarity and understanding that follows Prof. Morgan's call for better understanding of the "co-constitutive relationship" between race and disability.