

www.g-dd@m/ a Defense for the Preservation of Section 230 of the Communications Decency

Act of 1996

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One of the Black American artists lionized as a cultural icon today is Nina Simone. Simone once stated, “An artist’s duty, as far as I’m concerned, is to reflect the times,” and Simone did just that when on March 25, 1965, in the wake of Bloody Sunday, she performed in Montgomery, Alabama in view of thousands, on a platform constructed from empty coffins, her protest anthem titled *Mississippi Goddam* (Loudermilk, 2013, p. 125)! *Mississippi Goddam!* was actually composed two years earlier in 1963 in reaction to the white supremacist bombing of the *16th Street Baptist Church* wherein four young Black girls were killed (Loudermilk, 2013, p. 123). Unquestionably, this raw and gritty anthem penned by Simone was a reproof of American racism made evident by the tumultuous events comprising the Civil Rights Movement.

Today, *Mississippi Goddam!* continues to resonate with Black individuals, including academics like myself. Indeed, this essay’s title is a nod to Simone’s protest anthem, with the use of *www* and a *forward slash* mark on the title page as an implication that when it comes to things like the right to free speech guaranteed under the First Amendment, we are not in Mississippi anymore (so to speak), but the focus is now updated to the whole wide world in the context of the web. The tone of this essay is and will be one of socioracial justice and, as such, is an effort to address the question about Section 230 of the Communications Decency Act of 1996 using a different, less traveled route—that is, addressing the question at hand from a decidedly “mahogany” (that is, Black) perspective that is both historic and present in scope. Utilizing academic scholarship and the literary device of storytelling, the overall purpose of this essay is to draw attention to the pathways of Afro-American speech across select times and circumstances—explicating the relationship of the Black voice to the First Amendment—to build a unique and gradual case for Black persons and free speech in the age of internet via the preservation of Section 230 of the Communications Decency Act of 1996.

“But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of press (National Constitution Center, 2018).” These were timeless words which rang out from the pulpit of *Mason Temple COGIC* (Church of God in Christ) in Memphis, Tennessee on April 3, 1968, as Dr. Martin Luther King Jr. delivered his “I’ve Been to the Mountaintop” speech (National Constitution Center, 2018). And that “somewhere” for these respective freedoms aforementioned by Dr. King is none other than the First Amendment of the United States Constitution. Regarding the overarching theme of this essay, it is the *First Amendment* and the *freedom of speech* that is to be closely examined.

The First Amendment is a part of a comprehensive set of 10 rights enumerated in the Bill of Rights, which was codified by the pen of James Madison and adopted in 1791 to effectively limit the power of government as a means of protecting the liberties of we, the people (Bill of Rights Institute, 2021). The First Amendment of the Bill of Rights states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances (Cornell Law, 2021).” A legal interpretation of the freedom of speech dictates that the cornerstone of free expression is speech (Egemenoglu, 2020), and the fact that language is the linchpin of any culture makes the fundamental nature of speech as expressed in amendment one all-the-more salient. Still, Campbell (2018) notes that while the First Amendment prohibits Congress from abridging “the freedom of” speech, it does not forbid Congress from imposing restrictions on speech altogether (e.g., perjury and terrorist speech are illegal). The Constitution is as much a living, breathing document as it is (routinely) vague (Strauss, 2010), and albeit its vagueness supports its life by allowing for broad interpretation and application and ongoing amendments, this characteristic

can and does lead to dispute over modern sociopolitical issues as will later be seen with *Section 230 of the Communications Decency Act of 1996*.

The advent of the internet would usher in the promise of expanded access to information and greater convenience to communicate; however, before the internet would eventuate there were instrumental legal rulings and perspectives around free speech that developed—namely *Abrams v. United States (1919)*. The facts of *Abrams v. United States (1919)* are that the defendants—who were Russian immigrants, including one Jacob Abrams—“...Were charged with conspiring, when the United States was at war with Germany, to publish disloyal language about the form of government of the United States, which was intended to bring the form of the government into contempt, to incite resistance to the United States in the war, to advocate curtailment of production of ammunition essential to the war. Defendants argued that there was no substantial evidence in the record to support the guilty verdicts (Lexis Nexis, 2021).”

In *Abrams v. United States* ruling it was upheld by Justice John Clarke (who wrote for the majority) that the indictment of the defendants who disseminated antiwar and anarchist leaflets was rightful under the Espionage Act of 1917 (O’Neill, 2009). However, it is the dissenting opinion of Justice Oliver Wendell Holmes that would become a significant defense for free speech in the years thereafter. Justice Holmes advanced a theoretical paradigm known as “the marketplace of ideas,” which was developed by John Stuart Mill in the 1859 publication *On Liberty*. Goach (1998) underscores this assertion made by Justice Holmes based on the marketplace theoretical paradigm, “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market...” One of the notable pieces of legislation that is a testimony to the enduring impact of Justice Holmes dissent on informing modern legal matters is Section 230 of the Communications Decency Act of 1996.

The internet in its infancy required space to mature and for this to be possible generous latitude was needed legally (Proctor, 2021). Enter Section 230 of the Communications Decency Act of 1996. Generally speaking, private corporations like social media sites are not bound by amendment one (only state actors can be prosecuted for violations of the First Amendment), yet Section 230 not only provides protections for private corporations but also protects the speech of users to a great degree. Section 230 states, “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 (Internet Association, 2021).” Furthermore, Section 230 also declares, “No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material 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 (Internet Association, 2021).” ACLU (2021) elucidates that a general function of Section 230 is to immunize internet sites from legal liability based on content that is “user-generated.” It should come as no surprise that such a legal code would be divisive, as you have those who believe Congress needs to restructure Section 230 and those with firm convictions that it should be done away with entirely. Categorically, Section 230 must be preserved, because otherwise Black voices would be marginalized on the internet, perpetuating a historical narrative replete with the suppression of Black speech.

Mhmm: The First Amendment & the Secret Language of Slaves

The *Transatlantic Slave Trade* is arguably one of the most inhumane and deplorable events in world history, and infamously known for its nefarious route called the *Middle Passage*. What follows is a macabre account in the words of Olaudah Equiano—an African man captured

and taken onboard a slave ship during the Transatlantic Slave Trade in the 18th century. “When I was carried on board I was immediately handled, and tossed up, to see if I were sound, by some of the crew... When I looked round the ship too, and saw ... a multitude of black people of every description chained together, everyone of their countenances expressing dejection and sorrow... quite overpowered with horror and anguish, I fell motionless on the deck and fainted. The closeness of the place, and the heat of the climate, added to number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us. This produced copious perspirations, so that the air soon became unfit for respiration. The shrieks of the women, and the groans of the dying, rendered the whole a scene of horror almost inconceivable (National Park Service, 2017).” Certainly, Equiano’s story is reflective of common experiences of those who would be taken to America as slaves.

It must be said that the antiquity of Black people did not initiate with enslavement, which tends to be a historical starting point for those who discuss the story of Black African persons (Mourning, 2019). Regarding American thralldom, prior to enslavement Afro American people descended from ancestries of highly functioning civilizations with queens and kings such as Mansa Musa I of the Empire of Mali in West Africa, or Queen Nandi of the Zulu Kingdom in South Africa; however, with American thralldom came a dissolution of the kind of power and prestige that characterized eras prior to slavery in America. In particular, American thralldom bore significant impact on the rights and freedoms of Afro American people like the rights afforded under the First Amendment.

When the founding fathers conceived of the United States as a nation, they conceptualized of humankind having specific fundamental rights. This egalitarian ideal is then embedded into the U.S. Constitution as exemplified in sections like the Bill of Rights. Yet, at the

time when the Constitution was officially in effect the state of government was decidedly oligarchical in practice (Gilens, 2014)—ruled and enjoyed by elitist, white, land-owning men—and the liberties, or lack thereof, of Black slaves were dictated by the emergence of slave codes. Essentially, slave codes were sets of rules that treated Afro Americans as property and not as people (Brittanica, 2021), and because slaves were not viewed as people, they were routinely denied the rights of people. Concerning rights like those enumerated in amendment one, slave codes restricted a slave’s speech in court proceedings in that slaves were prohibited from testifying against white people (Brittanica, 2021). Furthermore, slaves were not allowed to read, write, or disseminate anti-slavery literature, which violated their right to exercise forms of speech and/or expression like writing (Law Shelf, 2021) as well their ability to access the freedom of press.

Beyond codes that ruled the lived experiences of slaves and impeded their expression, there were literal devices used to silence them. One apparatus in particular that was used on slaves was the muzzle. In sociology, there is a concept known as *necrolinguistics*, which means “linguistic-death-in-life (Mugane, 2005).” Per Mugane (2005) with necrolinguistics language is effectively locked up and the muzzle was a manifestation of this sociological phenomenon. The muzzle achieved a variety of purposes but, “Through the use of the muzzle, Africans were forced to keep it all (physical and mental) inside, to never say what they thought, not even to the wind (Mugane, 2005).” Unquestionably, the muzzle reified the idea of slaves not being human and reinforced slave codes that inhibited free expression.

Often innovation can be born out of great oppression and because slaves were not entitled to the rights of the First Amendment—or really any other constitutional rights for that matter—coded forms of expression and speech were developed. One such example is the word

“mmhmm.” Stanford University linguistics professor John Rickford explains that when Black slaves employed African vernacular it made southern slave owners uncomfortable, because they believed slaves might be conspiring to undermine their control (Devarajan, 2018). The idea is that slaves would devise words that could pass as English (e.g., mmhmm) and this acted as a form of codeswitching (Devarajan, 2018).

Another example of the secret language of slaves is TUT. Similar to Latin, TUT is something of a dead language today, but it was constructed by slaves like those in America to communicate with one another since slaves could not usually speak freely (Daniells, 2021). TUT was also used to promote literacy (McIlwain, 1995). The idea behind TUT is that it utilizes English phonetic spellings to form words (McIlwain, 1995). In a society that largely related slaves to a life of silence TUT provided a way for greater freedom of speech and expression without the support of First Amendment rights.

A final example of the secret language of slaves could be braids. Distinctly Black hairstyles like braids became a cosmetic site of resistance to subvert the institution of slavery in places like America. Joseph-Salisbury and Connelly (2018) state, “Perhaps the ultimate example of Black resistance through hair came in the utilisation of braids and cornrows as maps of escape routes for enslaved peoples.” In this way, braids became a form of speech all their own that aided the liberation not only of Black bodies but of expression.

So, how does the secret language of slaves connect with Section 230? The constitutional premise for Section 230 is this concept of free speech under the First Amendment. As a racial group Black people in America, like those who were slaves, have long been subjected to intense surveillance of our expression, especially our speech. And for those who advocate for the abolishment or stricter regulation of Section 230, this would inevitably entail greater inhibition

of expression, affecting groups like Black people by harking back to previous periods of being surveilled with close regulations of our internet speech, which would consequently infringe on our First Amendment rights yet again. And this infringement on free digital speech could potentially require groups like Afro Americans to innovate coded forms of speech and expression as we were compelled to do throughout American thralldom.

Red Sabbath: Jim Crow's Impact on the First Amendment & Black Speech in Civic Life

The post-slavery environment of the United States ushered in an era known as Reconstruction, which lasted from 1865-1877. During Reconstruction, Foner (2021) explains that efforts were made to improve equity for Black Americans politically, economically, and socially. As well, Reconstruction was a time to remedy challenges associated with readmitting those states which had seceded prior to or at the onset of the Civil War (Foner, 2021). Then, in 1877 Jim Crow laws (racist laws meant to enforce segregation and denigrate Black people) began in 1877 at which time the Supreme Court ruled that states could not ban segregated spaces on transportation shared in common (i.e., trains, streetcars, and riverboats; USC, 2021). Then, in 1883, the doctrine of “separate but equal” was established when portions of the Civil Rights Act of 1875 were overturned by the Supreme Court, and this spawned the passage of state laws that mandated separate but equal accommodations for Black people in places like schools, hospitals, trains, restrooms, and so on (USC, 2021). These Jim Crow laws also impacted *voting*.

It was the 7th day of March in 1965, that fateful day infamously known as “Bloody Sunday.” On this day, masses of disgruntled Black Americans—along with their non-Black accomplices who contended for racial justice—marched with pride and persistence in protest through the streets of Selma, Alabama. Albeit this march was initially intended to trek from

Selma to the state's capitol in Montgomery, it was brought to a bloody halt on the Edmund Pettus Bridge when state troopers, atop galloping horses and on foot, impeded the march with a riotous brutalization of peaceful protestors by employing weaponry and blunt physical force. Consequentially, that day innocent citizens exercising their right to freedom of assembly were ravaged, leading to several infirmed persons being hospitalized. But why exactly was this group marching? The right to vote (YouTube, n.d.).

It has been said that one's vote is their voice and Derfner and Hebert (2016) assert that voting is speech. However, thanks to Jim Crow, at this time in the mid-1960s Black Americans in places like Alabama were effectively made voiceless in civic life through a de jure obstacles to their right to participate in the franchise through things like complex registration systems, poll taxes, etc. (Smithsonian, n.d.). This, arguably, transgressed Black's First Amendment right to speech as bonified U.S. citizens under the fourteenth amendment, and vitiated other amendments that specifically substantiate Black's claims to voting such as the 15th and the 19th¹ (Cornell

1 Amendment XV

Section 1.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2.

The Congress shall have power to enforce this article by appropriate legislation.

Amendment XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Law, 2021). Ultimately, though, events like the march on Bloody Sunday were rewarded with the passage of the *Voting Rights Act of 1965* being passed not many months after on August 6, 1965.

What relation is there between Black civic speech in the era of Jim Crow and the Civil Rights Movement and Section 230? Voter manipulation. Undoubtedly, the book of Ecclesiastes presents an astute observation when it suggests that there is nothing new under the sun. In today's world of internet, one of the issues online is *voter suppression* (Perault, 2021). No matter if the method of manipulation has changed in controlling voter speech, it is still manipulation. With those living in the time of Jim Crow it may have been ridiculous literacy tests or poll taxes, and today it maybe online voter suppression, but the aim to manipulate is the same. However, by preserving Section 230 this would allow for internet platforms to self-regulate issues like voter suppression, while still protecting the exercise of things like political speech online for Black persons.

Honeysuckle Thicket & #BlackTwitter: An Argument for the Protection of Section 230

When one examines the demise of several significant Civil Right leaders and other Black lives, many of them were killed for daring to exercise free speech. People know all-too-well the story of Dr. King being shot at the Lorraine Hotel in Memphis, Tennessee on April 4, 1968. Or what about Malcolm X who was assassinated at the Audubon Ballroom February 21, 1965. Then, there was Herbert Lee who helped register Blacks to vote in Mississippi who was murdered by a state legislator on September 25, 1961 (Southern Poverty Law Center, n.d.). One cannot soon forget the young Emmett Till, who, when accused of being flirtatious with a white woman, was shot and with a 75-pound cotton gin wrapped around his neck using barbed wire

was disposed of in the Tallahatchie River (Hassan, 2021). Still, there were others like Medgar Evers who was a director for the NAACP chapter in Mississippi when a sniper, who was hiding behind a honeysuckle thicket just outside Ever's home, shot him on June 12, 1963 (Booth, 1994). Reflecting on these martyrs for the advancement of civil rights and Black lives, Black people today need protected online spaces to exercise free internet speech and engage in the digital marketplace of ideas without fear of harm or censorship and acts such as Section 230 are absolutely necessary to ensure that

When it comes to the internet it is filled with virtual tribes and one with a simple Google search can begin identifying their e-tribe. For Black persons one of the most notorious e-tribes is known as *#BlackTwitter*. Black Twitter refers to a chocolate space that exists on Twitter where Black people promote all-things Black culture (Wortham, 2016). Black Twitter is known for its hilarious memes, its Black intellectual thought, its ability to critique popular culture with hashtags like *#OscarsSoWhite*, or cancel problematic social figures, with a singular hashtag, but also its intricate role in movements like Black Lives Matter (Wortham, 2016). Concerning BLM (Black Lives Matter), one example is a grassroots campaign Black Twitter started called *#IfTheyGunnedMeDown*, which Wortham (2016) says surfaced after, "Michael Brown was killed in 2014 by a police officer in Ferguson, Missouri, and outlets covering his death published a photograph of him snarling at the camera. Horrified by the implication in that choice—that Brown may have deserved to be shot—many black Twitter users sprang into action and began circulating a copy of his high school graduation photo..."

In many ways, chocolate e-spaces like Black Twitter provide a rallying point for Black persons where we can be heard, understood, and contribute to larger public discourses. And when it comes to Black Lives Matter and the liberation of Black people in the age of tech, Black

Twitter is Black folk's electronic codeswitch. Our online braid pattern routing digital pathways to liberation. A space to speak truth to power. Our www.g-dd@m! Put simply, using chocolate e-spaces like Black Twitter as an example of the critical role of internet speech in matters of public life and Black issues, the importance of keeping Section 230 of the Communications Decency Act of 1996 is paramount.

One of the chief discussions about Section 230—aside from the debate to reform or abolish—is the ongoing tension between those who feel government should intervene in regulating internet speech more by shifting power away from big tech internet platforms or continue to allow respective online platforms to self-regulate to a great degree (Perault, 2021). And with this topic about the shifting of power, while there are several concerns with an over-empowerment of “Big Tech,” one of the pressing concerns is regulation of speech (Perault, 2021). One form of speech that has taken center stage in reform conversations is *hate speech*. Regarding hate speech, it can be understood as, “Speech, writing, or nonverbal communication that attacks, threatens, or insults a person or group on the basis of national origin, ethnicity, color, religion, gender, gender identity, sexual orientation, or disability (Dictionary, 2021).” When addressing the issue of hate speech and speech regulation on internet platforms through law reforms Nadine Strossen stated, “With regard to hate speech that conveys discriminatory ideas against traditionally marginalized or excluded groups, every hate speech law around the world is disproportionately enforced consistently against the very minority groups who are hoped to be protected (YouTube, 2020).” Further confronting the subject of greater speech regulation on media platforms by those in positions of power (e.g., governing officials) Strossen also noted, “Those who wield power are going to wield their discretion in ways that are predictably going to

perpetuate their power and not empower those who have been traditionally silenced or marginalized (YouTube, 2020).”

Overall, as it concerns the assessment of private corporate behavior and their relationship, or lack thereof, to amendment one, the debate over Section 230 is not an easy one to resolve and will likely be the center of legal contention for some time. Still, from a Black perspective, when considering the historical pattern of Black speech and expression being censored, and those who paid a dear price having been muzzled like livestock, hanging like strange fruit from poplar trees, assassinated by racist men using the cover of a honeysuckle thicket, or yelling “I can’t breathe!” while suffocating beneath an officer’s knee that is pressed against our neck, there need not be another form of censorship of the Black voice today with regard to internet speech. It is imperative for forcibly marginalized groups, like Black persons, that Section 230 be protected and preserved. Free speech is our right no matter its form.

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