

THE BROOKINGS INSTITUTION
THE FUTURE OF SECTION 230 REFORM

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P R O C E E D I N G S

MR. WITTES: Hello everybody, and welcome to the Brookings Institution. My name is Benjamin Wittes, I'm a senior fellow in Governance Studies, and I'm here with Quinta Jurecic, Danielle Citron, and Kate D'Adamo. I'm so sorry, Kate, I knew I was going to get it wrong.

We are here discussing the future of Section 230 and a new paper on the subject of the last time we talked about the future of Section 230, by Quinta Jurecic. We're going to turn things over to her momentarily. A few preparatory notes. Quinta's going to give an overview of the paper, then Danielle and Kate are both going to give reactions to it. I will introduce the individual speakers before they actually speak.

If you would like to submit a question you can do so by emailing Events@Brookings.edu or by Twitter, tweeting @BrookingsGov, BrookingsGov, G-O-V, and using the hashtag Section 230, that's hashtag Section 230 @BrookingsGov. The more good questions we have from you guys the more lively this will be.

So this is the first paper released as part of a new Brookings paper series on Section 230 reform. We're going to have a lot more on this as the next few months pass. This is a paper that I am sort of particularly proud of releasing. Quinta, you know, a lot of people, including me, tossed out ideas for Section 230 reform, and while we don't do it blithely, I hope, there is a tendency not to look back to carefully at unintended consequences or prior such efforts. And this is an effort to do so in a particularly rigorous and serious fashion. So please do check out the whole paper, and there is more to come on that front.

So let me introduce Quinta Jurecic. Quinta is a fellow in Governance Studies at Brookings. She is also a senior editor at Lawfare, and a contributor to the Atlantic. She is one of my closest collaborators on all manner of things, and has been working on issues that are at least tangentially related to Section 230, at least since she collaborated on a prior set of papers on sextortion that Brookings published a number of years ago. Quinta is a super deep thinker on these issues and it's a particular pleasure to

launch this particular piece of work.

So, Quinta, the floor is yours, and give us a sense of what you're doing in this paper.

MS. JURECIC: Thank you, Ben, for that really kind introduction. I'm excited to be here today with you, Danielle and Kate to discuss this.

So as you say, this is sort of related to a paper I put together for Brookings that's titled "The Politics of Section 230 Reform: Learning from FOSTA's Mistakes." I think that gives you a little sense of what direction I'm going to go here.

Just to give a brief overview though. So obviously I think most people who are here are familiar with Section 230, it's become kind of a political football over the last few years. But I think it makes sense to kind of take a little bit of a step back to begin with.

So the statute, it's been called the Magna Carta of the Internet. Jeff Kosseff of the U.S. Naval Academy, he's written a book about it, it's called "The 26 Words that Created the Internet." And I think that gives a really good sense of just how important the statute is and how it's really been seen as foundational to the rise of the Web and to the particular success of American Internet platforms.

And yet, you know, as of a few years ago the fate of this sort of Magna Carta of the internet has suddenly been cast into doubt. It used to be the sort of pillar of the web, nobody would think of questioning it except for a few folks, including Danielle, who was very early on in suggesting that there might be some problems with the statute.

But a few years ago the fate of the Magna Carta suddenly was thrown into doubt. And I'd argue that this is really focused on Russian election interference in 2016. There had been many problems with Internet governance before 2016 but the election interference sort of kick started what has become broadly known as the tech lash, which is a term coined by the economists, sort of referring to a souring of the public mood against tech companies.

And as a part of that Section 230 has come under scrutiny from both the

right and the left. President Trump has called for its repeal, President Biden during an early campaign event, or excuse me, during a conversation with the New York Times during the presidential primary, also called for its repeal. During this Congress members have introduced almost 30 bills to revise the statute, and that's only counting the legislation that's been formally introduced. There are far more proposals floating around.

So just a brief overview of what the statute actually does, because I think it can sometimes get confusing. The gist is that 230 means platforms can't be held liable for third-party content posted on their services. So the example I usually give is that, you know, if I post something defamatory about you on Twitter you can sue me but you can't sue Twitter.

And there are two components to the statute so 230(c)(1) protects platforms for leaving content up. So, you know, Twitter decides to leave my defamatory tweet up, you can't sue it. And then there's also a second component, 230(c)(2) which protects platforms if they take content down. The idea being that a platform isn't going to be penalized if it moderates content, it retains that protection from liability.

So 230 was passed, signed into law in 1996. Like I said, really through the next two decades after it passed I think the overwhelming view was that it was a crucial law that really helped enable innovation and growth on the Internet by sort of freeing website companies' platforms from having to worry about looking closely at the speech that was appearing on their sites so that they could, you know, innovate, grow, post all kinds of speech. I think even if you had talked about reforming Section 230 in 2010, again as Danielle can probably testify, people might have looked at you like you were a bit crazy.

Now though the pendulum is really swinging in the other direction. Starting in 2016, I'd argue that this sort of really gets going in 2018, voices on both sides of the political aisle have been calling for far more regulation of the Internet, not less. And these calls have often focused on Section 230. I would suggest sometimes independent of whether what people want is actually connected to what 230 does or what a reform to 230

would do.

And yet through all of this discussion there's really been very little conversation around the last time that Congress reformed Section 230, which was in 2018 with a law that's often-called FOSTA, for the allowed states and victims to fight Online Sex Trafficking Act. You'll sometimes also hear folks refer to it as SESTA which is an acronym for the earlier version of the Bill, so people sometimes use those two interchangeably.

And I think that this sort of failure to think carefully about FOSTA is really important because FOSTA's a cautionary tale for what can happen if you fiddle with 230 without really thinking too carefully about what the effects might be. I'll talk about what specifically FOSTA does in a minute, but the broad gist is that it expanded liability for website posted material that was related to sex trafficking, with a very broad definition of sex trafficking.

Now we're four years after its passage, there are academic studies and studies by sex traffic advocacy organizations that suggests that the law likely placed sex workers at increased risk, both of violence and of economic precarity as people lost access to websites that they used to advertise and communicate with other sex workers and were forced to work on the street in dangerous conditions. And apart from FOSTA's changes to Section 230 specifically, there is a July 2021 report released by the Government Accountability Office that showed that federal prosecutors have actually had little use for the additional criminal penalties for sex trafficking established by FOSTA. And even that the law may have hindered efforts to investigate and prosecute trafficking.

So let's dive into the specifics a little. I don't want to get too in the details because FOSTA's really a pretty messy hodgepodge of a law, which is part of what the problems are with it. But the gist is that it did a couple main things. So first it created a new crime, which we might refer to under 18 USC 2421(a) of owning, managing, or operating a web platform "with the intent to promote or facilitate prostitution." It also expanded existing federal sex trafficking law under 18 USC 1591 to criminalize "knowingly assisting,

supporting, or facilitating sex trafficking.”

It created a new exception to Section 230 for a number of things. So for federal civil claims for violations of Section 1591, so that's federal sex trafficking law, and also for state criminal prosecutions for behavior that would violate federal sex trafficking law and further that would violate that new statute 2421(a). I think it's important to note here that so Section 230 is a shield against federal civil claims and state criminal and civil claims but it doesn't shield federal criminal claims. So what this does is essentially open up those other avenues of liability as well for conduct that is related to sex trafficking.

And then the last thing that the statute did, the main thing, was establish that state attorney generals can also bring federal civil claims under Section 1595, which is the portion of the US Code that allows folks to sue for violations of 1591 on behalf of state residents who are harmed by federal sex trafficking violations.

So that was probably confusing. I've tried to be as clear as possible but if it was confusing that is because the language of the statute is very vague and confusing. It's really sort of a tangled mess of different provisions that touch on different aspects of different statutes.

And this is important because what it does, and to some extent what it does intentionally, is it removes that protection against moderation, or protection from liability for moderation that was established under Section 230. So under Section 230 a website wouldn't need to worry either if there was a content that it had left up or that there was content that it had moderated that could potentially get it into trouble under civil law. The problem here is that FOSTA creates a situation where even if you decide to moderate content, you might be worried, you know, if you're the general counsel of one of these companies, that that shows that you know that some of this content that could create liability is on your platform and thereby opening yourself up to liability itself.

So this sort of vagueness and confusion almost immediately starts creating problems. Websites begin shutting down extremely quickly in an effort to limit liability,

Craigslist shut down its personal section specifically referencing FOSTA, Reddit closed many forums, a number of escort specific websites shut down not only websites that they used to advertise, but also just, you know, used to communicate with one another, share information about safety. Switter, which was an alternative to Twitter, developed for sex workers to communicate with one another, briefly lost access to key service over anxieties by that provider that it might face legal liability under FOSTA just for essentially providing protection against distributed service attacks and web postings to Switter. I don't know, I think that really speaks to just how vague the statute is and how scared companies were that they could get dinged under it and how that led to a lot of limitations in what people could say on the Internet and how they could access their communities.

So this was not a surprise unfortunately. Sex workers and advocates, along with Internet freedom advocates and others had learned early on that FOSTA might have these effects. And the loss to these sites was really brutal for sex workers. When I say that it was harmful, that is not just speculation. We know, and Kate can speak about this, but, you know, sex workers rely heavily on online advertisements to safely find and screen clients and also find resources in the community to keep themselves safe.

After FOSTA passed, in those initial months there were a lot of news reports describing increasing numbers of sex workers who were forced to find clients in the street. Which is important because working on the street can be dangerous. You don't have the ability to screen, you don't have the ability to work in a space that you're comfortable in. And there have also been studies by sex work advocacy groups like a really good study by the Collective Hacking//Hustling, which found increase in sex workers reporting violence against them, and also economic instability after FOSTA. So again, these affects are documented.

Then on the flip side there's also not any evidence that the criminal portions of FOSTA have done any good. So I mentioned this 2021 report by the Government Accountability Office. The Report identified only two cases since 2018 in which the department charged a defendant under 2421(a), that's the new criminal statute. Crucially,

the Report also doesn't contain any data showing that rates of actual sex trafficking or even conventional sex over the Internet have declined. Rather, what the Report shows is an online sex trade that didn't shrink since April 2018, but rather fragmented across a number of platforms and apps, many of which moved overseas. And according to the GAO, that fragmentation has actually made it more difficult for the FBI to track down information in sex trafficking cases.

I think it's also important to note how the civil liability provision of this has been used. So plaintiffs have been gradually making use of this new loophole in 230 liability shield to bring civil suits against platforms. But the statute's drafting, which I cannot emphasize enough is really a mess, has left courts incredibly confused over a number of issues. There are big questions about the mens rea requirements for liability, there is a question opened up by the Texas Supreme Court about whether actually state level civil claims, which aren't explicitly exempted from 230 under FOSTA, could also be opened up against platforms.

And this is important, you know, not just for in terms of, you know, that it's not clear what plaintiffs will be able to sue for, but because these ambiguities are part of what makes platforms cautious. As long as it is not clear what platforms need to do in order to steer clear of liability they will have an incentive to really crack down on any speech that could potentially be related to sex trafficking. And as I've described, that is often related to things that involve, you know, consensual sex work by adults who want to be working in the trade, which has had really negative effects.

So FOSTA I think it's fair to say is not a success. And yet despite all of this, very few lawmakers talking about Section 230 reform more recently have drawn a link between FOSTA and the current 230 debate, or even mentioned it at all. That's not universal, so Representative Ro Khanna and Senator Elizabeth Warren among others have introduced legislation that would formally commission a federal study of FOSTA's effects on sex workers. But other legislators have really been largely quiet on FOSTA even as they

introduce just a flood of reform legislation.

One reason might be, as I said, that, you know, perhaps members of Congress haven't engaged more because of the statute is embarrassing. It's confusingly drafted, lawmakers don't have very much to show for their work even if they are aware of and sympathetic to the harm that sex workers have faced.

Another possibility is that sort of FOSTA was a bit ahead of the curve on 230 reform. Like I mentioned, I think the conversations around 230 as kind of a political football really circling in 2018 after FOSTA has already passed. And I think as part of that it's actually kind of a poor fit for the current political dynamic.

So the current complaint that Republicans often voice is that platforms are taking things down that Republicans want them to leave up. FOSTA does the opposite, it's driven by a desire to perhaps moderate more. On the other hand Democrats who really want reforms to 230 to nominally push platforms to take down, you know, race systems, extremist content. FOSTA is kind of an example of how tweaking 230 in that way can have negative effects and isn't a fix. So it's sort of not a good example for anyone.

But I do think that precisely because of that FOSTA is something that we need to pay more attention to. It shows very clearly that Section 230 is an extremely sensitive dial, and tweaks to it can have wide reaching effects.

I think it also shows that Congress needs to pay special attention to how proposed reforms to 230 could affect vulnerable constituencies. It's been very well documented that women, men of color, members of other groups subject to harassment and discrimination disproportionately shoulder some of the costs of 230. But FOSTA also shows that, you know, the frustrating irony is that vulnerable people are also likely to suffer more from the kind of overly aggressive moderation that could result from sloppy changes.

So there have been, you know, a little more nuance in proposals to 230 since the early days when the statute became prominent. There's a little more interest in focusing on transparency, which I can talk about. There's some interesting distinguishing

between platforms of different scales and functions. Which I would argue is one of the real problems with FOSTA that it didn't do that. But lawmakers have not embraced this nuance universally. So as I was finishing a paper in February 2022, the Senate Judiciary Committee favorably reported that the EARN IT Act, which is a bipartisan bill that would, among other things, remove Section 230 protection for child sexual abuse material at both the state and federal level and create additional legal risks for platforms employing anti-encryption. And many of the sex workers and advocacy groups and scholars who lobbied against FOSTA have been warning that EARN IT could have similarly devastating effects. So far it did not seem that those backing that bill have listened. So I'm hoping that perhaps once the bill reaches the full Senate that there would be a little more consideration there. And I think that that would be sorely needed for all the reasons that I've discussed.

MR. WITTES: Thank you, Quinta. So our first discussant on this paper is Danielle Citron, who is a professor at the University of Virginia Law School. She is also the vice president of the Cyber Civil Rights Initiative. I would be remiss if I didn't add that she is a MacArthur grantee, though I risk embarrassing her by saying that. And she is my co-author on a Section 230 reform proposal from a number of years ago, one that Congress has not given an acronym to and stuck in a bill.

Danielle, the floor is yours.

MS. CITRON: Okay, terrific. I think I'm going to make three points. And thank you so much for having me, it's really fun to talk about 230, especially as I've written with both Ben and Quinta about it. And the paper's fantastic, Quinta, as I told you when we initially communicated.

Three points. First is when FOSTA and SESTA emerged I worked on proposals in both the House and the Senate by both Republican and Democratic and there were so many cooks in the kitchen. And the effort that Jonathan Mayer and I were working on Senator Harris' behalf was very sort of targeted, almost an aiding and abetting kind of approach. And every time we tried to urge narrowness and care, the bill would come back

sort of more expansive and more messy. And so it was definitely disappointing having worked on it. But in the end so many Senators and Representatives signed on because how could one say no, right? We want to protect those who are vulnerable from sex trafficking, and it just wasn't an inevitability, unfortunately, right?

And Quinta and I teamed up to write a piece called *Platform Justice* in which we predicted disaster. Right, Quinta? And I think what we have seen is both it's more of a perception than reality, the perception was that we had expanded liability with many more cooks in the kitchen. So potential liability from state AGs, from civil litigants, from expanded federal criminal powers. And that looming threat of potential criminal and civil liability caused an overreaction and backlash. And who suffered both for sex workers and sexual expression, right? Like not only the sex, you know, the trade for sex, which is abysmal and I know Kate's going to talk about the sort of deep cultural impact this has had, but it caused an overreaction, as Quinta beautifully explained in a paper, you know, at great expense to sex workers and sexual expression. And yet the reality on the ground is that at least from the civil litigation perspectives, as I said, my research assistant, because Quinta and I are going to write a little piece for the Virginia Journal on Law and Technology about sort of FOSTA's impact.

The 35 civil lawsuits that we've seen have largely stalled and been dismissed on the grounds that the platform hadn't knowingly, having specific knowledge of the trafficking. And so a looming threat that caused a lot of silencing and great trauma for sex workers. Turns out was very ineffective, right, both civilly and criminally, right? Disappointing.

So that then goes to my third point. So I got time, got a few seconds? I'm good.

Ben and I, so in 2008 I wrote a piece called *Cyber Civil Rights*, in which I talked about and underscored the phenomenon with cyber stalking, which truly fell on the most vulnerable, so women, gender sexual minorities, definitely sex workers, right, LGBTQ,

like sexual gender minorities, you know, were driven off line, silenced, and their reputations destroyed, unable to work. So it was, as I called it, the civil rights story of the network gauge.

And in that paper I called for a duty of care, that we had seen law moves as a pendulum and we had seen a response of first to protect the industry and have no liability. I didn't want us to overreact with strict liability, I called for a negligence duty of care standard. And at the time I was viewed as totally wacky, right? Like I had a colleague, it was 2008, Privacy Laws Scholars Conference where I presented the paper, say that I was trying to kill communists. And I was like trying to wrap my head around what he was talking about, right? That I was the enemy of the First Amendment.

And so 2016 and '17 Ben and I started talking about the pathologies of what we had seen in the fallout of no regulation. And so we teamed up, this is the beauty of having Ben on the case, is that he helped me and we together wrote a statute, right? We crafted what it should look like, the reasonable steps approach that I had like imagined in 2008. And we, the idea behind a reasonable steps approach wasn't that in any given case how did a platform respond, but at large how do platforms respond and do they take reasonable steps to address illegality that causes serious harm.

And we have pitched it, the proposal to Congress, and every time we pitch it we get a suggestion back, which is a terribly written other alternative. So it's been an interesting process, right, with the note like since 2018 sort of where we've been.

So I'm going to stop there, albeit to say everyone should read Quinta's incredibly thoughtful paper. And I'm so delighted to be part of the discussion with all these, you know, dear friends.

MR. WITTES: Thank you, Danielle. Our second discussant today is Kate D'Adamo, and I apologize for getting her name wrong the first time. Kate is a partner at Reframe Health and Justice and a community organizer and advocate for sex workers. It is super great to have you here. And the floor is yours.

MS. D'ADAMO: Thank you so much. And, no, mispronouncing my name on the internet is like helping stay anonymous in my heart. So.

I first want to thank you for being part of this discussion. And I also love this paper and really love the direction that it's moving in. And I really appreciate the idea about really flushing out this conversation beyond 230.

I work with sex workers, I work with a criminalized population and so when we're talking about things like First Amendment protection, that is not something that is offered to criminalized communities, it is not offered to marginalized communities because speech, community building connection, sharing safety information, harm-reduction information, these are all criminalized activities. And so when we're talking about kind of some of these ideas, I think what we're doing is actually moving away from the core where the conversation should be, which I do not believe should rest in 230 or liability, or even, you know, the way that we framed regulation overall.

And I want to also offer kind of contextualizing history, not necessarily an alternative, but I think one that's really important. Which is that while we're talking about 230, you know, the way that we frame the story, the way that we frame the problem, the way that we frame the solution and the ending. And so when we're talking about what created the internet, we can talk about these 26 words, and I'm not saying they're not important, I'm saying that the internet was created by people who needed digital space because physical space was no longer available and it was no longer safe.

And so when we're talking about who and what created the internet, we have to talk about the sex industry; we have to talk about the people that moved into digital spaces and made them accessible and made them desirable. And, you know, did some of the very first, some of the innovative things that we are now talking about as kind of normalized in space.

You know, one of my favorite stories is that towards the beginning of the internet when we were talking about the initial membership services, so something we're

very familiar with right now and, you know, we're all on the same seven people's, like, Netflix, but like the very first idea of membership services, if you looked at the original major three that were developed, one was the Washington Post, one was stripper named Danny out of Seattle who came up with a really great idea to monetize it. So if we want to talk about live streaming, if we want to talk about a pop-up ad, sorry, if we want to talk about credit card processing, we have to look to porn and the sex industry. And so if we're having these stories about what created and fostered innovation on the internet, we can't have them without the people that did it. And did it out of necessity and not out of just kind of curiosity or didn't do it necessarily out of an exclusive way of, you know, monetizing and getting venture capital. We have to talk about the people that did it because those are the same users who are going to be disproportionately impacted.

And for sex workers, digital gentrification isn't actually that much different than the physical spaces of creating a stroll, making it a place that people go, making it a place that people move into and live, and then having that space being taken over by policing.

It's actually really similar when we look at what happened with Times Square and then when we look at what happened with Tumblr. And then when we look at what happened with OnlyFans. Sex workers move into spaces that are safer, that are more anonymous, where they can create a space to meet clients, to meet each other because they're pushed out of other spaces. And what happens is as soon as those spaces become desirable, sex workers are kicked out because all of a sudden it changes your valuation if you do have sex on your platform, if you do have marginalized communities on your platform. And especially making decisions about the future of your platform.

And so the alternative or contextualizing history I also want to give is that when we're talking about FOSTA/ SESTA, that was not, you know, as we've been talking about, that's not necessarily the first attempt at removing sex on the internet, that was the 2018 attempt.

But if we're looking at the very first time that attorney generals said sex is too visible, we have to look at Senator Blumenthal and when he was the Connecticut attorney general and he was sending letters to Craigslist and encouraging harassment of CEOs of Craigslist because Craigslist had been the first to have an adult services section. And an adult services section that was created because people were saying hey, there's sex workers on all of these different areas of your sites, can you just give them a section of their own. And so Craigslist did and then Craigslist got harassed. And that was 2010.

And only a few years later did many attorney generals target BackPage when all the traffic went there. And then in 2014 they shut down the very first website called My Redbook, based in the Bay Area, which was a place where sex workers met clients but also it was one of the best places where if you were street-based you could find out information to have a low-barrier online website. And it was the first one closed by the FBI, followed by RentBoy in 2016, followed by BackPage a few years later.

And in 2016 was the first federal attempt to do this, where they tried to expand the definition of trafficking to include advertising. And so when that did not work, when that did not en masse shut down these websites, they went in and they went after BackPage. And then they passed FOSTA/SESTA to create the civil liability because civil liability and criminal liability is a very different mens rea and had a very significant impact.

And so I want to conceptualize this in a story that's not just about 230, it's not just about, you know, this type of liability but it's actually about how is technological space being inhabited by people who are unsafe in physical space, who are then targeted in digital space because that is what happens in policing of criminalized bodies of communities.

And I think it's really important because the way that we tell the story is going to tell us our answer. And if our story and if our problem is violence then we have an anti-violence answer. If our problem is the cost of liability, then we have a cost of liability answer. And so I really encourage us as we're talking about, you know, we keep referring to digital space and the space of innovation. We have to be more innovative when we talk

about justice or we talk about, you know, legal protections, when we talk about harm and violence and the way we participate in those different things. And if we're really in innovative space who are willing to challenge some of these notions of what is possible, then we actually have to do that in terms of when we think and we talk about violence, when we talk about the participation of platforms and what they are doing and what due diligence looks like. Due diligence should not be defined as removing communities who are seen as liabilities. Due diligence has to be broader than that and we have to be more innovative in the way that we understand and talk about harm and violence if we're actually going to talk about this space as one of innovation.

MR. WITTES: Thank you. All right. So I'm going to ask a few questions to get the conversation started. This is a very good time to the extent members of the audience want to get in on the conversation. To submit a question, again you can email it to Events@Brookings.edu or tweet it at us @Brookingsgov using the hashtag Section230.

So I want to start by asking Quinta what the lesson, distill the lesson of FOSTA to a couple of sentences. Is it, you know, look both ways before you cross the street, is it don't touch 230 because the unintended consequences will be too high, is it, how do you, you know, what's the essential message here? Is it think about marginalized communities?

MS. JURECIC: Yeah, all those are great questions. I mean and I think Kate's remarks are really useful in helping, you know, think about how important the framing is here. So if you can permit me to really strain your metaphor, I can say definitely look both ways before you cross the street but also think about, you know, whose street it is and who is on the street.

And I say that because I do think that a lot of FOSTA's harms came from Congress really just jumping in feet first without doing any due diligence ahead of time. I mean the real kind of legislation to study harms from FOSTA on sex workers. That's the kind of thing that you would hope that Congress might do before it passes legislation, not

four years after it passes legislation.

But, you know, another lesson is that Congress didn't think carefully or listen to the people who were sort of raising their arms and saying this is going to be a real problem.

And so another way to frame it might be to say, you know, when we talk about 230 or when we talk about Internet reform, what problems are we actually trying to answer? Because I think too often, and you really see this with FOSTA, there's just a sort of a general sense that the Internet is bad and I don't like it and I want to fix it. And very rarely is, you know, do we define carefully what bad means or what fixing means or what a fixed-up place would look like.

And I think again to go to kind of, this goes to both the points that Kate and Danielle were making that, you know, part of the effect of that is that you tend to get a bill that is sort of kludgy and all over the place and not, you know, tight and focused. But also to go to Kate's claim that you get legislation that often sort of speaks to vague ideas of what, you know, "better" would look like without actually thinking about better for whom, under what circumstances, right? When we say "what kind of internet do we want," who is "we"?

And so I do think that the sort of look before you leap lesson is one of the big ones here. But I also think I would be remiss in not underlining how important it is to sort of for Congress to think carefully about which communities this is going to be affecting in different ways. Because I think that that is really often left out of the story and FOSTA is both a representation of how sort of ways of thinking about the Internet, ways of, you know, sort of celebrating the idea of gentrification can sort of drive legislation without people thinking about it very much but also that they need to, you know, think carefully about it in the first place.

MR. WITTES: All right. So I want to talk about a tension between Danielle's points and Kate's points. Which strikes me as worth surfacing.

So Danielle's saying okay and, you know, she's talking here about some

work that we did together. I'm going to attribute it all to her for purposes of this conversation. But she's saying okay, like if you go really specific and you say, instead of asking yourself the general question, what should platforms be responsible for, what steps should they take to make sure they're providing a safe environment, you end up in a situation where you kind of have an irrational patchwork. And so therefore go general, right? Just like think about the obligations that you would want platforms to have in general.

The more you go general, however, the more it seems to me, I guess you would alleviate from Kate's point of view the targeting criminalized population's issue. But you also risk exporting a problem that is now localized into a much more general space.

And so I'm interested from both of your perspectives whether the problem or whether a problem with FOSTA is that it's too targeted, i.e. targeting in the name of protection of that population, of course, a vulnerable population without really consulting that population on its effect. Or, you know, would that be better or worse, Kate, if you took Danielle's approach of just kind of looking at the steps and conditioning immunity on the steps that platforms are taking in general. Does your constituency do better or worse under those circumstances?

MS. D'ADAMO: I think that's a great question. And, you know, the challenge in general is, it's the same as like community building and world building, you know. I think that we're talking a lot of times about community spaces, but no one ever thinks about, you know, before I build a platform maybe I should read, you know, (inaudible) *and Invisible Communities*. Maybe if I'm thinking about regulations of a platform I actually should be reading, you know, enlightenment theorists and restorative justice thinkers instead of just checking with my legal counsel. And I think that that --

MR. WITTES: That's asking a lot of Kent Brose.

MS. D'ADAMO: I mean to be fair. If you want to create a community I have no problem asking a lot of you. And if you're going to create a community that is predicated on this idea of like, you know, I hear this all the time, like how can these platforms support

sex workers but not actually being willing to engage what that means, about what safety means for sex workers. And not actually in engaging in what it means to say all right, when there is harm. You're talking about communities that overwhelmingly are not able to participate in a criminal legal system. And you're talking, frankly, to a lot of abolitionists anyway.

I think that when we're talking about these regulations, you know, of course there should be general regulations, of course things are going to be really specific. We can't construct two very differently purposed spaces and just say well, all of the same rules apply at all times. Because that's just not how things like this work. That's just not how human interaction works.

And so I think that the question is not just about like what are the right regulations, because there's never going to be a right answer that fits for every single thing outside of it needs to really serve the people who want to be in that space. And that is going to be a different conversation for every single community and every single purpose.

I'm also saying that, because I agree, I'm not a 230 purist, I don't think there should be totally open space, I think we've seen what happens. I think that what is really difficult is that we are saying that the only mechanism of enforcement of these things are legal liability and offering immunity is the only thing that's safe. And that's just actually not good enough.

I don't want a platform where their primary goal, the primary value set is how can I keep my litigation costs low. Because that is not something that says that this is meant for people, it is meant for investors.

If we're talking about these different things and we're talking about, you know, how we construct these things, we have to think of how are you accountable to the users who are on your platform. And I absolutely agree, there's been a ton of slap suits, there's been an absolutely proliferation of suits that are targeting, that are really to the benefit of personal injury attorneys. And I will tell you that those same attorneys are blind

emailing sex workers saying like, have you been abused on this platform, let me represent you. And victims' services attorneys are so pissed off that victims across the board are being targeted and exploited in this way by the secondary industry that has risen up.

And I'm saying that there's a lot of people out there who have been victimized, who have been harmed, who are saying I do not understand how else to do this because I email platforms and I cannot get stolen content taken down. I try to keep my information private and it is not working. And so I'm not into, like I think the proliferation of slap suits are a massive, massive problem that is constructed by this intervention and I think there's a lot of very hurt people out there that want an anti-violent solution that is not predicated on trusting a really shitty attorney who -- sorry, Brookings, and me --

MR. WITTES: No, no, no, we're a really shitty attorney free, we call that out here.

MS. D'ADAMO: Thank you. And I don't want people who have experienced harm to feel like the only option that they have is to rely on one of these attorneys to file a slap suit in the hopes of getting anything that says you were harmed in this, was not the treatment you deserved.

MR. WITTES: Okay. So, Danielle, before we go to the audience I want to ask you the flip side of this question, which is when I read Quinta's paper I was like gosh, you know, Danielle and I proposed a kind of broad frame, wide angled approach to this and here Congress can't even think through the unintended consequences of a narrow statute, what's the Quinta paper going to be like about our version, which is much wider frame and would have much more sweeping consequences, including potentially sweeping unintended consequences.

What's the, you know, how do we think about, you know, the proposals that are not so narrowly targeted, like for example the one you and I have put forward?

MS. CITRON: Okay. So before I tackle that one, and I think we absolutely can move then. Just to know like Kate's surfacing of the really pernicious cultural attitudes

that it's costly for women and vulnerable people to be online, right. So sex workers are harassed and stocked and docked in ways the platforms can just ignore and do ignore. And then make money off of online advertising. And at the same time we're also surfacing a cultural attitude that criminalizes sex work which shouldn't be criminalized. And we've got to fix that.

And that seems like an immovable beast when you think about the proposal with Ben, right, where we're saying platforms should understand themselves as the guardians, as the stewards of online spaces. That they are like schools and, you know, employers, that they have a civil rights obligation to understand online platforms as the workplaces, as the schools, as the love zones, you know, like the close friendship zones that they are. And they are all those things at once. And yet they have treated those zones that are workplaces, schools, spaces of love and friendship, right, of organizing, of politics, of political speech, those are all those things all at once and frankly all they are for companies are behavioral advertising, right? They're the monitoring, surveillance, collection, use sharing, scoring like meeting of our personal data, right?

And so we're just, you know, they're not the town square for the company, right? They're not workplaces and schools. We use them as such, we use them as workplaces and schools but they treat us, right, they have no duties of loyalty to us or of care, and they should.

So I think to go back, you know, to answer your question of have we thought through the unintended consequences of an approach. And I'm going to say still a problem if we criminalize sex work. Because we say, you know, to get this under (c)(1) this immunity or legal shield, you've got to take reasonable steps to address illegality that causes serious harm. I worry that we're going to view illegality and serious harm as not protecting sex workers at all, it's quite the opposite, right, as Kate so beautifully explains.

So but I do think that we have thought through the long tail consequences, which is it will, a reasonable stepped approach is tailored to the size and the work of the

platform. So what's reasonable steps vis-à-vis illegality for a small enterprise is very different from the obligations or stewardship responsibilities and guardianship responsibilities of a platform that reaches across the globe, right.

And so, you know, the idea that we're going to squelch and kill the startups, that's often the response that we get. You know, it's like we are the friend of the Twitters and the Facebook, right, because they can afford to have content moderation that involves reasonable steps and the little person, the little startup can't.

Our response I think is that that's the point of reasonableness is like, you know, what's reasonable for a hotel chain, right, is different from what's reasonable for a bed and bath. Like, you know, right, a BNB. In terms of negligence liability that the law understands and operates, right?

Tort law is built on the foundation of reasonableness. And I've worked with content in safety teams at companies for the last 12 years, we don't reasonable steps, right? I can tick off 15 reasonable steps vis-à-vis that are just general illegality, not even particularly non-essential intent imagery, right, and stalking and threats, you know, right, that have emerged. There's a professional safety association that's Content Moderation Safety Association, right? It's real industry. Our colleague, Kate Klonick, wrote the foundation paper called *The New Governors* where she talks about the how rule-ish, that is how detailed the rules are inside. So reasonableness isn't something, Ben, that we like pulled out of thin air, right, it's been emerging.

And so you're right that thinking about the unintended consequences, there will be, you know, there will be costs, right, and there will be expenses, right? Companies will have to bear them. But so do every other company of every other industry, right? And so my fear is that what we lose, and, Ben, you and I when we wrote our paper, we sort of begin with the idea that if you say there should be no Section 230 reform, you're saying to the silenced, the stalked, the folks whose intimate privacy's been invaded, the folks who've been docked, we don't care. We don't care that you've been silenced and terrorized and

unemployed, right? And so I think we can't forget that as we think about there are consequences right now for doing nothing.

MR. WITTES: Okay. We're going to go to audience questions. Brian asks, let's agree that Section 230 reform is not happening in Congress. If anything the strident partisan disagreement over which direction to go on 230 and content moderation has become more extreme in the past two years in the sense that the two parties are moving away from each other. It is not happening. But the key underlying goal of 230 reformers is the desire to direct digital platforms, how to deal with objectionable content. And very real change is coming from overseas. The EU's Digital Services Act and the UK's Online Safety Bill are the two best and likely most impactful examples.

I would appreciate the panel's commentary on whether these major changes in government direction in content moderation for an increasingly wide range of online content will basically have the effect of 230 reform like changes.

So I want to ask a Quinta, first of all, do you agree with the premise that 230 reform is not happening? My impression is that the EARN IT Act is actually moving pretty quickly. So first all is the premise right in your view? And secondly, to what extent are foreign overseas regulators, particularly the EU and UK kind of doing 230 work reform work for us?

MS. JURECIC: I do think that 230 reform may be closer than we think. I mean on paper I completely agree that Republicans are saying moderate less, Democrats are saying moderate more, nobody seems to agree what exactly they want the platforms to do. On the other hand as we've kind of seen with FOSTA you can get quite a bit of mileage out of just saying I don't like this, fix it.

And if everyone agrees that they don't like it and that you can write the language sufficiently vaguely that fix it can encompass a lot of things to a lot of different people, you might be able to get to the end point with legislation even if that legislation is not very good.

I think EARN IT is an example of how things are moving forward. EARN IT is not 230 focused in some of the ways that some of the proposals are. I mean you see proposals that are put out as our aim here is to undercut 230, or our aim is to completely overdo 230. EARN IT has sort of a tortured back story but the focus is often on encryption when people talk about it and there's sort of this 230 aspect tucked in there, which gets more or less attention.

But it does strike me that I mean I think there's a very real possibility that that proposition is alive. It went through the Senate Judiciary Committee with flying colors. So I think that that is definitely not off the table, unfortunately.

I do think that the point about overseas regulation is really important. I mean and one of the things that we saw with FOSTA is that the effects of these kinds of laws go well across borders. So one of the really striking examples that you see with FOSTA is sex workers in New Zealand where sex worker people is decriminalized, actually lost access to websites that they needed and were forced into more dangerous positions and lost income. I think you can see that the flipside of this is that Switter, which I mentioned earlier, as a sort of Twitter alternative for sex workers actually the collective that created Assembly Four announced recently that they were shutting it down. It's Australia based, but because of legislation, including the UK Online Safety Bill and just because of the way that the Internet works, because companies are operating in, you know, across the world, legislation passed in one place can obviously effect, you know, people on the other side of the world here. So I do think that that's something to keep an eye on.

I'm curious for Danielle's thoughts on, among other things, the Digital Services Act and what effects it might have here. But I do think that Brian's point is very well made that, you know, the U.S. is not the only mover and shaker here.

MR. WITTES: Danielle, do you have thoughts on whether further reform is likely to happen and what the overseas environment means for it?

MS. CITRON: Okay. So in my forthcoming book called *The Fight for*

Privacy, and I sort of explore the global implications for intimate privacy and Section 230 and the UK Online Safety Act. And what's interesting and, Ben, you'll feel gratified is that the UK version of 230 reform is exactly what we're suggesting, which is the duty of care predicated on reasonableness. And they give examples, which I think we should do and which I do in my new book. Like what is reasonableness and what worms have we seen emerge.

So I think in some respect we, that's right, we're not the only mover, and I'm scared, of the EARN IT Act. I think it's yet another like hit my head against the wall, right? You know, I've given my piece and sent my thing to folks, staffers about it and I just don't think it's a smart move and if it passes I'll be depressed again.

And I have to say I remember being at a Brookings like JR Colts Roundtable Lahover (phonetic) thing with you, Ben. And we got our paper in 2018 and Daphne Keller was there and we both, she's the ESS type and former Goggle person, and I'm the last reformist, and FOSTA came up and we both were hitting our heads against the wall. Like once you have, right, reformers and, you know, and freedom, like civil libertarians, if we're in agreement it's a bad idea, I'm still worried.

MR. WITTES: All right, let's talk about that worry. Because it seems to me that FOSTA and EARN IT have sort of three big things in common. One is that they are significant changes to 230 that aren't framed as changes to 230, right? They're framed as -- Number Two, they're both framed as protecting people from sex, you know, in both cases great evils, one is sex trafficking, the other is child sexual exploitation material. And the third is that we --

MS. CITRON: Which if that's what it was, Ben, that's a good thing, protecting against child --

MS. D'ADAMO: Exploitation, right now I know, just think, we're in agreement about --

MR. WITTES: Believe me, I'm not against doing something about SESTA.

MS. CITRON: I know, of course --

MR. WITTES: But --

MS. CITRON: But, as you say, okay, yeah.

MR. WITTES: -- you end up in this situation in which nobody can agree about the principles on which to reform 230 but we can all agree, as Quinta says, that, you know, the Internet is bad and there's child sexual exploitation material, so let's do something about that, and you end up with the 230 regime that is conditioned by repeated interventions on that basis.

And I guess my question is, Quinta, and let's wrap up on this. Is there any way to force the policy process to zoom out and think more broadly about the 230 regime itself rather than to assume the 230 regime and then when we're really upset about Russian interference in the election, focus on sex trafficking and get to 230 that way, which is that's a real category error.

MS. JURECIC: Right. I will say I think that the most promising reform legislation I see in Congress right now is actually focused on questions of transparency and access to data. So the fact that, which has been introduced by Senator Schatz and Boone, so that's bipartisan. There's also legislation, the Platform Accountability and Transparency Act, which me personally at Stanford has been working with legislators on that would push to allow independent researchers access to platform data. And so then this is answering a little bit of the different question than the one that you asked, but I do think that it's important because it, you know, suggests that maybe before we try to make these big changes we should have a sense of what the actual problems are.

And, you know, what is it that platforms are doing and aren't doing, how can we make these online environments better and healthier, how can we make platforms more responsible stewards? And in my view at least having access to that information in the first place both creates more of an expectation that the platforms are going to be acting as, you know, as stewards, as people, or as entities that are accountable, but also allows us to more precisely identify what the problems are that we're interested in solving. And so in my view

those kinds of transparency measures are more promising first step that might sort of help us think more carefully about what kinds of problems we're actually trying to fix and what fixing them would look like.

MR. WITTES: You're basically out of time but I want to give both Danielle and Kate a final word. Danielle, your concluding thoughts.

MS. CITRON: Read Quinta's paper. This is so much fun, thank you so much for everyone's work.

MR. WITTES: Thank you. Kate.

MS. D'ADAMO: Yeah, read the paper, I think it's fantastic. I also I really read about the ADO, like if we have to figure out what problem we're going to solve. And I come from an anti-violence background, I'm an organizing. And just like 230 is used as a political football in tech conversations, victims of violence are right now being used as a political football to move forward policing and surveillance.

If we're going to talk about contextualizing like 230 reform, let's also contextualize it against the fact that family violence prevention services has gone unauthorized for a number of years, the amount hasn't been increased since 2010 to actually prevent family violence, including child abuse. Let's talk about the fact that the Child Abuse Prevention and Treatment Act has also completely stalled and not moving anywhere. And the only way that we got the Violence Against Women Act, which is a complicated bill, the only reason it moved forward was because it was attached to a funding bill which increased defense spending.

And so if we're going to have a contextualized conversation and actually name what the problem is, yes, platforms do have a responsibility to protect these bases that they're creating and have a responsibility of transparency and accountability to their users. And government has a responsibility if we're going to talk about an anti-violence problem, caring about it when it becomes visible on the Internet and divesting from preventing it beforehand, is actually complicity in abuse of violence. And we need to actually

talk about it that way. And if we're going to move any reforms forward it has to be a holistic solution that actually does, protects and support and serve people and not simply bottom lines of both governments and platforms.

MR. WITTES: We are going to leave it there. Kate D'Adamo, Danielle Citron, and Quinta Jurecic, thank you all for joining us today. And thanks to everybody who attended. We look forward to seeing you back in person soon.

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