

## #NoFilter: The Censorship of Artistic Nudity on Social Media

Gabriella Mas\*

Within the past fifteen years, “a new infrastructure for online society and creativity has emerged” in the form of social media.<sup>1</sup> These websites provide platforms for people to express their views, communicate with friends, and build networks.<sup>2</sup> Since the advent of the Internet and social media, the number of platforms from which people seek to showcase their creativity and personal expression has multiplied. In light of this recent shift to increased expression online, many social media users are shocked to realize that, because websites are private entities, they are free to delete user-generated posts at will.<sup>3</sup>

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\* J.D. (2017) Washington University School of Law; B.A. University of Florida, May 2013. This Note is dedicated to all artists and art teachers, especially Carol Wells, S.S.J. who is my inspiration. Special thanks to Elizabeth and Miguel Mas, Jr. for their constant encouragement; Alex Bell for his services as my sounding board and personal editor-in-chief; and Varsha Bhatnagar for her assistance in developing this title.

<sup>1</sup> JOSE VAN DIJCK, *THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA*, 4 (2013).

<sup>2</sup> Gwenn Schurgin O’Keeffe and Kathleen Clarke-Pearson, *Clinical Report—The Impact of Social Media on Children, Adolescents, and Families*, *AMERICAN ACADEMY OF PEDIATRICS*, Mar. 28, 2011, <http://pediatrics.aappublications.org/content/pediatrics/127/4/800.full.pdf>.

<sup>3</sup> The Communications Decency Act (CDA), discussed extensively within this note, exculpates websites from potential liability triggered by a user’s post while also explicitly allowing the website to remove content that it deems offensive. 47 U.S.C. §230 (2012). The general public appears to struggle with the application of the CDA to popular social media outlets. For example, in late 2015, a pro-fat-shaming video rant that offended many YouTube users, was flagged and removed from the site before being re-uploaded. Not surprisingly, the video went viral and thousands of people posted their own videos in response. Although most YouTube users took issue with the subject of the video and hundreds argued that the comedian

The United States Constitution differentiates between obscene speech and political, religious, or artistic expression.<sup>4</sup> Judicial and legislative bodies have crafted the doctrine regulating which works of literature and art qualify as “obscene” to allow for maximum freedom of expression while maintaining control of inappropriate content.<sup>5</sup> The social media providers’ ability to remove material that they subjectively deem inappropriate is problematic<sup>6</sup> for the millions of users who use their accounts for advertisement or expression.<sup>7</sup> There are valid reasons to allow providers to remove certain content from their platforms,<sup>8</sup> however, because of the unique space occupied by social media in contemporary society, there needs to be a clear way for users to know, or at least contemplate, which of their posts may be deleted.

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should apologize, very few people advocated the deletion of the video rant and were surprised when the comedian’s page was temporarily deleted. *See, e.g., Ashley Ross, ‘Dear Fat People’ Comedian Nicole Arbour: ‘I’m Not Apologizing for This Video’,* TIME (Sept. 10, 2015), <http://time.com/4028119/dear-fat-people-nicole-arbour/>; *Fat Shaming Video Causes YouTube Row,* BBC NEWS (Sept. 8, 2015), <http://www.bbc.com/news/technology-34185158>.

<sup>4</sup> “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.” U.S. CONST. amend. I.

<sup>5</sup> The definition changes over time. Some works of classic literature were labeled as obscene when originally published, but have since been recognized as artistic expression. *See, e.g., Dwight Garner, Daunting Path to Publication,* N.Y. TIMES (June 24, 2015), [http://www.nytimes.com/2014/06/25/books/kevin-birminghams-book-on-ulysses-and-censorship.html?\\_r=0](http://www.nytimes.com/2014/06/25/books/kevin-birminghams-book-on-ulysses-and-censorship.html?_r=0) (discussing the initial censorship of James Joyce’s *Ulysses*). For the modern legal test for obscenity applied by the United States Supreme Court, see *infra* Part I, and *Roth v. United States*, 354 U.S. 476 (1957).

<sup>6</sup> *See infra* notes 80–88 and accompanying text regarding Facebook’s opaque decision-making process on this topic.

<sup>7</sup> In 2015, Facebook surpassed 1.44 billion users. Emil Protalinski, *Facebook Passes 1.44B Monthly Active Users and 1.25B Mobile Users; 65% are Now Daily Users,* VENTURE BEAT (Apr. 22, 2015, 1:15 PM), <http://venturebeat.com/2015/04/22/facebook-passes-1-44b-monthly-active-users-1-25b-mobile-users-and-936-million-daily-users/>. Twitter has 320 million active users each month. *Twitter Usage,* TWITTER, <https://about.twitter.com/company> (last visited Feb. 3, 2017).

<sup>8</sup> *See generally* Joshua N. Azriel, *Social Networking as a Communications Weapon to Harm Victims: Facebook, MySpace, and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act*, 26 J. MARSHALL J. COMPUTER & INFO. L. 415, 420 (Spring 2009) (discussing the prevalence of cyberbullying and the growth of Internet-based defamation lawsuits).

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In an effort to ban pornographic material on their forums, most social media websites prohibit their users from posting nude images.<sup>9</sup> Typically, their Terms of Service allow for images of paintings or sculptures featuring nudity.<sup>10</sup> The issue for many artists and art lovers is that the websites seem incapable of enforcing the distinction they have created between artistic nudity and pornography.<sup>11</sup>

The line distinguishing pornography from art—though frequently hazy—is important in determining whether an image or work qualifies as obscene.<sup>12</sup> Government entities actively engage with this issue because the First Amendment guarantees freedom from certain types of censorship.<sup>13</sup> Rather than allowing social media websites—which do not utilize an articulable method for determining artistic value—to subjectively decide what content is appropriate, a more objective standard should be ascertained and used.

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<sup>9</sup> Many adult film stars utilize Twitter as their primary means of publicizing themselves because, unlike Instagram and Facebook, it does not delete their explicit posts. See Aurora Snow, *Twitter's Great Porn Purge of 2015*, DAILY BEAST (May 16, 2015, 2:55 AM), <http://www.thedailybeast.com/articles/2015/05/16/twitter-s-great-porn-purge-of-2015-porn-stars-and-xxx-companies-fear-the-worst.html>. But see *Adult or Sexual Products and Services*, TWITTER, <https://support.twitter.com/articles/20170427?lang=en> (last visited Feb. 9, 2016) (officially, “Twitter prohibits the promotion of adult or sexual products and services globally”).

<sup>10</sup> See, e.g., *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards#> (last visited Feb. 6, 2016) (“We remove photographs of people displaying genitals or focusing in on fully exposed buttocks. We also restrict some images of female breasts if they include the nipple, but we always allow photos of women actively engaged in breastfeeding or showing breasts with post-mastectomy scarring. We also allow photographs of paintings, sculptures, and other art that depicts nude figures. Restrictions on the display of both nudity and sexual activity also apply to digitally created content unless the content is posted for educational, humorous, or satirical purposes. Explicit images of sexual intercourse are prohibited. Descriptions of sexual acts that go into vivid detail may also be removed.”).

<sup>11</sup> See, e.g., *Facebook Blocks Little Mermaid Over ‘Bare Skin’*, BBC NEWS (Jan. 4, 2016), <http://www.bbc.com/news/blogs-news-from-elsewhere-35221329> (noting that, although Facebook’s Community Standards stated otherwise, the website told the user that “the rules applied even if an image had ‘artistic or educational purposes.’”).

<sup>12</sup> Most art historians find that art may exist within the realm of eroticism while art and pornography are mutually exclusive. See generally PETER WEBB, *THE EROTIC ARTS*, (1983) (chronicling the history of erotic themes in art and distinguishing art and pornography). See also Hans Maes, *Who Says Pornography Can't Be Art?*, in *ART & PORNOGRAPHY* 17–47 (Hans Maes & Jerrold Levinson eds., 2012).

<sup>13</sup> See U.S. CONST. amend. I.

The issue is best exemplified in a recent case involving a French man who filed suit against Facebook after the site deactivated his account and deleted a photograph he posted online.<sup>14</sup> The photograph was taken at the Musée d'Orsay in Paris and depicts Gustave Courbet's *L'Origine du Monde*<sup>15</sup>—a nineteenth century French realist painting depicting the female sex organs.<sup>16</sup> The painting, which has been controversial since its creation,<sup>17</sup> has come to be recognized as an icon of French culture and art.<sup>18</sup> French citizens were upset by the removal of such a well-known French masterpiece and the French Supreme Court announced in May 2015 that it had jurisdiction to hear the case, notwithstanding Facebook's Terms of Service which insisted that any case brought against the website would need to be heard in California.<sup>19</sup> In making its decision, the court noted that the

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<sup>14</sup> See Daniel Kadar, *French Courts are Competent to Judge Over a French Facebook User's Complaint*, LEXOLOGY (Mar. 12, 2015), <http://www.lexology.com/library/detail.aspx?g=b4e5e476-4c86-4f41-804e-08f8e7cc955b>; Blandine Le Cain, *L'Origine du Monde: la Justice Française Confirme sa Compétence Pour Juger Facebook*, LE FIGARO (Feb. 12, 2016, 7:52 AM), <http://www.lefigaro.fr/actualite-france/2016/02/12/01016-20160212ARTFIG00047-nouvelle-etape-judiciaire-pour-facebook-face-a-l-origine-du-monde.php>.

<sup>15</sup> See *L'Origine du Monde*, MUSEE D'ORSAY, [http://www.musee-orsay.fr/en/collections/works-in-focus/search/commentaire/commentaire\\_id/the-origin-of-the-world-3122.html](http://www.musee-orsay.fr/en/collections/works-in-focus/search/commentaire/commentaire_id/the-origin-of-the-world-3122.html) (last visited Sept. 23, 2015).

<sup>16</sup> Brian Eads, *French Courts Lead EU Challenge to Facebook and Other US Giants*, NEWSWEEK (Apr. 9, 2015, 2:21 PM), <http://www.newsweek.com/2015/04/17/french-courts-lead-eu-challenge-facebook-and-other-us-giants-321137.html>.

<sup>17</sup> Ironically, the French Post Office called the painting “pornographic” in 2013 when a group of stamp aficionados suggested it as a design for a new stamp. See Romain Davie, *La Poste Refuse de Donner Son Timbre a L'Origine du Monde*, LE FIGARO, (Jan. 31, 2015, 7:28 PM), <http://www.lefigaro.fr/actualite-france/2014/01/31/01016-20140131ARTFIG00348-la-poste-refuse-de-donner-son-timbre-a-l-origine-du-monde.php>; Coline Milliard, *L'Origine du Monde Sparks Facebook Legal Battle*, ARTNET NEWS (Jan. 23, 2015), <https://news.artnet.com/art-world/lorigine-du-monde-sparks-facebook-legal-battle-230535>; see also WEBB, *supra* note Error! Bookmark not defined.11, at 166 (describing the painting's initial reception).

<sup>18</sup> See, e.g., Roberta Dencheva, *10 World-Famous Paintings You Can Only See in Paris*, CULTURE TRIP (Oct. 10, 2016), <https://theculturetrip.com/europe/france/paris/articles/10-world-famous-paintings-you-can-only-see-in-paris/>.

<sup>19</sup> You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims.

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choice of law provision was “abusive” and particularly emphasized the importance of the case and painting to French culture.<sup>20</sup>

The larger implication of this issue is that many contemporary artists are unable to take advantage of social media in the same way as others. Lawyers, entertainers, and other users can utilize their social media pages to keep in contact with customers, recruit new business, and confidently post images and descriptions of their work without fear that their profiles will be deleted from the platform.<sup>21</sup> However, some other creative members of society are unable to reap the same benefits.<sup>22</sup> Limiting artists’ and art enthusiasts’ access to social media based on the content of their work easily becomes viewpoint discrimination<sup>23</sup> when websites that serve as news outlets and platforms of expression selectively and unexpectedly delete posts.

This note explores the appropriateness of discouraging social media outlets from engaging in viewpoint discrimination; specifically, the discrimination that results when outlets remove images of artistic value. Social media providers are private entities and therefore not required to comport with the First Amendment

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The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

*Statement of Rights and Responsibilities*, FACEBOOK, §15.1 <https://www.facebook.com/terms.php> (last visited Jan. 30, 2016). See also Vivienne Wait, *Why a French Court Could Disrupt Facebook’s Global Ambitions*, TIME (May 21, 2005), <http://time.com/3892097/facebook-jurisdiction-challenge/>; Eads, *supra* note 16.

<sup>20</sup> See Wait, *supra* note **Error! Bookmark not defined.**17.

<sup>21</sup> See, e.g., The McLeod Firm, FACEBOOK, <https://www.facebook.com/themcleodfirm/posts/1114789921867131> (last visited Jan. 30, 2016) (describing a successful jury verdict); Cher, INSTAGRAM, <https://www.instagram.com/p/mB7nVpy76L/?taken-by=cher> (last visited Jan. 30, 2016) (promoting a concert tour show).

<sup>22</sup> For example, Instagram deleted part of an art project created by Canadian artist Rupī Kaur. Ironically, the website repeatedly deleted a photo the artist posted in an attempt to break the “taboos” surrounding menstruation. Kaur’s photo and account were eventually reinstated after a viral public outcry. See Steve Holden, *Instagram Period Photo: Woman Who Took It Says She Wasn’t Being Provocative*, BBC NEWSBEAT (Apr. 4, 2015), <http://www.bbc.co.uk/newsbeat/article/32105388/instagram-period-photo-woman-who-took-it-says-she-wasnt-being-provocative>.

<sup>23</sup> For a discussion on viewpoint discrimination, see *infra* note 31.

protections of traditional American jurisprudence. However, because they hold themselves out as forums for public discourse, I propose that these social media platforms be considered public—not unlike radio and television broadcasters—and therefore be encouraged to abide by the censorship doctrine that has been developed by the Supreme Court.

Part I of this note highlights some of the critical issues in defining obscenity by examining the history of the obscenity laws in the United States as well as how that doctrine has been applied to website providers and works of artistic expression in the United States. Part II discusses the development of social media and its impact upon the way people around the world choose to communicate and express themselves. Part III discusses potential solutions to the conflict between encouraging expression of diverse viewpoints and recognizing social media providers as entities seeking to control the content published on their platforms.

### I. DEFINING OBSCENITY

The First Amendment generally prohibits the government from restricting the speech of private individuals.<sup>24</sup> On occasion, however, the law requires certain private entities to comport with notions of viewpoint diversity.<sup>25</sup> Some entities are defined by legislatures as common carriers and subjected to certain limitations that are not typically applicable to private entities.<sup>26</sup> While the concept of a

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<sup>24</sup> U.S. CONST. amend. I.

<sup>25</sup> For the past several decades, courts have emphasized the importance of allowing public access to a multitude of diverse viewpoints on any particular topic. *See Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”). *See also Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 464–65 (3d Cir. 2011).

<sup>26</sup> For an example, see 4 Mich.Civ. Jur. Carriers §§ 3–4 discussing “common carriers” and “private carriers.” In particular, Section 4 notes that, unlike common carriers, a private carrier “is under no obligation to carry all who apply. In addition, it preserves its right to discriminate.” *See also* 47 U.S.C. § 225 (2010) (regulating telecommunications services for hearing-impaired and speech-impaired individuals).

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common carrier traditionally refers to public transportation, many state legislatures have expanded their definitions of common carrier to include television, radio, and Internet providers.<sup>27</sup> Traditionally, broadcast radio, television, and Internet providers are expected to protect viewpoint diversity.<sup>28</sup>

Congress established the Federal Communications Commission (FCC) to regulate “commerce in communication by wire and radio . . . to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service.”<sup>29</sup> It ensures that radio and television broadcasters comply with concepts of decency<sup>30</sup> and fairness.<sup>31</sup> Because the most popular social media platforms hold themselves out to the public as forums for public communication and expression, these platforms should fall within the same category as broadcast television and radio and therefore be required to balance the First Amendment with obscenity laws.

When government actors wish to qualify a particular work as

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<sup>27</sup> For a sample of various state definitions of “common carrier,” see 66 PA. CONS. STAT. § 102 (2016) and LA. STAT. ANN. § 45:1504 (1968).

<sup>28</sup> For example, Internet service providers are barred from, among other things, blocking, throttling, and paid-prioritizing of content. *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5607 (2015).

<sup>29</sup> 47 U.S.C. § 151 (1996); *see also* 47 U.S.C. § 154 (1996). The FCC’s mission is to “regulate[] interstate and international communications by radio, television, wire, satellite, and cable.” *About the FCC*, FED. COMM’NS COMM’N, <https://www.fcc.gov/about/overview> (last visited Jan. 9, 2016).

<sup>30</sup> *See* Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t] . . . The Federal Communications Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 238–41 (2008).

<sup>31</sup> To curtail viewpoint discrimination, the FCC has specific rules governing the amount of airtime allowed to different candidates for political office during election season. Television and radio stations are required to allow the same amount of airtime to each qualified opponent. 47 U.S.C. § 315(a) (2002). *See also* DAVID OXENFORD, *POLITICAL BROADCASTING: ANSWERING YOUR QUESTIONS ON THE FCC’S RULES AND POLICIES* 7 (2009) (“Equal opportunities (sometimes referred to as ‘equal time’) require that a broadcaster treat all candidates for the same office in the same way. Stations must provide equal amounts of time for candidates for the same office, and otherwise treat candidates for the same office in the same way.”).

“obscene,” they must show that it lacks “serious literary, artistic, political, or scientific value.”<sup>32</sup> Laws governing censorship and obscenity in the United States exist at both state and federal levels.<sup>33</sup> These laws are dynamic and change with society’s conceptualization of the appropriate level of censorship in the lives of the public.<sup>34</sup> However, the laws governing censorship and obscenity are carefully crafted to protect artistic expression.<sup>35</sup>

Although laws regulating inappropriate material in the United States have existed since 1712,<sup>36</sup> the modern conceptualization distinguishing obscenity from freedom of expression was developed in the twentieth century. By 1950, most states had enacted legislation restricting the ability to buy and sell obscene materials.<sup>37</sup> In *Winters v. New York*, a book dealer was convicted under the New York obscenity law<sup>38</sup> for possession of and intent to sell magazines

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<sup>32</sup> *Miller v. California*, 413 U.S. 15, 26 (1973) (“At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”).

<sup>33</sup> See HARRIET F. PILPEL & THEODORA S. ZAVIN, *RIGHTS AND WRITERS* 315–16 (1960).

<sup>34</sup> Various courts have defined obscenity as that which causes people to “derive sexual provocation,” as “erotically stimulating,” as “filthy, indecent, or disgusting,” as a “stimulus to irregular sexual conduct,” as “sexually impure,” “immoral,” that which may “portray acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior,” as “sexually suggestive,” or as that which may “tend to promote wanton thoughts and arouse lustful desires in the minds of substantial members of the public into whose hands the magazine is likely to fall,” or as anything which may “tend to the corruption of youth.”  
*Id.* at 317.

<sup>35</sup> See, e.g., *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (“The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”).

<sup>36</sup> “As early as 1712, Massachusetts made it criminal to publish ‘any filthy, obscene, or profane song, pamphlet, libel or mock sermon’ in imitating or mimicking of religious services.” *Roth v. United States*, 354 U.S. 476, 482–83 (1957) (citing Acts & Laws of the Province of Mass. Bay, c. CV, § 8 (1712), Mass. Bay Colony Charters & Laws 399 (1814)).

<sup>37</sup> See, e.g., *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957) (quoting the Michigan obscenity statute); *Roth*, 354 U.S. at n.2 (1957) (quoting the California obscenity statute).

<sup>38</sup> The statute stipulated that anyone who:

Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the



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containing descriptions of various crimes.<sup>39</sup> In holding that statutes criminalizing the sale or distribution of materials must clearly describe the prohibited content,<sup>40</sup> the Supreme Court rejected the State's argument that First Amendment protections apply only to informative materials.<sup>41</sup> The court balanced the need to limit indecent and obscene acts while upholding freedom of the press and freedom of expression.<sup>42</sup>

In 1957, the Supreme Court was faced with three cases highlighting the tension between censorship and the First Amendment. In the first of the cases, *Butler v. Michigan*,<sup>43</sup> a book dealer was convicted under the Michigan obscenity statute for selling obscene literature.<sup>44</sup> The Michigan statute, which criminalized the sale of works containing "obscene, immoral, lewd or lascivious language" or potentially "incite[ing] minors to violent or depraved or immoral acts,"<sup>45</sup> was held unconstitutional.<sup>46</sup> In so holding, the Court "eliminated as unconstitutional one of the oft-used tests of obscenity: the effect of a work on children."<sup>47</sup> By eliminating this test, the Court emphasized the importance of ensuring a work's availability to the public, so long as it was appropriate for *some* identifiable audience.<sup>48</sup>

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publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime[.] had committed a misdemeanor. *Id.* at 508 (quoting N.Y. PENAL LAW § 1141(2)).

<sup>39</sup> 333 U.S. 507, 508 (1948).

<sup>40</sup> *Id.* at 515 ("There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess the meaning of the enactment.").

<sup>41</sup> *Id.* at 510.

<sup>42</sup> *Id.*

<sup>43</sup> 352 U.S. 380 (1957).

<sup>44</sup> *Id.* at 382.

<sup>45</sup> "Any person who shall import, print, publish, sell, . . . any book, magazine, newspaper, writing, pamphlet, . . . containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, . . . shall be guilty of a misdemeanor." *Id.* at 381 (quoting MICH. PENAL CODE § 343).

<sup>46</sup> *Id.* at 383–84.

<sup>47</sup> PILPEL & ZAVIN, *supra* note 33, at 318.

<sup>48</sup> *Butler*, 352 U.S. at 383 ("The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to

After overruling the common definition, the Court attempted to provide a standard for judging obscenity with *Roth v. United States*.<sup>49</sup> *Roth* analyzed the constitutionality of two statutes—one federal<sup>50</sup> and one state<sup>51</sup>—after two mail order businessmen were convicted of sending obscene materials through the mail. While the defendants argued that the First Amendment protects all forms of speech, the Court held that works properly categorized as “obscene” are not protected by the First Amendment.<sup>52</sup> In holding that obscenity statutes *are* permissible under the Constitution, the Court analyzed the censorship norms at the time the Constitution was drafted.<sup>53</sup> The Court further announced that the government could not censor any idea “having even the slightest redeeming social value.”<sup>54</sup> The test to determine if an idea did not have redeeming social value was whether “the average person, applying contemporary community standards, [would find that] the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>55</sup>

A few years later, the Court pushed back against the community standards test. In *A Book Named “John Cleland’s Memoirs of a*

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burn the house to roast the pig.”).

<sup>49</sup> 354 U.S. 476 (1957). *Roth* is a single decision incorporating the Court’s analysis for both *Roth v. United States* and *Alberts v. State of California*.

<sup>50</sup> The Federal obscenity statute provided:

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, . . . of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

*Id.* at 479 n.1 (quoting 18 U.S.C. § 1461).

<sup>51</sup> The California obscenity statute provided:

Every person who willfully and lewdly, either . . . [w]rites, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; . . . is guilty of a misdemeanor.

*Id.* at 479 n.2 (quoting CAL. PENAL CODE § 311 (West 1955)).

<sup>52</sup> PILPEL & ZAVIN, *supra* note 34, at 319.

<sup>53</sup> *Roth*, 354 U.S. at 483–84.

<sup>54</sup> *Id.* at 484.

<sup>55</sup> *Id.* at 489.

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*Woman of Pleasure*” v. *Attorney General of Massachusetts*,<sup>56</sup> the Court struggled to apply the *Roth* test to an erotic novel published 200 years earlier.<sup>57</sup> A plurality of the Court held that a work having any redeeming social value does not qualify as obscene.<sup>58</sup> The Court recognized that certain criteria—social value, prurient appeal, and patent offensiveness—must be evaluated independently and even a work that was patently offensive may have social value and therefore should not be considered “obscene.”<sup>59</sup>

In this case, the Court said that, because there was evidence presented that *Memoirs* possessed “some minimal literary value does not mean it is of any social importance.”<sup>60</sup> The plurality found that the relevant issue was whether the book had literary value, not whether it violated social standards.<sup>61</sup> This case left the state of the obscenity test in question for several years.

Finally, in *Miller v. California*,<sup>62</sup> the Court attempted to establish a definitive test to determine whether a work was “obscene.” The appellant in this case was convicted under the California obscenity statute<sup>63</sup> after mass-mailing sexually explicit advertising materials to

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<sup>56</sup> 383 U.S. 413 (1966).

<sup>57</sup> *Id.* *Memoirs of a Woman of Pleasure*, also known as *Memoirs of Fanny Hill*, was written by John Cleland and chronicles the story of a young girl who becomes a prostitute. Government displeasure with the book dates to 1749—one year after it was originally published—when warrants were issued for the arrest of the author, printers, and publishers of the novel. For many years, the book was printed exclusively by small presses because large publishers were afraid of the impact publishing the book would have upon their reputation. The first commercial scale publication of the book did not occur until 1963. It was this publication that sparked the suit which was eventually presented to the Supreme Court as *In A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*. Peter Sabor, *From Sexual Liberation to Gender Trouble: Reading Memoirs of a Woman of Pleasure from the 1960s to the 1990s*, 33 EIGHTEENTH CENTURY STUD. 561, 561–62 (2000).

<sup>58</sup> *Memoirs*, 383 U.S. at 419 (“A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> 413 U.S. 15 (1973).

<sup>63</sup> *Id.* at n.1 (quoting California Penal Code § 311.2 (a)) (“Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to

unwilling recipients. The test was a series of three relevant inquiries:

[(1) W]hether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest[;] . . . [(2)] whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and [(3)] whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>64</sup>

In laying out this test, the Court rejected the “utterly without redeeming social value” test from *Memoirs v. Massachusetts* in favor of a “community standard,” thereby avoiding the necessity of creating a generalized definition.<sup>65</sup> The Court articulated its desire to allow for artistic expression in establishing this test by noting that even patently offensive material may not properly be categorized as “obscene” so long as it has “serious literary, artistic, political, or scientific value.”<sup>66</sup> This three-prong analysis is presently the applicable standard for determining obscenity in American law.<sup>67</sup>

Two cases decided after *Miller* helped to solidify the scope and applicability of the obscenity law. In *Smith v. United States*,<sup>68</sup> the Court reiterated that the “contemporary community standard” language articulated in *Miller* is not unconstitutionally vague.<sup>69</sup>

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distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor . . .”).

<sup>64</sup> *Miller*, 413 U.S. at 24.

<sup>65</sup> *Id.* at 24–25.

<sup>66</sup> *Id.* at 26 (“At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.”).

<sup>67</sup> See *United States v. Stevens*, 559 U.S. 460, 462 (2010); *State v. Muccio*, 890 N.W.2d 914, 925 (Minn. 2017).

<sup>68</sup> 431 U.S. 291 (1977).

<sup>69</sup> *Id.* at 308. In this case, a man was convicted of numerous counts of mailing obscene materials under 18 U.S.C. § 1461. He submitted several questions to be asked during voir dire, most of which attempted to ascertain if any of the potential jurors were familiar with the contemporary community standards of Southern Iowa. The court accepted one of his questions but refused all that were associated with notions of “contemporary community standards.” The defendant appealed arguing that the “contemporary community standard” concept was

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Rather it is a prong of the test that allows for significant flexibility to protect a state's ability to determine what might qualify as obscene in that particular region.<sup>70</sup>

In *Pope v. Illinois*,<sup>71</sup> the Court made clear that the application of “contemporary community standards” applies only to the first two prongs of the *Miller* test.<sup>72</sup> In clarifying the proper standard by which to judge the third prong—lacking serious literary, artistic, political, or scientific value—the Court emphasized that the view of the community was irrelevant.<sup>73</sup> Rather, the relevant inquiry was whether any reasonable person could find value in the material when considered as a whole.<sup>74</sup> Today, litigation is almost inevitably spawned when public entities attempt to regulate artistic expression.<sup>75</sup>

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unconstitutionally vague. *Id.* at 293, 296–98.

<sup>70</sup> *Id.* at 300–01 (“The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked.”).

<sup>71</sup> 481 U.S. 497 (1987).

<sup>72</sup> Each of the two petitioners was an attendant at an adult bookstore who had the misfortune of selling certain magazines to detectives. Both attendants were convicted under the Illinois obscenity statute, which they argued was unconstitutional because it failed to require that the value of the magazines be judged by an objective standard and not by the contemporary community standard. Both the trial and appellate courts instructed the jurors that the proper test to consider the value of the magazines was to consider how it would be viewed by an ordinary adult in Illinois. *Id.* at 500–01.

<sup>73</sup> *Id.* (“Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”).

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 190–93 (E.D.N.Y. 1999) (where a museum brought suit when the city suspended its funding after the museum announced it would be hosting a certain travelling exhibition). The Mayor of New York was specifically offended by a mixed media work entitled *The Holy Virgin Mary* by the critically acclaimed British artist Chris Ofili. *Id.* The work incorporates several different mediums into a depiction of the Virgin including elephant dung and small photographs of buttocks and female genitalia. See also CENSORSHIP: A WORLD ENCYCLOPEDIA 525 (Derek

With the growing popularity of the Internet, Congress recognized the potential for a flood of lawsuits related to user-generated posts on the Internet and passed the Communications Decency Act (CDA)<sup>76</sup> to protect website providers from such liability. “Congress passed CDA 230 to preempt state laws imposing liability on online platforms, with an eye to providing the platforms immunity regarding defamation suits for others’ speech.”<sup>77</sup> This preemption was essential to allow websites to operate without constantly keeping themselves abreast to changing state laws nationwide.<sup>78</sup> Additionally, the law vests the particular website provider with the power to ultimately decide whether to remove or restrict access to material which it subjectively finds lewd, lascivious, or otherwise obscene.<sup>79</sup>

The constitutionality of the Act was challenged and upheld in *ACLU v. Reno*.<sup>80</sup> Brought by several computer and communications organizations that publish or post on the Internet, this case challenged two provisions in the CDA relating to publication of materials “deemed ‘indecent’ or ‘patently offensive’ for minors” as violative of the First Amendment and the Due Process Clause of the Fifth

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Jones ed., Volume I: A-D, 2001); Scott Reyburn, *Chris Ofili's 'The Holy Virgin Mary' to be Sold*, N.Y. TIMES (May 28, 2015), <http://www.nytimes.com/2015/05/29/arts/design/chris-ofilis-the-holy-virgin-mary-to-be-sold.html> (describing additional history of the work); Katya Kazakina, *Ofili's Madonna Sets Record at Christie's \$150.3 Million Sale*, BLOOMBERG BUSINESS (June 30, 2015, 2:12PM), <http://www.bloomberg.com/news/articles/2015-06-30/giuliani-blasted-madonna-with-dung-art-sells-for-4-6-million> (describing the subsequent auction where the painting sold for \$2.9 million). The museum held the exhibition as planned after the court denied the city’s motion to dismiss. *Brooklyn Inst.*, 64 F. Supp. 2d at 193 (“There is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the validity of a major cultural institution as punishment for failing to abide by governmental demands for orthodoxy.”).

<sup>76</sup> 47 U.S.C. § 230 (1998).

<sup>77</sup> Marvin Ammori, *The “New” New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259, 2286 (2014).

<sup>78</sup> At one point, “forty-seven state attorneys general asked Congress to modify CDA 230 to permit them to bring suit against online platforms” that violated state law. Such an exception would have been problematic because “[s]tates have very different laws and many criminalize fairly innocuous activities. If companies had to comply with fifty different state criminal codes and were liable anytime any user violated a single one, then operating speech platforms would be cost prohibitive and extraordinarily risky.” *Id.* at 2288.

<sup>79</sup> 47 U.S.C. § 230(c)(2)(A) (1998).

<sup>80</sup> 929 F. Supp. 824 (E.D. Penn. 1996).

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Amendment.<sup>81</sup> Although the Court invalidated the portions of the Act dealing with indecent material,<sup>82</sup> the remainder of the CDA was upheld as valid.

## II. THE IMPACT OF SOCIAL MEDIA

The CDA protections eliminating liability for content posted by users are essential to the existence of the modern Internet.<sup>83</sup> Because websites are legally entitled to remove materials they do not wish to promote on their platforms, many social media websites attempt—for their user’s benefit—to define deletable content in their Terms and Conditions.<sup>84</sup> Mainstream social media platforms include a prohibition on certain forms of nudity and attempt—with varying degrees to success—to define the prohibited content.<sup>85</sup> Because of the numerous complaints lodged against some of these websites, many have amended their Terms to exclude certain artistic works from the category of “inappropriate content.”<sup>86</sup> However, these sites frequently fail to practice what they preach and often delete images of artistic works, leaving many users surprised to find their posts deleted and accounts deactivated.<sup>87</sup>

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<sup>81</sup> *Id.* at 827–29.

<sup>82</sup> *Id.* at 849.

<sup>83</sup> See Ammori, *supra* note 77, at 2287 (Top lawyers at Dropbox, Yelp, Tumblr, and Twitter have said that CDA 230 “allows us [Yelp] to exist” and is “the cornerstone for a functioning Internet.”).

<sup>84</sup> See, e.g., *Twitter Media Policy*, TWITTER, <https://support.twitter.com/articles/20169199> (last visited Mar. 31, 2017); *Terms of Use*, INSTAGRAM, <https://help.instagram.com/478745558852511> (last visited Jan. 20, 2016).

<sup>85</sup> See, e.g., *Community Standards*, *supra* note 10 (clearly describing what types of images Facebook deems inappropriate and subject to removal).

<sup>86</sup> See, e.g., *Facebook Blocks Little Mermaid*, *supra* note 11 (“In March 2015, the site clarified its rules on nudity and said that it does allow photos of paintings, sculptures and other art that depicts nude figures.”). See also *Acceptable Use Policy*, PINTEREST, <https://about.pinterest.com/en/acceptable-use-policy> (last visited Mar. 31, 2017) (“Artistic, scientific or educational nude photographs are okay here, but we don’t allow those (like photographs of sexual activity) that could be a bad experience for people who accidentally find them.”).

<sup>87</sup> See, e.g., Holden, *supra* note 22; Henri Neuendorf, *Why Did Facebook Censor Copenhagen’s Little Mermaid?*, ART NET (Jan. 5, 2016), <https://news.artnet.com/art->

Facebook, like other social media websites, handles reports of inappropriate postings by users internally and through a somewhat vague process<sup>88</sup> that relies largely upon complaints made by other users.<sup>89</sup> Once a post has been removed, the websites either do not have an appeal process in existence or do not inform users how to utilize it.<sup>90</sup> Coupling the indiscriminate application of their own terms with the vague “appeals” process leaves users feeling violated and helpless.<sup>91</sup>

The Internet, and thus social media websites, has created a “unique and wholly new medium of worldwide communication.”<sup>92</sup> It is “more about human connectivity than it is about technology and marketing.”<sup>93</sup> The growing popularity of social media<sup>94</sup> has greatly

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world/facebook-censorship-little-mermaid-denmark-copenhagen-401984.

<sup>88</sup> See *What Happens After You Click “Report”?*, FACEBOOK (June 19, 2012, 10:05 AM), <https://www.facebook.com/notes/facebook-safety/what-happens-after-you-click-report/432670926753695> (“If one of these teams [Safety, Hate and Harassment, Access, and Abusive Content] determines that a reported piece of content violates our policies or our Statement of Rights and Responsibilities, we will remove it . . . . We also have special teams just to handle user appeals for the instances when we might have made a mistake.”). See also *Twitter Media Policy*, *supra* note 84. But see, e.g., Eads, *supra* note 16 (the French man whose Facebook account was deactivated after posting an image of *L’Origin du Monde* “learned [his account had] been shut down by an algorithm censoring porn.”).

<sup>89</sup> What happens after the report is made varies from site to site. For example, YouTube automatically deletes flagged video until it has a chance to review the post in question. See “*Fat Shaming Video Causes YouTube Row*,” BBC NEWS, <http://www.bbc.com/news/technology-34185158> (last visited Oct. 15, 2015) (“In cases where a channel or video is incorrectly flagged by the community and subsequently removed, we work quickly to reinstate it”). See also *What Happens After You Click “Report”?*, *supra* note 88 (for a description of Facebook’s review process).

<sup>90</sup> See Dewey, *infra* note 96. But see, e.g., *Twitter Media Policy*, *supra* note 84 (describing Twitter’s appeals process).

<sup>91</sup> Lee Rowland, *Naked Statue Reveals One Thing: Facebook Censorship Needs a Better Appeals Process*, ACLU (Sept. 25 2013, 10:07 AM), <https://www.aclu.org/blog/naked-statue-reveals-one-thing-facebook-censorship-needs-better-appeals-process>. In 2013 Facebook removed a post by the ACLU from its page. The post included a link to a blog post highlighting the controversy surrounding a bronze statue in a Kansas park depicting a bare-chested woman taking a selfie. The organization acknowledged that—as a nationwide organization—it was in a unique position among Facebook users and was able to contact Facebook, appeal the removal, and have the post reinstated. *Id.*

<sup>92</sup> *Reno v. ACLU*, 521 U.S. 844, 850 (1997).

<sup>93</sup> ADEEL A. SHAH & SHEHERYAR T. SARDAR, SANDSTORM: A LEADERLESS REVOLUTION IN THE DIGITAL AGE 59 (2011).



impacted the way most people view creativity and expression. A person's profile and posts are seen as viable methods of self-expression.<sup>95</sup> As the number of people relying on social media as their primary means of expressing themselves has grown, so too has the outrage when expressive or artistic posts are deleted.<sup>96</sup>

Social media platforms are hotbeds for expressive activity, enabling people around the world to communicate with each other freely and easily.<sup>97</sup> They market themselves to the public as a place for personal expression, creativity, and advertisement.<sup>98</sup> Although

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<sup>94</sup> See Protalinski, *supra* note 7.

<sup>95</sup> The growing trend in personal attachment to a social media profile is evidenced by the amount of scholarship available on "Facebook addiction." See e.g., Shereen Lehman, *Facebook Addiction Linked to Depression*, REUTERS (June 3, 2015, 8:47 PM), <http://www.reuters.com/article/2015/06/04/us-mental-health-facebook-idUSKBN00K01L20150604>; Jessica Grogan, Ph.D., *Is Facebook Distorting Your View of the World*, PSYCHOLOGY TODAY (Mar 10, 2014), <https://www.psychologytoday.com/blog/encountering-america/201403/is-facebook-distorting-your-view-the-world>; Gwenn Schurgin O'Keeffe, MD, Kathleen Clarke-Pearson, MD, & Council on Communications and Media, *Clinical Report—The Impact of Social Media on Children, Adolescents, and Families*, 127(4) PEDIATRICS 800 (Apr. 2011), [http://research.fit.edu/sealevelriselibrary/documents/doc\\_mgr/1006/O'Keeffe\\_and\\_Pearson\\_2011\\_The\\_Impact\\_of\\_Social\\_Media\\_on\\_Children,\\_Adolescents,\\_and\\_Families.pdf](http://research.fit.edu/sealevelriselibrary/documents/doc_mgr/1006/O'Keeffe_and_Pearson_2011_The_Impact_of_Social_Media_on_Children,_Adolescents,_and_Families.pdf).

<sup>96</sup> See, e.g., Caitlin Dewey, *Censorship, Fat-Shaming and the 'Reddit Revolt': How Reddit Became the Alamo of the Internet's Ongoing Culture War*, WASHINGTON POST (June 12, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/06/12/censorship-fat-shaming-and-the-reddit-revolt-how-reddit-became-the-alamo-of-the-internets-ongoing-culture-war/> (when Reddit banned certain forums on the site, many users abandoned the website and petitioned for the CEO to be fired); see also Holden, *supra* note 22 (for an example of an artist using social media as a main form of expression).

<sup>97</sup> These specific platforms go out of their way to market themselves to the public as a forum for discussion, expression, and advertisement. See *Community Guidelines*, INSTAGRAM, <https://help.instagram.com/477434105621119/> (last visited Feb. 8, 2016) ("We want Instagram to continue to be an authentic and safe place for inspiration and expression."); Max Slater-Robins, *Instagram's CEO Admitted the Reason it Censors Some Photos of Female Nipples From the App is to Keep Apple Happy*, BUSINESS INSIDER (Sep. 30, 2015, 8:28 AM), <http://www.businessinsider.com/why-instagram-bans-freethenipple-2015-9?r=UK&IR=T> (Kevin System, the CEO of Instagram, has said that Instagram is "committed to artistic freedom"); *About*, FACEBOOK, [https://www.facebook.com/facebook/info?tab=page\\_info](https://www.facebook.com/facebook/info?tab=page_info) (last visited Jan. 21, 2016) ("Founded in 2004, Facebook's mission is to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them.")

<sup>98</sup> See FACEBOOK, <http://www.facebook.com> (last visited Jan. 20, 2016) ("See photos

most social media sites require users to have some form of account, this requirement is not an attempt to restrict the number of users or render the sites less public.<sup>99</sup> Creating an account serves merely as a means by which users can identify one another. Moreover, some of the social media sites allow non-users to view user-generated content without logging in.<sup>100</sup> Technology advances at a rate incompatible with effective legal change.<sup>101</sup> Many decision makers are likely unaware of these issues or unlikely to understand their gravity and impact on the lives of younger generations.<sup>102</sup>

Because freedom of speech is one of the cornerstones of American law and is not easily limited or revoked,<sup>103</sup> social media users become unsettled when they learn that content viewed as unthreatening artistic expression in the real world can be censored by

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and updates from friends in News Feed. Share what's new in your life on your Timeline"); *FAQ*, INSTAGRAM, <https://instagram.com/about/faq/> (last visited Jan. 20, 2016) ("Instagram is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone, then choose a filter to transform the image into a memory to keep around forever. We're building Instagram to allow you to experience moments in your friends' lives through pictures as they happen. We imagine a world more connected through photos.").

<sup>99</sup> On the major social media websites, users are required to provide certain personal information but are instantly granted access to the sites once such information is submitted. There are a small number of anonymous social media sites, though so far they are unpopular and have not gained mainstream recognition. *See, e.g., About Social Number*, SOCIAL NUMBER, [www.socialnumber.com/about](http://www.socialnumber.com/about) (last visited Feb. 9, 2016) ("Social Number' is a free app that allows you to connect with other 'like-minded' people anonymously. Here you are just a number and your real identity is never revealed.").

<sup>100</sup> Instagram, Twitter, and LinkedIn—just to name a few—all allow people to view certain user-generated content without being required to create an account or log in first.

<sup>101</sup> *See* Sheheryar T. Sarder & Benish A. Shah, *Social Media, Censorship, and Control: Beyond SOPA, PIPA, and the Arab Spring*, 15 U. PA. J. L. & SOC. CHANGE 557, 577 (2011) ("In this world where mobile apps and user-created content are published with remarkable speed, individuals are tasked with interpreting laws to accommodate rapid technological development.").

<sup>102</sup> "In a 2010 Congressional hearing, Justice Scalia admitted to not know what Twitter is, stating that he has 'heard of it talked about.'" *Id.* at 577–78.

<sup>103</sup> *Brooklyn Inst. of Arts & Scis. v. City of New York*, 64 F. Supp. 2d 184, 193 (E.D.N.Y. 1999) ("There is no federal constitutional issue more grave than the effort by government officials to censor works of expression and to threaten the validity of a major cultural institution, as punishment for failing to abide by governmental demands for orthodoxy.").

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a private company online.<sup>104</sup> This idea becomes deeply troubling when these same unregulated companies which in many instances serve as news outlets can remove political, artistic, and religious speech at will as well.

#### PROPOSAL

Social media platforms should be held to the same standards as other public forums, specifically broadcast radio and television.<sup>105</sup> Although all websites at one time, and most websites currently, fall within the category of private entities, social media sites occupy a unique space in the modern world. They are functionally public because of the way in which they market themselves, allow for infinite simultaneous users, and provide a space for conversation by the public on any topic.

Once social media platforms are recognized as public forums, First Amendment doctrine would require the websites to consider the *Miller* test before deleting a questionably obscene post. By considering first, “whether ‘the average person, applying contemporary community standards’ would find that the [post], taken as a whole, appeals to the prurient interest,” second, “whether the [post] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law,” and third “whether the [post], taken as a whole, lacks serious literary, artistic, political, or scientific value,”<sup>106</sup> many improper deletions will be avoided. For artistic images, the third factor of the *Miller* test will continue to be determinative.

Classifying social media websites as public forums and requiring them to comport with First Amendment doctrine will not obviate their ability to remove improper material encouraging cyberbullying,

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<sup>104</sup> See Holden, *supra* note 22 (“When I initially put [the photograph] up I knew there would be some controversy and some hate comments and then it would go away. Never in a million years did I expect it to be on every major headline everywhere.”).

<sup>105</sup> See *supra* notes 24–28 and accompanying text.

<sup>106</sup> *Miller*, 413 U.S. at 24.

hate speech, or pornography. Just as the FCC does not allow for swearing or gratuitous nudity during primetime, social media sites should retain the ability to remove certain inappropriate content. However, the exemption within the CDA allowing the sites to remove content they subjectively find offensive should be replaced with a more narrowly-tailored authority.

Because technology advances faster than law, there is currently a very public space in which people are encouraged to express themselves—unless they like certain artworks. The legal modifications suggested by this note allow for continued control over improper content posted on the Internet while recognizing social media sites as public spaces that cannot discriminate based on a particular viewpoint. The applicable standard when determining what content has artistic value should be what a reasonable member of society would find valuable—not merely what a single person willing to click a “report” button finds unoffensive.

#### CONCLUSION

The prevalence of social media in recent years has grown exponentially.<sup>107</sup> Advertising a business, keeping in touch with friends, and getting the news are all common uses for the various social media platforms. However, many people find themselves unable to fully express their thoughts or utilize the sites in the same way as the general public. Artistic vision and expression are fundamental components of society and—arguably—the reason that social media outlets exist.

Social media websites function as public forums because they market themselves as a place where *anyone* can come and connect with their friends, share their thoughts, and even advertise their business.<sup>108</sup> There is no fee to join the sites and no waiting period or selection of members or users. Furthermore, the number of users who

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<sup>107</sup> See *supra* note 7.

<sup>108</sup> See *supra* note 97 and accompanying text.

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can utilize the sites at any given time is infinite. Any private membership social media sites that once existed disappeared long ago.

To encourage the continued expression and creativity of users of various social media outlets, there must be a reliable and transparent way for people to know the criteria by which their post will be evaluated to determine whether it will be removed. Recognizing social media websites as public forums accomplishes this task.

The CDA recognizes the importance of including some filter on a user's ability to post content.<sup>109</sup> Because the social media platforms are not themselves responsible for any of the user-generated content that is posted on their forums; they still should not be liable for deletion of obscene or inappropriate posts. However, the CDA should be amended to allow only those posts that fail the *Miller* test to be deleted at will. Artistic images that a reasonable member of society might find valuable should not be removed.

Because the social media websites hold themselves out as forums for public conversation, they should be governed by the federal obscenity law. The direct role social media plays in lives of millions of people every day should carry with it an obligation to *actually* allow people the freedom to express their viewpoints—even if they are unpopular.

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<sup>109</sup> See *supra* notes 76–79 and accompanying text.