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## Oops!...They're Violated Again: How Section 230 of the Communications Decency Act Fails to Protect Women in Media

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## I. INTRODUCTION

To many, the story of Britney Spears is the quintessential American Tragedy. Her catapultic rise to fame as a teen saw her lauded by an adoring public and praised for her innocent nature. As she continued to grow, however, the public discourse did as well. No longer was she the innocent, talented girl from small-town Louisiana.<sup>1</sup> Instead, she was hypersexualized, with media outlets asking a teenage Spears whether she had a breast augmentation<sup>2</sup> and criticizing her clothing choices by slut-shaming her to her face on national television.<sup>3</sup> American media seemingly believed it was their right to not only know about a young woman's sexual history but that it was appropriate to ask her about it at press junkets.<sup>4</sup> Suddenly, a decade into her successful career, Ms. Spears' public "downfall"<sup>5</sup> led to widespread judgment by media outlets and laypersons diagnosing her every move.

If you asked Ms. Spears the story of her life and career, however, it would sound much different. I am sure she would focus on the success of her career. The records she broke.<sup>6</sup> The

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<sup>1</sup> Britannica, *Britney Spears*, BRITANNICA (April 22, 2022, 5:07 PM), <https://www.britannica.com/biography/Britney-Spears>

<sup>2</sup> Nick Bond, *Dutch interviewer Ivo Niehe defends shocking Britney Spears interview*, NEWS.AU.COM (March 20, 2022, 4:05 PM), <https://www.news.com.au/entertainment/tv/flashback/dutch-interviewer-ivo-niehe-defends-shocking-britney-spears-interview/news-story/76c68333baf63b45830eb1750791b68f>

<sup>3</sup> Graham Gremore, *Someone made a supercut of all the times teenage Britney Spears was slut-shamed in interviews and wow*, QUEERTY (March 20, 2022, 4:22 PM), <https://www.queerty.com/someone-made-supercut-times-teenage-britney-spears-slut-shamed-interviews-wow-20201015>

<sup>4</sup> Claudia Willen, *Britney Spears has had to sit through incredibly misogynistic and invasive interviews. Here are the worst ones.*, INSIDER (March 20, 2022, 3:40 PM), <https://www.insider.com/britney-spears-worst-interviews-sexist-questions-comments-moments-videos>

<sup>5</sup> Reuters Staff, *Britney Spears hospitalized again*, REUTERS (March 21, 2022, 9:15 PM), <https://www.reuters.com/article/us-spears-hospital/britney-spears-hospitalized-again-idUSN3128619820080131>

<sup>6</sup> Guinness World Records, *Fastest-selling album in the US by a female Artist*, GUINNESS WORLD RECORDS (April 20, 2022, 4:30 PM), <https://www.guinnessworldrecords.com/world-records/76363-fastest-selling-album-in-the-us-by-a-female-artist>; Guinness World Records, *Best-selling artist, teenage*, GUINNESS WORLD RECORDS (April 20, 2022, 4:30 PM), <https://www.guinnessworldrecords.com/world-records/77579-best-selling-artist-teenage>; Guinness World Records, *Best start on the US Album chart by a female artist*, GUINNESS WORLD RECORDS (April 20, 2022, 4:30 PM), <https://www.guinnessworldrecords.com/world-records/86801-best-start-on-the-us-album-chart-by-a-female-artist>;

success of her international tours.<sup>7</sup> And, of course, her role as a mother and the love and adoration she has toward her two children.<sup>8</sup> In fact, she would likely say the story of her that the public has so eagerly and ravenously consumed for over 20 years is nothing short of fiction.

Ms. Spears' plight in mass media, and the contortionist act put on by publications with women's stories is nothing unique. For as long as the media has been widely available to the public, women have been underrepresented and stereotyped in virtually all media outlets.

Today, these problems are only exacerbated by the growth of the internet and the accessibility the general public has to make their thoughts and opinions known to the world. Legislation purporting to offer protection in media have failed to shield vulnerable groups, like women, from harmful representation. Congress, in their own efforts, has been unsuccessful in making any real progress in amending said legislation to keep up with the modern world.

Section 230 of the Communications Decency Act aims to provide immunity to certain internet services to shield them from violative use of the internet by third-party users. Specifically, it protects Internet Service Providers who "voluntarily" take action to restrict access to material that is considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."<sup>9</sup> When the Communications Decency Act was enacted, the internet was a vastly different place than it is today. Although Section 230 of the Communications Decency Act was originally enacted to immunize, or protect from liability, Internet Service Providers from harmful speech promulgated on their sites,<sup>10</sup> it has since come to also immunize behavior that would otherwise be seen as actionable, both civilly and criminally.<sup>11</sup>

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<sup>7</sup> Gil Kaufman, *Britney Spears Adds Circus Tour Dates Thanks to Strong Sales*, MTV (April 20, 2022, 5:10 PM), <https://www.mtv.com/news/1601043/britney-spears-adds-circus-tour-dates-thanks-to-strong-sales/>

<sup>8</sup> CapitalFM, *How Old Are Britney Spears' Sons And Where Are They Now?*, CAPITAL FM (April 20, 2022, 5:15 PM), <https://www.capitalfm.com/news/how-old-britney-spears-sons-kids-sean-jayden/>

<sup>9</sup> 47 U.S.C.A. § 230 (West).

<sup>10</sup> See *infra* note 90.

<sup>11</sup> See *infra* Part V.

Protections for media companies, specifically those online who are afforded these immunities, ultimately harm those who are underrepresented or misrepresented in media. Offering immunity perpetuates gender stereotypes and targeted attacks on account of gender are continued to be seen as the norm. With the growth of online publications and dwindling of physical copies or even television distribution, legislation has failed to keep up with the modern world and broader reach to better protect citizens and women specifically. This paper will propose sweeping changes be made to when Section 230 immunity should apply. Additionally, this paper proposes steps that Internet Service Providers and sites must take to better protect women online by way of an exploration of the current landscape of Section 230 of the Communications Decency Act and by tracing its development and interpretation since its enactment.

Part II of this paper will analyze the lack of women present in a variety of media outlets. This Part proves that all forms of media are currently dominated by men, and thus, men are the primary group controlling the narrative surrounding women generally. Part III will dissect how the misrepresentation of women in media outlets leads to further stereotyping of women. Part IV will walk through the history of the Communications Decency Act to explain how the internet was viewed by lawmakers at its inception, including primary concerns of ensuring its expansion. This Part supports the need for change in Section 230 of the Communications Decency Act by contrasting the internet of the 1990s to the one visited by American users today. This is followed by Part V which highlights the failure of said legislation to protect women, namely in its broad interpretation that affords immunity for harmful behavior online. Finally, in Part IV, it proposes amendments to the Communications Decency Act to better protect women and to make sure those women consuming media online are not exposed to information or posts that could be harmful.

## II. LACK OF WOMEN IN MEDIA

### A. Women as Authority in News Media

American media did not begin online, as the availability of the internet can be traced back to 1991.<sup>12</sup> However, Americans have long been consuming mass media, through their televisions, newspapers and other printed sources, and the radio. The news that Americans consume is guided by those who are at the helm. This Part will explain the disparity between men and women in American newsrooms, regardless of the medium being used to disseminate the news. As a conclusion, this Part will connect that disparity to the need to better protect women in news sources and for women to be in positions where news surrounding women can be accurately broadcast.

When it comes to news media, women are far less likely than men to be seen in media outlets. This applies both to roles of authority and to being cited as sources in stories. In fact, women make up about one-third of news story sources, even though they make up almost half of the work force at around 47%.<sup>13</sup> This is true even when looking at so-called “women’s issues.” Male voices are four to seven times more likely to be cited than women in stories about abortion or birth-control.<sup>14</sup> This perpetuates harmful messages to the public about who should have a say in these issues, specifically who holds greater stake in their discussion. By focusing mainly on male voices, the notion that men hold power in these realms, and society in general, are reinforced.<sup>15</sup> Though it cannot be said for sure, this lends itself to the conclusion that women voices and stories are not taken as seriously by the masses. Thus, in mediums where the average

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<sup>12</sup> Martin Bryant, *20 years ago today, the World Wide Web opened to the public*, THE NEXT WEB (April 21, 2022 3:50 PM), <https://thenextweb.com/news/20-years-ago-today-the-world-wide-web-opened-to-the-public>

<sup>13</sup> Tracy Everbach, *Women’s (mis) Representation in News Media*, in MEDIA DISPARITY 15, 17 (Cory L. Armstrong ed., 2013).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 18.

woman is more able to lend her voice and opinion, such as the internet, it follows that she will be dismissed or ridiculed for her words because that is what society has been conditioned to believe.

A study conducted over the course of 20 years in 114 countries, shows that only 24% of persons heard, read about, or seen in newspaper, television, and radio are women.<sup>16</sup> As of 2015, 37% of stories in news media broadly were reported by women, which showed no statistical change in over a decade.<sup>17</sup> When it comes to digital news stories or news tweets, the numbers are even less equitable, with women making up only 26% of those in that medium.<sup>18</sup> Suffice to say, there are significant gaps in the media when it comes to women's representation. With the changes taking place in where people go to consume media and the news, specifically with younger generations looking to social media and YouTube as their primary news sources<sup>19</sup>, it follows that even less women are being heard.

Between the years 2000 and 2015, a study followed the percentage gap between men and women that made up newspaper, radio, and television. In newspapers, that gap shrunk the most going from a 66% gap to a 48% gap. Close behind was radio, where the gap fell from 74% to 58%. Television had by far the smallest change of just 4% from 56% in 2000 to 52% in 2015.<sup>20</sup> These numbers are especially concerning when coupled with the fact that, at least in the United States, television media consumption continues to reign supreme, being threatened only by use of a mobile device.<sup>21</sup>

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<sup>16</sup> UN WOMEN, <https://www.unwomen.org/en/digital-library/multimedia/2020/2/infographic-visualizing-the-data-womens-representation> (last visited March 23, 2022).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Common Sense Media, *New Study Reveals Teens Get Their News from Social Media and YouTube*, COMMON SENSE MEDIA (April 22, 2022, 7:00 PM), <https://www.commonsensemedia.org/press-releases/new-survey-reveals-teens-get-their-news-from-social-media-and-youtube>

<sup>20</sup> UN WOMEN, *supra* note 16.

<sup>21</sup> Aran Ali, *How Media Consumption Has Changed Over the Last Decade (2011-2021)*, VISUAL CAPITALIST (March 21, 2022, 7:22 PM), <https://www.visualcapitalist.com/how-media-consumption-has-changed-in-2021/>

A 2011 study titled the *Global Report on the Status of Women in News Media* looked at 59 nations and 522 companies to reveal a not-so-shocking male dominated news industry.<sup>22</sup> The study found that men held three-quarters of positions on boards and in top management and 74% of reporting positions.<sup>23</sup> When looking just to the United States, the Women’s Media Center in 2015 found that women held about one third of jobs in print news, evening news broadcasts, and news agency wire services.<sup>24</sup> The gender gap in the United States was discovered to be slightly smaller with women holding 42% of internet news site jobs.<sup>25</sup> These numbers tell a disturbing story. Without knowing for certain, the data suggests that the “news,” a term used loosely here to describe all media outlets covering news stories, does not consider the perspective of women on events to be significant. While this is concerning in and of itself, the message it sends to women is even more of a problem and can continue to foster a society that silences women, even when they dare to speak out.

#### B. Women Take Their Fight to Court

While these numbers are alarming, the realization of their existence is nothing new. Beginning in the 1970s and continuing in the 1980s, women from a number of media outlets began bringing sex discrimination lawsuits against their employers which led to larger numbers of women journalists entering the newsroom.<sup>26</sup>

In 1970, this spark was lit by a lawsuit filed by the Equal Employment Opportunity Commission on behalf of 46 women at *Newsweek* fighting for equal pay and career

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<sup>22</sup> Carolyn M. Byerly & Alisa Valentin, *Women’s Access to Media: Legal Dimensions of Ownership and Employment in the United States*, in RACE AND GENDER IN ELECTRONIC MEDIA, CONTENT, CONTEXT, CULTURE 346, 350 (Rebecca Ann Lind ed., 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Everbach, *supra* note 13, at 16.

advancement.<sup>27</sup> Many broadcast companies, however, settled out of court. Because of this, it is hard to ascertain just what many of these broadcasting companies accused of unfair hiring and employment practices agreed to. Much of the information pertaining to these settlements has been sealed. In 1973, the Equal Employment Opportunity Commission again filed a case on behalf of women journalism employees, this time at the Associated Press.<sup>28</sup> The company settled out of court and developed an affirmative action plan for women and minorities, which led to the number of women working at the Associated Press to double in the next five years up to 44% by 1988.<sup>29</sup> Later in 1973, *The Reader's Digest* similarly settled out of court with eight female employees who sued the magazine for discriminatory promoting, hiring, and reporting assignment practices.<sup>30</sup> *The Reader's Digest* paid the plaintiffs \$1.5 million and set a legal precedent of providing back pay, raises, and procedures to advance greater numbers of women into top editorial jobs.<sup>31</sup>

In 1975, in *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co, Inc*, the court allowed the Equal Employment Opportunity Commission to intervene on behalf of women.<sup>32</sup> Both parties thus entered a consent decree where NBC agreed to various goals including a specific percentage of women in certain positions.<sup>33</sup>

The success of women led lawsuits in the fight for equality in broadcasting cannot be mentioned without acknowledging the fight put on by racial minorities for the same treatment. In fact, the earlier cases that allege and vindicate racial discrimination in the media helped to

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<sup>27</sup> Byerly & Valentin, *supra* note 22, at 353.

<sup>28</sup> *Id.* at 356.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Women's Comm. for Equal Emp't Opportunity (WC=EO) v. Nat'l Broad. Co.*, 71 F.R.D. 666, 672 (S.D.N.Y. 1976)

<sup>33</sup> Byerly & Valentin, *supra* note 22, at 356.

pave the way for women who unfortunately found themselves in the same boat. In *TV 9, Inc. v. Federal Communications Com.*, the DC Circuit Court of Appeals held that if minority ownership would likely increase diversity of content, especially when looking at opinion and viewpoint, merit should be awarded to the minority ownership.<sup>34</sup> In 1985, the DC Circuit Court of Appeals denied application of the *TV 9* standard to women in *Steele v. FCC* holding that it is not reasonable to think granting preferences to women would increase program diversity the way it would for Blacks' opinions and beliefs.<sup>35</sup> In fact, the court reasoned that women are divided themselves and therefore cannot possibly manifest a distinctly female editorial viewpoint, even though the same could be said for African Americans and other racial or ethnic groups.<sup>36</sup> The possibility of women being recognized as a minority and thus awarded greater protection was stymied yet again in 1986 in *Pappas v. FCC*. In *Pappas*, the DC Circuit Court of Appeals again held that the FCC had no discretion to grant women a preference in obtaining broadcasting licenses the way ethnic minority groups are given preferences.<sup>37</sup>

These cases, as well as countless others that have not been made available to the public, are examples of how women and their encounters with gendered mistreatment are silenced and how that silence is then rewarded. This is, unfortunately, not unique to the world of broadcasting. The world saw this on a large scale when Harvey Weinstein's accusers and survivors began to come out with stories of sexual harassment after years of abuse. Like the cases cited above, Weinstein and his enablers made use of non-disclosure agreements and settlements with large payouts to keep women silent on the abuses they suffered.<sup>38</sup> While there is no data to show the

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<sup>34</sup> *TV 9, Inc. v. Fed. Comm'ns Com.*, 495 F.2d 929, 938 (1973).

<sup>35</sup> *Steele v. FCC*, 770 F.2d 1192, 1199 (1985).

<sup>36</sup> *Id.*

<sup>37</sup> *Pappas v. FCC*, 807 F.2d 1019, 1024 (1986).

<sup>38</sup> Ed Pilkington, *Weinstein's enablers: how associated helped him silence accusers for years*, THE GUARDIAN (April 9, 2022, 2:47 PM), <https://www.theguardian.com/world/2020/feb/25/harvey-weinstein-trial-helpers-enablers>; See also, Carter Sherman, *Harvey Weinstein Raped and Silenced Women for Decades, Prosecutors Allege in Graphic*

impact these stories have on women, this paper concludes that they very likely lead to women being afraid to speak out for fear of being silenced. This paper argues that the widespread practice of silencing women into settlement and not addressing the problems head on leads women to harbor feelings of inferiority. These feelings, in turn, manifest themselves in the way women present themselves and the treatment they come to expect by others. Without making changes to these practices and the overall narrative surrounding women, there cannot be real solutions to problems faced by women.

### C. Lack of Women in Politics and Economy

Although the cases cited previously led to some change in the number of women employed by broadcasting companies as a result of the settlements reached, the narrative surrounding women has not changed. When it comes to major news topics, including science and health; economy; social and legal; celebrity, arts, and sports; crime and violence; and politics and government, women still hover around a quarter of the coverage in all categories.<sup>39</sup> The second lowest of all these categories is the economy at 21% of media in the topic being about women.<sup>40</sup> While this is a low number, the lack of job opportunities for women in industries that would be reported about is likely a contributing factor. In June of 2019, the Fortune 500 hit a milestone of the most women CEOs on record at a whopping 6.6% while the number of other women in the workforce has stagnated over the last 20 years.<sup>41</sup>

Unsurprisingly, women are the least represented in media topics in the area of politics and government, making up 16% of all coverage.<sup>42</sup> This low number likely contributes to the way

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*Opening Remarks*, VICE (April 9, 2022, 3:10 PM), <https://www.vice.com/en/article/z3b4y3/harvey-weinstein-raped-and-silenced-women-for-decades-prosecutors-allege-in-graphic-opening-remarks>

<sup>39</sup> UN WOMEN, *supra* note 16.

<sup>40</sup> *Id.*

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

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

women in this sphere are presented to the public and discussed. As will be discussed further, while there is no way to know for sure, the substantially small number of women being highlighted in this field perpetuates the idea that women still do not belong. This can have detrimental effects on how the public perceives women that do break through and further discourage more women from entering the arena when the discourse around those who are already there is staggeringly different from their male counterparts.

When it comes to politics in television media, women make up an even smaller percentage at just 13.6% of guests on Sunday morning political talk shows.<sup>43</sup> Again, as with media coverage of economic topics, this is largely indicative of and the result of a larger representation problem surrounding women in politics. While the fact that global political representation among women has doubled in the past 25 years sounds like a huge stride, and it is, it still amounts to just one in four, or 24.9%, parliamentary seats being held by women worldwide.<sup>44</sup> As of October 2019, across 22 countries, there were only 10 female heads of state and 13 female heads of government compared with four and eight across twelve countries in 1995.<sup>45</sup>

#### D. Misguided Representation of Women in Sports Coverage

Rounding out the bottom three categories for media topics about women is celebrity, arts, and sports at just 23% of all coverage.<sup>46</sup> Over the course of a little more than a century, the Olympics has come close to equitable representation of both men and women in sports. While the first modern Olympics in 1990 only had 22 women competing, which made up 2.2% of all athletes, the 2020 Tokyo Olympics, pre-Covid, were projected to have close to equal representation of men and women competing for the first time in history.<sup>47</sup> The growth of

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<sup>43</sup> Everbach, *supra* note 13, at 17

<sup>44</sup> UN WOMEN, *supra* note 16.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> UN WOMEN, *supra* note 16.

women's sports and access to sports by female athletes is attributed to Title IX.<sup>48</sup> This representation, though seemingly equal on the surface, paints a disturbing picture when more closely dissected.

Media outlets are more likely to show women sports that are seen by the general public as gender-appropriate, which includes individual sports rather than perceived gender-inappropriate team sports.<sup>49</sup> The combined sports programming of CNN and ESPN shows that 95.4% of women's sports coverage was devoted to tennis and golf, which are both individual female sports.<sup>50</sup> This false sense of equity seemed to be too much for ESPN because coverage of women's sports on SportsCenter declined between 1999 and 2004.<sup>51</sup> When turning back to the Olympics, specifically the 1996 Olympics, although air-time was balanced between men's events and women's events, the coverage of women's events was dominated by swimming, diving, and gymnastics, which collectively made up 66% of the coverage of women events.<sup>52</sup> Important to note, these sports are, again, all individual sports, and more specifically ones where participants dress in leotards and swim suits. This led to limited coverage of the gold-medal winning teams of soccer, softball, and basketball.<sup>53</sup>

Across the board, women are underrepresented across media platforms in all major broadcast areas. The lack of representation means less women have their voices heard and there are fewer female perspectives in the conversation, regardless of what that conversation may be. While this is nothing new, there are new media outlets becoming accessible via the internet every day.

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<sup>48</sup> 20 U.S.C.A. § 1681 (West); Title IX prohibits sex-based discrimination in schools or other education program receiving federal funding and has largely been used to provide for equal access in athletics.

<sup>49</sup> Dunja Antunovic & Marie Hardin, *From Annihilation to Ambivalence: Women in Sports Coverage*, in *MEDIA DISPARITY*, 71, 77 (Cory L. Armstrong ed., 2013).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 79.

<sup>52</sup> *Id.* at 77.

<sup>53</sup> *Id.* at 78.

Despite the recognition of this problem, there are is no change when these conversations move online. Likely because of the lack of women in media, the way they are presented is not indicative of the complexities of the group as a whole, and instead focuses on stereotypes and typical gender roles, which will be discussed in Part III.

### **III. STEREOTYPING AND MISTREATMENT OF WOMEN IN MEDIA**

When women do not have the opportunity to be seen or heard in the media, the narrative surrounding them often perpetuates one of the many stereotypes that exist around women. News articles about women tend to focus on their appearances more than their male counterparts', which is especially true for female politicians.<sup>54</sup> Other stories choose to focus on women as “victims” of crimes while ignoring the men as perpetrators of the crime.<sup>55</sup> This Part will first explore how these practices persist in reality television. As a growing genre of television, reality television shapes the views of many Americans through shows which appeal to a wide variety of interests. Next, this Part will explain how the landscape of women’s coverage in sports lends itself to a skewed view of the public of inferiority of female athletes by unfairly comparing them to a male standard. Finally, this Part will shed light on how the internet is a growing space that is unsafe for women, despite the novelty it still has in 2022. Although the internet is developing in a time where these problems are at the forefront of many people’s thoughts, there is nothing being done to combat the feelings of danger women feel when online.

#### **A. Women in Reality Television**

On television reality shows that focus on crime, such as *America’s Most Wanted*, the majority of the victims were young white women but the majority of on-screen speakers were male, at 67%, which almost doubled the female on-screen speakers, who only appeared 37% of

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<sup>54</sup> Everbach, *supra* note 13, at 19-20.

<sup>55</sup> *Id* at 22.

the time.<sup>56</sup> Of those speakers, men often served as crime experts while women spoke of the pain associated with their own victimization from the crime being covered.<sup>57</sup> This sends the message that men are more capable and rationale to speak to audiences about the experiences of women than the women who had experienced the crime themselves. Subconsciously, this is pushing a narrative onto viewers that women are helpless and require men to come in and make sense of their victimization while serving as their heroes.

There are some reality television shows in the crime subgenre that attempt to do better by the females who appear on their shows, but they still fall short. This allows an underlying narrative of male superiority to shine through. Of 388 stories shown on *Cops* and *Real Stories of the Highway Patrol*, 93% of scenes had a male primary officer.<sup>58</sup> Female officers in these shows were only present in 22% of nondomestic assaults and 7% in domestic assault calls, but would be shown counseling the victim.<sup>59</sup> While these shows focus on the job and work life of the officers, *Police Women of Broward County*, which focuses on female police officers also shows the women at home performing household duties, taking care of their children and husbands, and shows them in their bathing suits.<sup>60</sup>

Another popular subgenre of reality television is dating. In 64 hours of reality dating shows, the attitude of “women are sex objects” was expressed 5.9 times per hour, while “men are sex-driven” was expressed 3.6 times per hour.<sup>61</sup> Those attitudes were more likely to be expressed by men than women,<sup>62</sup> which demonstrates that these attitudes and ideas about women that are

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<sup>56</sup> Adriane Grumbein & J. Robyn Goodman, *The Good, the Bad, and the Beautiful: How Gender is Represented on Reality Television*, in *MEDIA DISPARITY*, 99, 100 (Cory L. Armstrong ed., 2013).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

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

<sup>60</sup> *Id.* at 101.

<sup>61</sup> *Id.* at 102.

<sup>62</sup> *Id.*

pushed out to the masses are mainly perpetuated by men and not taken on by women about themselves.

When discussions of these shows by their audiences follow viewing, whether in households, workplaces, or the internet, viewers ideas and opinions are shaped by what they see on screen. Viewers continue to watch these shows so it can be inferred from the data that the success of this genre of television is likely due to the approval of the way the shows and those on them are being presented. It follows that this means that viewers largely agree that these stereotypes and ideas about women and their role in society are correct.

#### B. Stereotyped Coverage of Women Sports

The underlying stereotypes about the inferiority of women is also expressed subtly in the manner that women's sports are covered. In the 1992 Olympics, 85% of the time the women's basketball team was referred to as the US Women's Team while the men's team was simply referred to as the US Olympic Team, without the need to qualify the team with gendered language.<sup>63</sup> While seemingly a harmless indicator, the choice in language furthers the idea that men are the standard to which women ought to be compared. Even comparisons of the photography of male and female athletes show that audiences prefer to look at images of women athletes that de-emphasize their athleticism and amplify their sexuality.<sup>64</sup> These small decisions in which images to use in media coverage of women's sports subtly hints that woman are more desired when they can be sexualized and are less admired for their ability and accomplishments.

#### C. The Internet as an Unsafe Space for Women

While the issues discussed above are nothing new as women have been facing stereotyped and gendered coverage in more traditional media styles for decades, the internet as a new media

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<sup>63</sup> Antunovic & Hardin, *supra* note 49, at 74.

<sup>64</sup> *Id* at 75.

space in no different despite the visibility and focus in the modern era to be more inclusive and equitable.

Women are not safe when they retreat to the internet from the privacy of their own homes as they face gendered harassment and discrimination on a variety of internet platforms. Women are more likely to be stalked both online and offline by men at 67% than by a woman at 24%.<sup>65</sup> Of the victims of cyber harassment, only 60% will ever learn of the identity of their attackers and only half of those victims will have had any prior relationship with their attacker.<sup>66</sup> Online abuse often occurs in what have come to be known as “cyber-cesspools.”<sup>67</sup> These are websites that encourage users to post abusive material about specific individuals to make a profit through ad sales.<sup>68</sup>

There are sites that traffic revenge porn, where the operators seek to acquire the most embarrassing material to bring in the most money without regard for what it does to the victims.<sup>69</sup> Sites such as Campus Gossip asked users to post gossip that was often personal, homophobic, misogynistic, and racist against professors and students.<sup>70</sup> TheDirty.com posted sexually explicit posts and pictures, of which the majority were women.<sup>71</sup> IsAnybodyDown.com listed the full names and contact information of more than 700 people whose nude photographs had been posted to the tune of \$3,000 a month to the site’s operator.<sup>72</sup> Another site was Texxxan.com, which posted intimate photographs of young girls without their permission alongside their personal information.<sup>73</sup> While the data discussed is general and not gendered,

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<sup>65</sup> DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 50 (2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 51.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 51-2.

<sup>70</sup> *Id.* at 51.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 51-2.

these problems are ones that are more often faced by women as they are more sexualized by society.

Online harassment disproportionately affects women in more severe ways, leading to differing views between the two genders, though generalized, about the internet as a whole. A 2017 study shows that while 70% of women believe online harassment is a big deal, only 54% of men feel the same.<sup>74</sup> While men and women receive relatively equal harassment online that involves being called names or receiving physical threats, women are far more likely to encounter sexualized forms of abuse online.<sup>75</sup>

Due to the form of cyber harassment typically faced by women, 35% of have described the experiences as extremely or very upsetting, as compared to only 18% of men who have experienced online harassment.<sup>76</sup> Consequently, when reflecting on priorities of the internet, 63% of women said it was more important to feel safe and welcome online as to 56% of men who saw the priority online being their ability to speak their minds freely.<sup>77</sup>

These views govern the way men and women approach the internet and the steps they take to protect themselves. A quick Google search for “How men protect themselves online” turns up ten links to how someone can protect themselves while using the internet, with not a single article using any gendered language in the title or accessible text on the Google search page.<sup>78</sup> A similar search of “How women protect themselves online” turns up ten results, nine of which use gendered language in the title to direct the online safety tips at women and girls and the tenth result referring to “sisters,” which indicates it is targeted at women.<sup>79</sup> While it is clear that

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<sup>74</sup> Maeve Duggan, *Online Harassment 2017*, PEW RESEARCH CENTER (March 19, 2022 7:45 PM), <https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/>

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> GOOGLE, <https://www.google.com> (then search “How men protect themselves online”).

<sup>79</sup> GOOGLE, <https://www.google.com> (then search “How women protect themselves online”).

regardless of gender identity it is important to keep safe online, only women and girls have easily accessible articles that target how they need to protect themselves differently because of their gender. This implies a greater need for safety measures for women who use the internet than men, or, at the very least, more of a demand for tips on internet safety being sought by women than by men.

The internet, as stated, is still relatively new when comparing it to other media outlets or ways of public discourse. Because of this, the law surrounding the internet is also still relatively new. There is little recourse available to the women who identify as victims of this type of mistreatment and abuse because of many reasons. Mainly, it is difficult to ascertain the identity of abusers when on the internet and it is also difficult to hold Internet Service Providers accountable for facilitating a space that is inherently unsafe for women. While there is some legislation in this area, namely Section 230 of the Communications Decency Act, it fails to meet the needs of women online.<sup>80</sup>

#### **IV. HISTORY OF THE COMMUNICATIONS DECENCY ACT**

In 1995, lawmakers began setting their sights on the internet. They understood that they wanted it to be a place that was open and free but also understood that meant it would come with postings of potentially illegal or offensive material.<sup>81</sup>

The Telecommunications Act of 1996 was passed with two goals in mind. First, legislators wanted to promote competition online while reducing regulation so that lower prices and higher quality services could be secured for American telecommunications consumers. Second, they

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<sup>80</sup> See *infra* Part IV.

<sup>81</sup> Danielle Keats Citron & Mary Anne Franks, *The Internet As A Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45 (2020).

hoped for the quick deployment of new telecommunications technologies into the homes of Americans.<sup>82</sup>

The Communications Decency Act, part of the Telecommunications Act of 1996, was introduced to make the internet safer for children.<sup>83</sup> Specifically, it addressed concerns about pornography and proposed criminal penalties for disturbing, sexually explicit material online and recognized the need for private sector help in curbing the amount of offensive material online.<sup>84</sup>

Section 230 of the Communications Decency Act was prompted by *Stratton Oakmont v. Prodigy Services*.<sup>85</sup> Prodigy was a computer network where users could communicate with one another and other subscribers through a bulletin board service.<sup>86</sup> In national publications, the director of Prodigy explained that the service exercised editorial control over the content posted on its computer bulletin boards and had a policy stating that it was a family oriented computer network.<sup>87</sup> The plaintiff in the case, a securities firm, alleged that Prodigy was strictly liable for defamatory comments made about the firm on a financial bulletin board on the site because they were the publishers of the posts.<sup>88</sup> The court ultimately held that Prodigy's choice to gain editorial control opened them up to higher liability than to computer networks who do not exercise that choice and awarded the financial firm \$200 million.<sup>89</sup>

Lawmakers immediately took notice and saw a need to immunize the activity that was brought into *Prodigy* because they feared holding online providers liable for inexact screening

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<sup>82</sup> Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 602 (2019).

<sup>83</sup> Citron & Frank, *supra* note 81, at 4.

<sup>84</sup> *Id.*

<sup>85</sup> Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans S 230 Immunity*, 86 FORDHAM L. REV. 401 (2017); *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

<sup>86</sup> *Id.* at 1.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.* at 1.

<sup>89</sup> *Id.* at 5.

would lead to no screening of material at all for offensive content because they could act passively to avoid publisher liability.<sup>90</sup>

As a result, in 1995, the Communications Decency Act was introduced by Senators Exon and Gorton, who built upon existing law that exempted from liability common carriers who acted in good faith to restrict obscene material.<sup>91</sup> Exon and Gorton sought to extend this liability to online service providers to incentivize the adoption of new technologies and policies relating to restricting access to offensive materials.<sup>92</sup> Representatives Cox and Wyden proposed an amendment to this new Communications Decency Act called “Protection for Private Blocking and Screening of Offensive Material,” which provided immunity to online service providers that restricted access to objectionable material.<sup>93</sup> This amendment was later codified in Section 230.<sup>94</sup>

Ultimately, several provisions the Communications Decency Act were struck down by the Supreme Court citing First Amendment concerns, leaving Section 230 remaining.<sup>95</sup> Section 223, the Family Empowerment Amendment was struck down on First Amendment grounds in *Reno v. ACLU*.<sup>96</sup> The purpose of Section 223 was to give “Good Samaritan” protection to providers or users of interactive computer services that blocked or screened offensive material online, but the court found it impermissibly vague, over-inclusive, overly-broad content-based regulation that could get in the way of the free exchange of ideas.<sup>97</sup>

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<sup>90</sup> Citron & Wittes, *supra* note 85, at 4.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Citron & Franks, *supra* note 81, at 4.

<sup>94</sup> *Id.*

<sup>95</sup> Citron & Wittes, *supra* note 85, at 3.

<sup>96</sup> Volpe, *supra* note 82, at 603-604.

<sup>97</sup> *Reno v. Aclu*, 521 U.S. 844, 871 (1997).

Section 230(c)'s Good Samaritan blocking and filtering of offensive content provision contains two key goals. First, under Section 230(c)(1), providers or users of interactive computer services will not be treated as publishers or speakers of user generated content.<sup>98</sup> This provision seeks to address the problem of underscreening, as seen in *Prodigy*.<sup>99</sup> Second, Section 230(c)(2) states that online providers will not be held liable for good-faith filtering or blocking of user generated content.<sup>100</sup> This provision seeks to address protections of over-screening.<sup>101</sup> There are however limitations for the immunity provisions. These include federal criminal law; intellectual property law; the Electronic Privacy Communications Act; and, as of 2018, facilitation of sex trafficking.<sup>102</sup>

## **V. FAILURE OF THE COMMUNICATIONS DECENCY ACT TO PROTECT WOMEN AND COURT SANCTIONED MISOGYNY**

The Supreme Court has declined to define the meaning of Section 230 of the Communications Decency Act, but state courts and other lower federal courts have generally agreed that a broad construction of the legislation is best.<sup>103</sup> This has mainly been done by reasoning that First Amendment values are what drove the creation of the Communications Decency Act to begin with and there still exists a need for a competitive free market online.<sup>104</sup> Additionally, those courts that have addressed this have also recognized the need for multiple avenues of intellectual and creative activity to flow freely.<sup>105</sup> While the free flow of ideas and a

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<sup>98</sup> Citron & Franks, *supra* note 81, at 5.

<sup>99</sup> Citron & Wittes, *supra* note 85, at 5.

<sup>100</sup> Citron & Franks, *supra* note 81, at 5.

<sup>101</sup> Citron & Wittes, *supra* note 85, at 5.

<sup>102</sup> Citron & Franks, *supra* note 81, at 5.

<sup>103</sup> Citron & Wittes, *supra* note 85, at 6.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

free market online without undue restrictions on fundamental Constitutional principles is integral in the United States, it has also been used as rationale for the courts to sanction misogyny.

In *Jane Doe No. 1 v. backpage.com*,<sup>106</sup> sex trafficking survivors sued Backpage alleging the site was not afforded Section 230 immunity for their sexual assaults because the service they created enabled sex trafficking.<sup>107</sup> There was evidence introduced to show that the site had removed posts that discouraged sex trafficking and tailored their internal rules to protect sex trafficking practices from being detected.<sup>108</sup> This included allowing anonymous email addresses to be used and using photographs that were stripped of metadata so no identifiable information could be pulled off them.<sup>109</sup> Although the court acknowledged the evidence in favor of the sex trafficking survivors was persuasive, it ultimately held for Backpage finding the site was immune from liability under Section 230.<sup>110</sup> The court noted that showing the site operated through a deceptive business model was not enough to strip away the protections granted by Section 230.<sup>111</sup>

*Daniel v. Armslist* dealt with a site that sells dangerous products.<sup>112</sup> The site connects unlicensed gun sellers to buyers who cannot pass background checks.<sup>113</sup> In the case, a domestic abuser's estranged wife filed a restraining order against him that prohibited him from being able to legally purchase a gun.<sup>114</sup> As a result of the service provided by the site, he was able to purchase a gun illegally and used it to murder his estranged wife and two of her co-workers.<sup>115</sup>

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<sup>106</sup> This case was decided in 2016. In 2018, sex trafficking became a limitation on the immunity provision of Section 230 which would have likely changed the outcome had the case been decided later.

<sup>107</sup> *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16 (1st Cir. 2016).

<sup>108</sup> Citron & Wittes, 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Jane Doe No. 1*, 817 F.3d at 21.

<sup>111</sup> *Id.*

<sup>112</sup> *Daniel v. Armslist, LLC*, 2019 WI 47, ¶ 5.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at ¶ 3.

<sup>115</sup> *Id.*

The Wisconsin Supreme Court found that the site was immune from liability under Section 230 even though the role of the site in question had to do with a service and not speech, which is what Section 230 is said to protect.<sup>116</sup>

*Jones v. Dirty World* saw another example of a woman being sexualized and harassed online while the website that facilitated it was protected by Section 230.<sup>117</sup> In *Jones*, images of a young, female NFL cheerleader were posted online along with information about her alleged sexual conduct.<sup>118</sup> The content for the website was generated by submissions from readers to the site's operator who would then offer his own spin on the information.<sup>119</sup> Although the lower courts found in favor of the woman, the Court of Appeals held that Section 230 of the Communications Decency Act barred the woman from seeking recovery from the site as publisher if they did not materially contribute to the tortious content.<sup>120</sup> The court concluded this even after the woman and other members of her family reached out to the website to remove the defamatory content that she alleged was untrue.<sup>121</sup>

Allowing providers to turn a blind eye to practices that harm women sends a message that issues that are primarily faced by women are less important. The gender stereotypes and lack of focus on women outside of these stereotypes has led society, and women themselves, to expect this kind of disparate treatment from various platforms.

## **VI. PROPOSED AMENDMENTS TO LEGISLATION**

The United States is not alone in facing these problems surrounding misrepresentation and stereotyping of women in the media leading to harm. The Conference of the Council of Europe

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<sup>116</sup> *Id* at ¶ 2.

<sup>117</sup> *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 417 (6th Cir. 2014)

<sup>118</sup> *Id* at 402.

<sup>119</sup> *Id* at 403.

<sup>120</sup> *Id*.

<sup>121</sup> *Id* at 401-2.

Network of National Focal Points on Gender Equality found that the media's mistreatment of women and reproduction of female stereotypes are linked to violence against women in everyday life.<sup>122</sup> To combat this, the Council of Europe has adopted Recommendation CM/Rec(2013)1 on gender equality in the media.<sup>123</sup> The recommendation provides updates and new policies that seek to address inequality and violence against women in new media environments.<sup>124</sup> They first encourage media organizations to adopt self-regulatory measures, including internal codes of conduct and ethics and supervision.<sup>125</sup> The goal of these practices is to promote gender equality in multiple areas.<sup>126</sup> These include equal access and representation in media, including where women are currently underrepresented. Next, balancing the participation of women and men in management roles, bodies with supervisory roles, and general decision-making processes. Finally, implementing a non-stereotyped image, role, and visibility of women and men to avoid sexist advertising, language, and content that could lead to gender-based discrimination or violence.<sup>127</sup>

As the Conference of the Council of Europe Network of National Focal Points on Gender Equality recognized, there is a desperate need for equal employment conditions in the media in order to combat the harmful narratives and inequality facing women.<sup>128</sup> Companies that function within the realm of the media, which includes radio, television, print, and the internet, need to do more to hire women in high powered positions and to even the playing field.

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<sup>122</sup> REPORT OF THE 1ST CONFERENCE OF THE COUNCIL OF EUROPE NETWORK OF NATIONAL FOCAL POINTS ON GENDER EQUALITY, MEDIA AND THE IMAGE OF WOMEN 3 (Report prepared by Katherine Sarikakis, July 4-5, 2013).

<sup>123</sup> *Id.* at 18.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

As Section 230 of the Communications Decency Act does not serve to protect internet users from harmful content in furtherance of its original purpose, this paper proposes that it should be amended to better serve the way the internet is actually used in the modern age. Section 230 provides immunity to internet providers for third-party generated content and for site operators seen as “Good Samaritans” in their attempts to regulate what would be considered offensive content.<sup>129</sup> Instead, this paper takes the stance that Section 230 immunity should apply only when a user circumvents systems put in place by the site operators used to screen for posts that would be considered offensive. While it can be argued that this puts too much pressure on site operators to sift through a seemingly endless stream of posts on some sites, there is technology available to lighten their load. As the Internet Service Provider stated in *Prodigy*<sup>130</sup>, it can be impossible to look through every post, but that case concerned internet activity in the 1990s when the internet and capabilities on sites and their directors were much different.

Today, users of Instagram are able to enable a feature that filters comments on their page or in messages for words or phrases that the user considers offensive. On Instagram, this is an optional feature that a user must enable. Once enabled, Instagram will filter words or phrases that may be considered offensive but do not go against their “Community Guidelines.” Users also have the option of creating a custom list of words or phrases they wish to be filtered out of the comments or messages on their page.<sup>131</sup>

Once enabled, when another user wants to comment on a post or send a message with offensive content to a user who utilizes the feature, the comment is flagged and tells the potential poster that it is against community guidelines and therefore the comment is not posted. If Instagram can employ tactics like this to keep their platform safe, so can other sites.

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<sup>129</sup> See *supra* note 100.

<sup>130</sup> *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710.

<sup>131</sup> Instagram, Help Center (April 29, 2022, 6:55) <https://help.instagram.com/700284123459336>

Similarly, Facebook currently employs a fact-checking process on their site to prevent the spread of misinformation. Facebook works with third-party fact-checkers who identify misinformation on their own as well as through user-generated feedback on posts. Additionally, Facebook will send posts to their fact-checkers by flagging key words or phrases. The fact-checkers then review the information to determine whether the content is false. If they make a false finding, Facebook is made aware and acts accordingly. Facebook may act by removing a post or user, notifying those who have previously shared the post that it may contain misinformation, and apply a warning label that links users to a fact-checker article disproving the information.<sup>132</sup>

These safeguards are meant to protect users from potentially harmful information. On Instagram, users are protected from cyber harassment and bullying, which has been proven to have detrimental effects. In the same vein, users on Facebook are protected from potentially false information that could create and perpetuate a harmful narrative about current events and the world at large leading to the further dissemination of the misinformation.

There are potential arguments to be made about First Amendment rights, namely freedom of speech, but freedom of speech on a social media platform or privately run site is not the kind of speech the First Amendment seeks to protect. The approach that restricted access or filtering of the way users express themselves on sites is a misinterpretation of the First Amendment, specifically the Free Speech Clause. The state action doctrine draws a line between governmental and private actors and asks whether a private entity, like Internet Service

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<sup>132</sup> Facebook, *How Facebooks' third-party fact-checking program works*, FACEBOOK (April 30, 2022, 7:45 PM) <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/how-it-works>

Providers, can be subject to First Amendment constraints. The answer to this question is yes only if the private entity exercises a function that is traditionally reserved to the State.<sup>133</sup>

A similar argument is that social media platforms ought to be treated as public forums, such as our parks, which is owned by the public for the benefit of all and therefore restricting access would be unconstitutional.<sup>134</sup> This argument, however, fails to consider the fact that social media platforms and other third-party user sites are privately owned and have never been classified as a neutral public forum the way public parks, streets, and sidewalks have.<sup>135</sup>

This paper's proposed change to Section 230 would require all online publications and social media sites to employ these safety features if they want to continue to enjoy immunity under Section 230 of the Communications Decency Act. If the sites do employ similar technologies that automatically filter and screen out potentially dangerous and offensive material, and they can show their system works, they will continue to be protected and granted immunity under Section 230 if they can show the third-party user who posted the offending content did so by purposely cracking their system.

This paper further proposes that sites provide a mechanism for users to report posts that violate the Communications Decency Act much like Facebook employs features for users to report potentially false or misleading information. Specifically, users would be able to report harmful posts that reinforce stereotypes. In turn, the site can further bolster their own systems as described above to either take down the offending posts if it turns out they are in violation or

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<sup>133</sup> *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926, 204 L. Ed. 2d 405 (2019); *See also*, *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 493, 46 A.3d 507, 513 (2012) (finding "Federal case law requires some form of "state action" to trigger the protections of the First Amendment).

<sup>134</sup> Citron & Frank, *supra* note 81, at 17.

<sup>135</sup> *Id.*, citing Catherine Padhi, *Ted Cruz vs. Section 230: Misrepresenting the Communications Decency Act*, *LAWFARE* (Apr. 20, 2018), <https://www.lawfareblog.com/ted-cruz-vs-section-230-misrepresenting-communications-decency-act>

warn potential readers before reading the posts to let them know that some may find the content offensive and that there are harmful stereotypes perpetuated within the post.

Again, these tactics are already employed by many sites with posts generated by third-party users<sup>136</sup>. Specifically, these tactics are used to blur pictures or videos to display a warning that some may find the images to be graphic and offensive and prompting the user to either accept and view the images or to continue scrolling through the site.

## VII. CONCLUSION

Websites need to be held accountable for harmful posts that perpetuate stereotypes against women and the corporations and individuals in charge of those websites should be the ones who face the music. Only once the narrative surrounding women in the media changes will women have a chance to reclaim their own identities. Further, with more women at the helm of disseminating information, whether it be on television, in print, on the radio, or on the internet, there will be more equity in the way issues that typically pertain to women are presented and taken in by the public.

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<sup>136</sup> Craigslist, *Fair Housing is Everyone's Right!*, Craigslist (April 29, 2022, 6:55 PM) <https://www.craigslist.org/about/FHA> (explaining what the Fair Housing Act is and why posts on their site need to be in compliance. Craigslist tells users what to look for in identifying potentially discriminatory posts as well as how to flag the post as in violation of the Fair Housing Act).