

3-2022

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Recommended Citation

Segall, Eric J. (2022) "Social Media Platforms and Free Expression: An Introduction," *Mercer Law Review*.
Vol. 73 : No. 2 , Article 4.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss2/4

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Social Media Platforms and Free Expression: An Introduction

Eric J. Segall*

On Friday, October 8, 2021, the Mercer Law Review hosted a virtual Symposium on “Social Media Platforms and Free Expression.” This important topic could not be timelier. With the Right calling for regulation of Facebook and Twitter in order to stop the removal of conservatives from their platforms,¹ to the direct effect of social media on our elections and our politics,² the worldwide spread of this technology has brought with it new and difficult legal issues regarding freedom of expression and social harms. Congratulations to the Mercer Law Review for addressing these controversial and complex questions.

Professor Gary Simson’s presentation suggested that the combination of this new technology regarding expression and the elasticity of free speech rules do not provide easy answers to the legality of government attempts to regulate the internet.³ Professor Simson summarized some of the grave dangers caused by the instant availability of expression of all forms on a worldwide basis. Two of the many problems posed by this new technology are the use of social media platforms by wrongdoers to cultivate hatred and negative stereotypes against vulnerable groups and the use of these platforms by many different organizations and people to confuse and mislead the public on

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1. See Mark Macarthy, *Justice Thomas Sends a Message on Social Media Regulation* (Apr. 9, 2021), BROOKINGS, <https://www.brookings.edu/blog/techtank/2021/04/09/justice-thomas-sends-a-message-on-social-media-regulation/>.

2. See Hayleigh Moore & Mia Hinckle, *Social Media’s Impact on the 2020 Presidential Election: The Good, the Bad, and the Ugly* (Nov. 3, 2020), UNIVERSITY OF MARYLAND, <https://spac.umd.edu/news/story/social-medias-impact-on-the-2020-presidential-election-the-good-the-bad-and-the-ugly>.

3. Gary Simson, *First Amendment Realism*, DIGITAL COMMONS, <https://guides.lawl.mercer.edu/mlr> (forthcoming).

important matters of public policy. Professor Simson argued that it is time for the Supreme Court of the United States to reconsider some of its more rigid free speech doctrines to accommodate the need to battle the negative aspects of social media while also maintaining a robust commitment to the freedoms of speech, expression, and association.

Professor RonNell Andersen Jones discussed the issues surrounding Justice Gorsuch and Thomas' recent suggestions that the Court reconsider the landmark case *New York Times v. Sullivan*.⁴ This decision required that public officials, and as held in subsequent opinions, public figures, must show actual malice or a reckless disregard of the truth before prevailing in a defamation suit. Professor Jones suggested that some critics of the case, other than the Justices, are concerned about the threats to democracy that have accompanied widespread social media disinformation.⁵ But Professor Jones argued that this threat is not a *Sullivan* problem and reconsideration of *Sullivan* is also not a solution. This is because much of the falsity on social media is not defamatory. In any event, to the extent social media publishes wholly invented, consciously distributed lies, that material already falls outside the scope of *Sullivan* protection. Additionally, it is not a good idea for our country to try and tackle the misinformation crisis through time-consuming, expensive, complicated libel litigation against the major disinformation purveyors, who are entities that are often anonymous and judgment-proof. Professor Jones concluded that reconsidering *Sullivan* would stifle important speech and materially harm the marketplace of ideas while not being an effective weapon against dangerous and false internet speech.

In this volume the first article, by Professor Jon Garon, focuses on social media and the rights and difficulties of minors.⁶ He astutely points out that young people today must navigate all the obstacles children have always faced plus this new interconnected world. Observing that teenagers, even before the pandemic, spend so much time both in school and at home online, he suggests that legal doctrine has not kept pace with technological advancements. His paper discusses many important issues regarding the legal rights of minors both inside and outside of school and suggests that we need to display more empathy towards our children and rethink how our institutions handle

4. 376 U.S. 254 (1964).

5. RonNell Andersen Jones, *Should N.Y. Times v. Sullivan be Reconsidered?*, DIGITAL COMMONS, <https://guides.lawl.mercer.edu/mlr> (forthcoming).

6. Jon Garon, *To Be Seen But Not Heard: How the Internet's Negative Impact on Minors' Constitutional Right to Privacy, Speech, and Autonomy Creates a Need for Empathy-by-Design*, *Lead Articles*, 73 MERCER L. REV. (forthcoming Mar. 2022).

unique issues involving our future generations. This article provides an excellent look into how social media positively and negatively affects our children's lives and how the law needs to deal with these perplexing issues.

Professor András Koltay, a legal scholar from Budapest, brings a valuable perspective to the Mercer Law Review Lead Articles Edition.⁷ He lays bare many of the differences between how other western Democracies handle free speech questions and the almost free-speech absolutism imposed on America by the Supreme Court. Pointing out that in many other countries social media platforms are required to take down certain forms of speech, such as defamation, when they are notified of such speech, he compares that legal regime to the law in America where these platforms are actually immunized for any damages caused by harmful speech on their websites. Politicians, legal scholars, judges, and all invested parties in our country should pay much closer attention than they are now doing to how other free societies balance freedom of expression with the harms social media platforms cause. Professor Koltay's excellent comparative article is a wonderful place to start.

Professor Seth Oranburg's article argues that Congress should repeal section 230 of the Communications Decency Act,⁸ and its immunity for social media platforms.⁹ This federal law provides immunity to Twitter, Facebook, and other social media companies from lawsuits for illegal speech on their websites. Focusing on the role social media played in facilitating the January 6, 2021 Capitol Riots, Professor Oranburg points out that these companies pick and choose the speech on their platforms through complicated algorithms that tend to emphasize negative news and also encourage people to divide into polarized groups. These giant corporations are also crowding out more responsible local media and other less divisive sources of news and discussions. The immunity created by § 230, according to Oranburg, increases these harms while providing little benefit to the American public. Recognizing that the complete removal of § 230 immunity might harm small companies that do in fact facilitate helpful debate and robust political discussion, Oranburg suggests limiting § 230 immunity

7. Andras Koltay, *The Protection of Freedom of Expression from Social Media Platforms, Lead Articles*, 73 MERCER L. REV. (forthcoming Mar. 2022).

8. 47 U.S.C. § 230 (2018).

9. Seth Oranburg, *Social Media and Democracy after the Capitol Riot, or, A Cautionary Tale of the Giant Goldfish, Lead Articles*, 73 MERCER L. REV. (forthcoming Mar. 2022).

to a smaller group of websites and maybe even only for not-for-profit corporations.

Professor Russell Weaver's article concerns the combination of § 230 immunity for social media platforms and their power to censor speech.¹⁰ He believes that allowing these websites to decide who gets to speak—while also providing them with immunity for that speech—is an unfortunate combination. Professor Weaver uses our long history of encouraging freedom of speech and expression to support his legal arguments. But Professor Weaver is also justifiably concerned with treating these speech producing companies as common carriers and requiring them to allow all speech on their platforms which might by itself violate the First Amendment.¹¹ His tentative and interesting suggestion is to give these companies a choice: accept § 230 immunity and allow all speech unless it is not protected by the First Amendment or, if they want censorial control, to give up their immunity.

Congratulations again to the Mercer Law Review, and the professors who presented and wrote about such thought-provoking articles on a difficult, sensitive, and timely topic. I have no doubt this Issue of the Mercer Law Review will provide much-needed help to the lawyers, judges, and politicians who are wrestling with the complexity of social medial regulation as well as anyone else interested in this important national and international debate.

10. Russel Weaver, *Social Media, Section 230, and Free Expression, Lead Articles*, 73 MERCER L. REV. (forthcoming Mar. 2022).

11. U.S. CONST. amend. I.