

Media Law Update, 2020

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Media Law Update
A JACC-CSUF Tradition since 1979

Presentation Overview:

Trends in Media Law, 2019-2020

The First Amendment and Public Opinion

The U.S. Supreme Court and Recent First Amendment Decisions

Notable Libel Cases

Notable Newsgathering and FOI Cases

Internet and Social Media Issues

Additional Reading/Watching

The First Amendment and Public Opinion

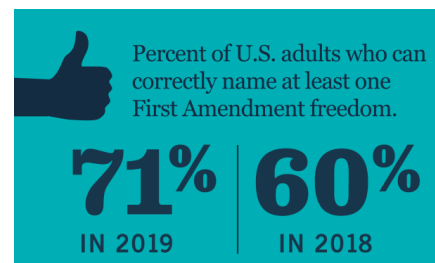
"State of the First Amendment"

- Conducted annually by the First Amendment Center of the Freedom Forum Institute

"Trusting the News Media in the Trump Era"

- Analysis of 50 studies by the Pew Research Center

"State of the First Amendment"



"State of the First Amendment" Survey

Percent of U.S. adults who can name the First Amendment freedom:



"State of the First Amendment" Survey

Students should be allowed to express their opinions on social media without worrying about being punished by teachers or school administrators for what they say.

72% AGREE | **27%** DISAGREE

"State of the First Amendment" Survey

Public institutions should revoke invitations to guest speakers when the speaker:

would incite violence or threaten public safety: **71%** AGREE
 is accused of sexual harassment: **59%** AGREE
 would provoke large-scale protests: **51%** AGREE
 is likely to offend: **46%** AGREE

"State of the First Amendment" Survey

76% AGREE

The spread of fake news and misinformation on the internet is a serious threat to our democracy.

"State of the First Amendment" Survey

72% AGREE

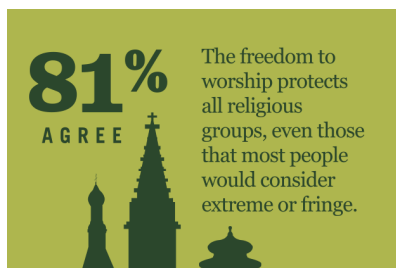
It is important for the news media to act as a government watchdog.

"State of the First Amendment" Survey

Public school students should be allowed to report on controversial issues in their student newspapers without the approval of school authorities.

64% AGREE
34% DISAGREE

"State of the First Amendment" Survey



"State of the First Amendment" Survey

Percent of U.S. adults who believe the freedoms of the First Amendment "go too far."

29%
IN 2019

23%
IN 2017 & 2018

"State of the First Amendment" Survey

"Trusting the News Media in the Trump Era"

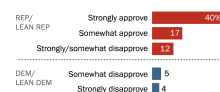
Republicans far more likely than Democrats to say journalists lack ethics
% of U.S. adults who say journalists have very low ethical standards

31% of Republican/Lean Rep

5% of Democrat/Lean Dem

... but Republicans who strongly approve of Trump stand out even more
% of U.S. adults who say journalists have very low ethical standards

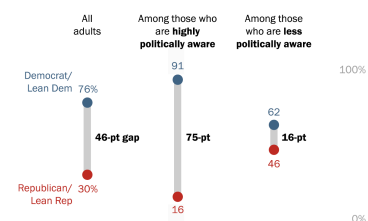
Among those who approve/disapprove of the way Trump is handling his job as president



Pew Research Center study

Highly engaged partisans are extremely polarized in their confidence in journalists

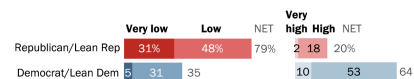
% of U.S. adults who have a great deal/fair amount of confidence that journalists will act in the best interests of the public



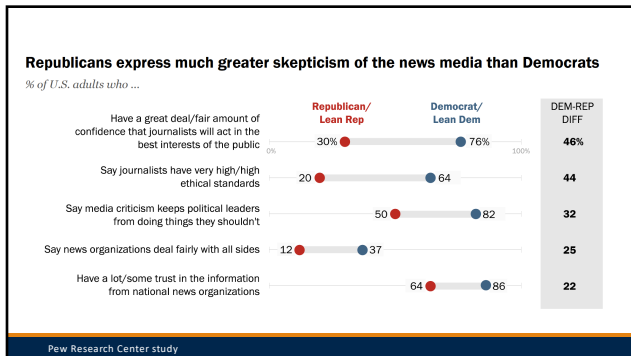
Pew Research Center study

Republicans are far more likely than Democrats to say that journalists lack ethical standards

% of U.S. adults who say journalists have ___ ethical standards



Pew Research Center study



Website/campaign

#ProtectPressFreedom

protectpressfreedom.org

A free, independent press has always been a cornerstone of democracy, but today it faces a wide range of threats — legal, financial, verbal, even physical. Collectively these threats chip away at the access to information on which we rely to understand the world around us, make daily decisions in our communities, and hold people in power accountable.

PROTECT YOUR RIGHT TO KNOW

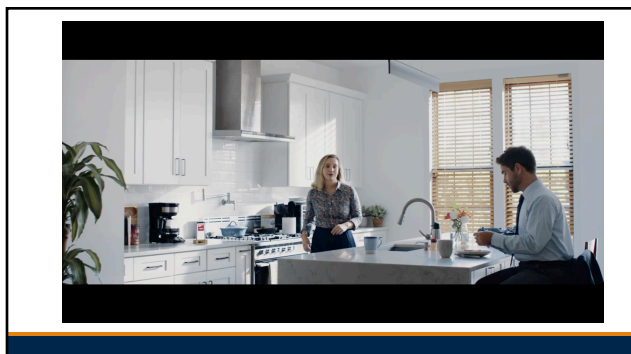
TEST YOUR PRESS FREEDOM KNOWLEDGE

UNDERSTAND THE THREATS

HOW WE GOT HERE

TAKING ACTION

IF OUR FREE PRESS IS SILENCED, AMERICAN FREEDOM NO LONGER EXISTS



1 FOR ALL

FREE SPEECH CENTER

at Middle Tennessee State University

1 For All Campaign



U.S. Supreme Court — 2019-2020 Term

Major Issues at SCOTUS in 2020

- **Access to President Trump's tax returns**
 - *Trump v. Vance* and *Trump v. Mazars USA, LLP* - Does separation of powers prohibit a county prosecutor for obtaining the president's tax records from a third party?
- **Abortion rights**
 - *June Medical Services LLC v. Gee* - Does a Louisiana law requiring abortion-performing doctors to have hospital-admitting privileges at local hospitals create an "undue burden" on a woman's right to an abortion?
- **LGBT rights and anti-discrimination**
 - *Altitude Express v. Zarda*, *Boock v. Clayton County*, and *R.G. & G.B. Harris Funeral Homes, Inc. v. EEOC* - Does Title VII of the Civil Rights Act of 1964 that prohibits discrimination "because of ... sex" apply to sexual orientation and gender identity?
- **DACA and immigration policy**
 - *Dept. of Homeland Security v. Regents of the University of California* - Reviewing whether Trump administration acted lawfully in repealing DACA policy
- **Consumer protection**
 - *Spillo Law LLC v. Consumer Financial Protection Bureau* - Is the authority of the CFPB, created in the Obama administration, a violation of separation of powers?



First Amendment and Media Cases, Last Term

- FOIA exemptions expanded (*Food Marketing Institute v. Argus Leader Media*)
- Ban on "immoral" or "scandalous" trademarks struck down (*Iancu v. Brunetti*)
- Narrow statutory interpretation applied to resolve circuits splits on copyright questions (*Fourth Estate Public Benefit Corp v. Wall-Street.com* and *Rimini Street Inc. v. Oracle USA Inc.*)
- Establishment clause doesn't preclude historical monuments with religious overtones (*American Legion v. American Humanist Association*)
- Retaliatory arrest: probable cause preempts most retaliatory arrest claims (*Nieves v. Bartlett*)

FOIA: Food Marketing Institute v. Argus Leader Media (2019)

- Issue: What is the meaning of "confidential" in exemption 4 of the Freedom of Information Act?
- Exemption 4 of FOIA allows the government to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential."
- The Sioux Falls Argus Leader filed a FOI request for records showing how much businesses received in food stamps
- the government denied the request, saying the data was exempt from disclosure under exemption 4 of FOIA
- Federal appellate circuits have split on the meaning of "confidential" and the scope of exemption 4.
- SCOTUS 6-3 ruled in favor of non-disclosure
- "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4."

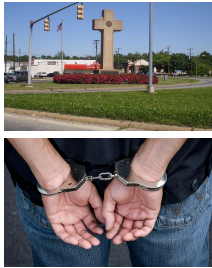
Trademarks: Iancu v. Brunetti (2019)

- SCOTUS ruled 9-0 the Lanham Act's ban on "immoral" or "scandalous" trademarks is facially unconstitutional under the First Amendment.
- Viewpoint discrimination not allowed under First Amendment, Justice Kagan writes for the majority
- The case involves the denial of a trademark to the streetwear brand of clothing called "FUCT," created by Los Angeles designer Erik Brunetti in the 1990s.



Copyright law and statutory interpretation

- *Fourth Estate Public Benefit Corp. v. Wall-Street.com* (2019)
- When has registration of a copyright "been made" under statute?
- While copyright law does not require one to register for a copyright with the federal copyright office to obtain a copyright, a copyright must be registered in order to file a copyright infringement lawsuit.
- Federal circuits have split on whether a claim "has been made" by the act of filing, or until the office has acted on application.
- SCOTUS ruled unanimously that copyright office must act on registration before a lawsuit can proceed
- Effect may be to limit or delay filing of some copyright lawsuits, or encourage holders to file for registration
- *Rimini Street Inc. v. Oracle USA Inc.* (2019)
- SCOTUS ruled unanimously to narrowly construe "full costs" in statute
- Dispute over what costs the winning party is able to recover.
- Decision resolved conflicts between two separate parts of the copyright statute whose interpretations have varied among the federal circuits.



Other 1A cases last term

Freedom From Religion: *American Legion v. American Humanist Association*

- Historical monuments with secular meanings are not not unconstitutional expression of religious support

Retaliatory Arrest: *Nieves v. Bartlett*

- Probable cause defeats a First Amendment retaliatory-arrest claim except where similarly situated individuals were not arrested

Upcoming free speech cases

[Carney v. Adams](#) – Does a Delaware law that limits the number of judges based on political parties to its three highest courts violate the First Amendment rights of a citizen who seeks office without regard to his political affiliation?

[Thompson v. Hebdon](#) - The Court without argument vacated and remanded a Ninth Circuit Court of Appeals decision that upheld Alaska's relatively low limits on individual campaign contributions to candidates.

[Barr v. American Association of Political Consultants](#) - Does an exception from a ban on automated phone calls for government debt collectors violate the First Amendment?

Upcoming copyright and trademark cases

[Google v. Oracle](#) - what constitutes fair use on the internet? Oracle accused Google of illegally copying thousands of lines of code for its Android operating system. The Trump administration is siding with Oracle, while most tech companies support Google.

[U.S. Patent and Trademark Office v. Booking.com B.V.](#) - Is the addition of a generic top-level domain (".com") to an otherwise generic term a protectable trademark?

Upcoming religion cases

[Espinoza v. Montana](#) – Does Montana's ban on using state-funded scholarships for religious schools violate the First and/or Fourteenth Amendments?

[Our Lady of Guadalupe School v. Morrissey-Berru](#) and [St. James School v. Biel](#) – Do the First Amendment's religious classes prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions?

Some notable current libel cases

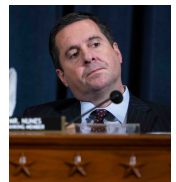
CA congressman files many libel lawsuits in 2019

•March 2019, Nunes filed a \$250 million lawsuit in Henrico County Circuit Court in Virginia against Twitter and several users, including Republican consultant Liz Mair and two anonymous parody accounts with the usernames "Devin Nunes' cow" and "Devin Nunes' Mom."

•April 2019, Nunes filed \$150 million lawsuit in Albemarle County Circuit Court in Virginia against The McClatchy Company, owner of the *Fresno Bee*, for a story in Nunes' hometown newspaper about investors in a winery he partly owned.

•September 2019 Nunes sued Hearst Magazines and journalist Ryan Lizza for \$75 million in Iowa for an allegedly defamatory story published in *Esquire* magazine in 2018 about Nunes' family farm.

•December 2019, Nunes filed a \$435 million lawsuit against CNN in federal court in the Eastern District of Virginia, over a story about the Ukraine scandal that led to President Trump's impeachment.



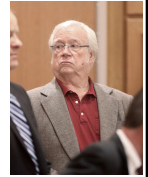
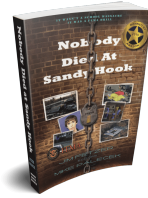


Sandy Hook parents fight conspiracy theories

- 20 children and 6 adults killed in mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut in 2012
- Conspiracy theories flourished online and in alt-right media
- Families filed defamation lawsuits in response to conspiracy theories saying mass shooting was faked

Jury awards \$450,000 to Sandy Hook father

- Authors James Fetzer and Michael Palecek, *Nobody Died at Sandy Hook: It was a FEMA Drill to Promote Gun Control*
- Book claimed Leonard Pozner, father of youngest victim, was complicit and faked son's birth certificate
- Pozner sued; Publisher and Palecek settled
- June 2019: judge finds Fetzer, retired professor, liable for defamation
- October 2019: jury awards \$450,000 in damages



Libel lawsuits against Alex Jones continuing

- Several families suing Alex Jones, the host of the InfoWars show and website, for libel, in Texas and Connecticut courts
- "Jones knowingly peddled false and malicious narratives in order to make money at the expense of the Sandy Hook families' grief, safety and security," attorney said.
- In December 2019, Jones was ordered to pay \$100,000 in fees for failing to provide witnesses and documents in the Texas case.



NY high court to rule in Trump libel case



- Summer Zervos, former Apprentice contestant, alleges Trump made numerous unwanted sexual advances on her in 2007 in his NY office and Beverly Hills Hotel in LA
- While running for president, Trump said allegations against him "phony stories," "totally false," and "fiction"
- Zervos sued for libel, saying Trump's denials amounted to defamation against her
- Case is proceeding in NY state courts
 - Motions to dismiss rejected
- In January 2020, NY Court of Appeals (high court in NY) agreed to hear appeal
 - Trump had been facing Jan. 31 deadline for deposition

Jury finds Oberlin College libeled bakery

- Oberlin College hit with an initial \$44 million libel judgment
- Incident at Gibson's Bakery, employee suspected customer was using fake ID, spotted bottles of wine hidden under coat; customer later pled guilty to several criminal charges
- The customer was a black student at Oberlin, and the incident sparked protests against the bakery and accusations of racism
- Bakery and two owners sued, accusing Oberlin of stoking false racism allegations.
- Jury sided with the bakery: \$11 million in compensatory damages and \$33 million in punitive damages.
- The judgment was reduced to \$31 million because of legal caps, both sides appealing



Journalist's home raided



- San Francisco police raided home of freelance journalist Bryan Carmody in May 2019.
- Police obtained a search warrant for evidence of who leaked an autopsy report about public defender Jeff Adachi.
- Carmody spent 6 hours in handcuffs while police searched home and confiscated electronic devices.
- After outcry and lawyers, police apologized and search warrants quashed.
- The Reporters Committee for Freedom of the Press has filed FOIA lawsuit to obtain records showing why the FBI was involved.
- Experts said the raid appeared to violate California's shield law, which provides robust protection for journalists' source information.

Access to police records

- CA Legislature passed two landmark police transparency laws effective Jan. 1, 2019.
 - Senate Bill 1421 amended the state's Public Records Act to require disclosure of records when officers are involved in shootings, use of force or sexual assault.
 - Assembly Bill 748 requires the release of police body camera footage within 45 days of an incident unless the release would interfere with an ongoing investigation.
- Some law enforcement agencies refused to turn over records, and others sued over whether the laws were retroactive, applying to cases before Jan. 1, 2019.
- Jan. 2020: *Becerra v. Superior Court* - AG refused to turn over local police records in the possession of his office. CA appeals court upheld a lower court ruling ordering release of records



Judge halts WH press pass suspension

- Trump administration lost initial legal battle over press pass suspension for Playboy correspondent Brian Karem.
- July 2019: Karem suspended after dispute with former WH aide Sebastian Gorka
- Karem v. Trump*: Sept. 2019, federal district court in Washington D.C., granted motion for a preliminary injunction ordering Karem's press pass be restored.
 - Judge said ban was not based on a fair notice of standards of professional behavior and violated Karem's due process rights.
 - Trump administration appealing; Jan. 2020, the Reporters Committee and 44 media organizations filed an amicus curiae brief
- Similar to 2018 case *CNN v. Trump*, federal judge ruled that the WH failed to provide notice or an appeal process when it banned Jim Acosta from the White House; WH restored press pass and CNN dropped lawsuit.



Journalists mandated reporters under Title IX?

- August 2019, NPR Illinois and Pro Publica published stories critical of how the University of Illinois at Urbana-Champaign protected professors accused of sexual misconduct, included reporting from victims.
- University informed NPR Illinois that because NPR Illinois's broadcasting license is owned by the university, reporters working for the station were considered mandated reporters under the federal law Title IX
 - University: journalists must report victim accounts of sexual misconduct to state officials.
- Reporters Committee for Freedom of the Press said university's position "undermines both freedom of the press and campus safety" and violates Illinois's reporter's privilege statute.



Online extremism

- October 2019: House Homeland Security Committee unanimously approved the National Commission on Online Platforms and Homeland Security Act (H.R. 4782)
 - creating a bipartisan commission to study how extremists commit violence and terror using online platforms and make recommendations for legislation.
 - Incidents including the live-streaming of a mass shooting in Christchurch, New Zealand were cited by lawmakers in voting for the bill.
- Initial feedback from civil liberties and privacy groups have suggested that most proposals will be opposed on First Amendment grounds.



Calls to revise Section 230

- Calls to revise Section 230 as gov't scrutinizes social media companies
- Section 230 of Communications Decency Act:
 - Passed in 1996; gives internet companies immunity for content posted by users and right to moderate content without being deemed a "publisher"
- March 2018, Congress passed FOSTA-SESTA, amending Section 230, to exempt websites that facilitate sex trafficking.
 - "Ultimately, I fear this bill will set off a chain reaction that leads Congress to cut away more categories of behavior from Section 230, and dismantle the legal framework that's given the United States the position it holds as a tech-economy superpower," said Oregon Senator Ron Wyden
 - Several lawsuits are challenging whether FOSTA-SESTA violates the First Amendment.
- Democratic Presidential Candidate Joe Biden in January 2020 re: Section 230: "It should be revoked."



Data scrapping and privacy

- hiQ Labs v. LinkedIn*
 - September 2019: Ninth Circuit Court of Appeals panel upheld preliminary injunction in support of company that scraped publicly accessible data from LinkedIn, despite the practice being prohibited in LinkedIn's user agreement.
 - Court ruled the practice did not violate the Computer Fraud and Abuse Act, the main federal computer crime statute.
 - The CFAA is a growing concern for online users, because it is used to prosecute hackers and provides a civil cause of action for computer activities defined as "without authorization."
 - Federal appellate circuits differ on how broadly the CFAA applies to activities that can be described as involving unauthorized uses of websites.
 - Key factor is that the data scrapped came from public LinkedIn profiles, not information that requires a log-in to access.
- Described as "hugely important" decision



California data privacy laws take effect

- California Consumer Privacy Act grants consumers right to know what info websites collect and share about them.
- Citizens can also bar websites from selling data about them
- CA Legislature passed the law in part to avoid a ballot measure that could have imposed even stricter data privacy regulations on the tech industry, which is based in the state's Silicon Valley region.
- Law took effect Jan. 1, 2020

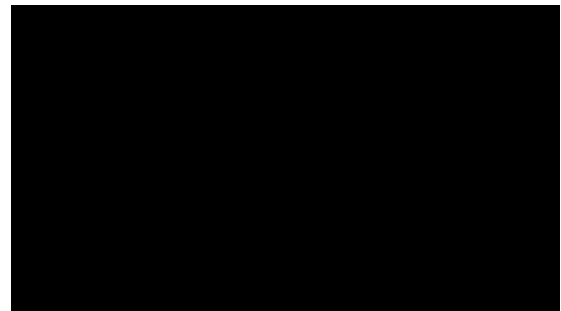


Privacy ballot measure in 2020

- Enough signatures to qualify for November 2020 ballot
- Funded by SF real estate developer Alastair Mactaggart
 - Cocktail party with tech engineer: 'If people just knew how much we knew about them, they'd be really worried'
- Provisions include:
 - Citizens can prevent companies from selling "sensitive personal information"
 - Race, health, SS #, GPS locations, financial data
 - Children's data restrictions
 - Opt-in rather than opt-out for info on kids under 16
 - Stiffer penalties for copies that wrongly share and sell data about children
 - Require disclosure about how algorithms target consumers with specific ads
 - Create a new state agency field questions and complaints

Rise of deepfakes

- Deepfakes -- added to the Collins Dictionary in 2019 -- are digitally altered videos depicting real people doing and saying things they did not do.
- The rise of deepfakes in mass communications comes as the "functioning of the marketplace of ideas is under serious strain" with the decline of traditional media and as "falsehoods spread like wildfire on social networks," says law professor Danielle Keats Citron.
- "Creators of deep fakes count on us to rely on what our eyes and ears are telling us, and therein lies the danger ... Under assault will be reputations, political discourse, elections, journalism, national security, and truth as the foundation of democracy," Citron says.



CA Legislature passes ban on deepfakes

"Deepfakes distort the truth, making it difficult to distinguish between legitimate and fake media and more likely that people will accept content that aligns with their views," says Representative Marc Berman (D-Palo Alto)

Assembly Bill 730 prohibits the distribution of "materially deceptive audio or visual material" that seek to injure candidates and sway voters within 60 days of an election

- Must be done with actual malice and "with the intent to injure a candidate's reputation or to deceive" voters
- Videos must appear to be authentic and cause people to have "fundamentally different understanding" than original
- Exemptions for materials identified as manipulated, news, satire, parody

Assembly Bill 602, provides a cause of action for victims of pornographic deepfakes.

Is the deepfakes ban constitutional?

U.S. v. Alvarez (2012)

- SCOTUS struck down Stolen Valor Act, plurality said law was content-based regulation not able to withstand strict scrutiny review
- "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth," Justice Kennedy wrote, referencing George Orwell's 1984.
- "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth," Kennedy wrote.

Alvarez suggests CA's AB 730 will be difficult to reconcile with First Amendment principles; CA would have to show law is narrowly tailored to achieve a compelling gov't interest.



Further
reading

*Notable
books
published
in 2019*

Thank you!

This presentation is available at

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