

Media Law Update, 2020

*Journalism Association of Community Colleges
Faculty Midwinter Conference
Feb. 2, 2020*

Jason M. Shepard, Ph.D.
Chair and Professor, Department of Communications
California State University Fullerton
Web: jasonmshepard.com | Twitter: [@jasonmshepard](https://twitter.com/jasonmshepard)

The First Amendment and Public Opinion

Public knowledge and support of the First Amendment showed mixed results in the 2019 [“State the First Amendment Survey”](#) conducted annually by the First Amendment Center of the Freedom Forum Institute. 71% of respondents were able to correctly name at least one First Amendment right, up from 60% in 2018. Only 1% of respondents were able to correctly identify all five First Amendment freedoms. The study found many misconceptions, including that the First Amendment includes a right to bear arms (it does not) and that social media companies violate the First Amendment when they remove objectionable content. 29% of respondents said the First Amendment goes too far in protecting offensive speech, up from 23% in 2018. “Overall, the results of 2019’s survey showed continued efforts to educate the public about its First Amendment freedoms are critical, and that increased awareness can result in increased public support,” the study concluded.

As it relates to journalism and public opinion, political party affiliation is a key indicator of distrust of the news media, according to 2019 analysis by the Pew Research Center of more than 50 research studies. Republicans consistently express far greater skepticism of the news media and their motives than Democrats, according to the study, titled [“Trusting the News Media in the Trump Era.”](#) The report found that the more strongly an individual supported President Trump, the more likely they were to hold hostile views of the news media. “About three-in-ten Republicans and Republican-leaning independents (31%) say journalists have *very low* ethical standards, roughly six times the 5% of Democrats and Democratic leaners who say this. Trump’s strongest approvers, though, express even greater suspicion: 40% of Republicans who strongly approve of Trump’s job performance say journalists’ ethics are that low,” the study found.

In November 2019, the Reporters Committee for Freedom of the Press and the Committee to Protect Journalists, along with more than 40 media, technology and nonprofit partners, launched the [Protect Press Freedom campaign and website](#). “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,” wrote Bruce Brown, executive director of Reporters of Committee for Freedom of the press. “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.” The project includes a website of resources and a social media campaign using #protectpressfreedom.

SCOTUS First Amendment Cases

The Supreme Court of the United States decided several First Amendment and media-related cases in 2019.

FOIA: In [Food Marketing Institute v. Argus Leader Media](#), the Supreme Court issued a decision expanding the scope of documents that can be withheld from public disclosure under the federal Freedom of Information Act (FOIA). The case involved a FOIA request from the *Sioux Falls Argus Leader* for records showing how much money businesses received in food stamp reimbursements. The government denied the request, saying the data was exempt from disclosure under exemption 4 of FOIA, which allows the government to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” Federal appellate circuits have split on the meaning of “confidential” and the scope of exemption 4. In a 6-3 ruling, the Supreme Court said that information is confidential for purposes of the statute when the information is “both customarily and actually treated as private” by its owner and provided to the government under an assurance of privacy. The *Argus Leader* [called the decision](#) a “shattering blow to government transparency.”

Trademarks: In [Iancu v. Brunetti](#), the Supreme Court ruled that the Lanham Act’s ban on “immoral” or “scandalous” trademarks is facially unconstitutional under the First Amendment. The case involved the denial of a trademark to the streetwear brand of clothing called “Fuct,” [created by Los Angeles designer Erik Brunetti](#) in the 1990s. Such a ban is unconstitutional viewpoint discrimination, the Court ruled unanimously. Justice Kagan wrote for the court’s majority opinion, while several justices wrote separate concurring and dissenting in part opinions disagreeing on whether to act broadly by striking down the statute or more narrowly by limiting its scope.

Copyright law: The Supreme Court ruled in two copyright cases on narrow questions of statutory interpretation in which there were disputes among federal circuits. In [Fourth Estate Public Benefit Corp. v. Wall-Street.com](#), the Court ruled that a copyright owner cannot file an infringement lawsuit until the copyright office has acted on its registration application. 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 copyright registration “has been made” by the act of filing, or after the office has acted on the application. On SCOTUSblog.com, Jessica Litman [writes](#), “The opinion resolves a longstanding circuit split, but the practical implications may be modest. The decision may encourage some copyright owners to register their claims promptly, may reduce forum shopping, may delay some infringement suits for several months and may deter plaintiffs from including peripheral copyright infringement claims in suits over other disputes in order to brandish the threat of large copyright damage awards.” In [Rimini Street Inc. v. Oracle USA Inc.](#), the Supreme Court limited the amount of damages a winning party could recover as “full costs” as defined by the statute. The decision resolved potential conflicts between two separate parts of the copyright statute whose interpretations have varied among the federal circuits. The case involved an attempt by Oracle, the prevailing party, to recover \$13 million in “nontaxable costs” covering expenses for expert witnesses, discovery and jury consulting, in addition to other allowable costs.

Freedom from religion: In [The American Legion v. American Humanist Association](#), the Supreme Court ruled 7-2 that a 93-year-old government-funded memorial of World War I shaped like a cross does not violate the Establishment Clause of the First Amendment. The Court’s majority

ruled that historical monuments on public property with secular meanings have a presumption of constitutionality, even if they have religious overtones.

Retaliatory arrest: In [Nieves v. Bartlett](#), the Court ruled that a citizen did not have a valid First Amendment retaliatory-arrest claim because police had probable cause when they arrested him. [The case involves the arrest of an Alaskan man](#) at a festival who claims the officers intended to suppress his protected speech by arresting him. Police said the man, Russell P. Bartlett, was drunk, yelling at police and refused to identify himself. Because the case was the third since 2006 to reach the Court raising similar questions, the Court's opinion provides some clarity to lower courts. Writing for the majority, Justice Roberts said plaintiffs must prove the absence of probable cause in order to proceed with a First Amendment retaliation legal claim. Roberts created a "narrow qualification" in cases where someone was arrested when otherwise similarly situated individuals were not.

In the current October 2019 term, the Supreme Court accepted the following cases with media law and First Amendment implications, with decisions expected by June 2020:

1. **Political speech:** [Carney v. Adams](#) – Does a Delaware law that limits the number of judges to its three highest courts based on political party affiliation violate the First Amendment rights of a citizen who seeks office without regard to his political affiliation?
2. **Campaign contributions:** [Thompson v. Hebdon](#) – In November 2019, 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.
3. **Prior restraints:** [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?
4. **Establishment of religion/equal protection:** [Espinoza v. Montana](#) – Does Montana's ban on using state-funded scholarships for religious schools violate the First and/or Fourteenth Amendments?
5. **Freedom of religion:** [Our Lady of Guadalupe School v. Morrissey-Berru](#) and [St. James School v. Biel](#) – Do the First Amendment's religious clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions?
6. **Copyright:** [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.
7. **Trademarks:** [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?

Notable libel cases

Congressman Devin Nunes files multiple libel lawsuits: California congressman Devin Nunes has [filed several lawsuits](#) in 2019 alleging defamation. He filed several in Virginia, in what critics say is inappropriate “forum shopping” and “libel tourism.” In 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 user names “Devin Nunes’ cow” and “Devin Nunes’ Mom.” In April 2019, Nunes filed a separate \$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. And in 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 at the heart of President Trump’s impeachment. Thus far, judges in Virginia have not dismissed the cases, and they have ruled that the lawsuits meet basic jurisdiction requirements. Critics have accused the congressman of “forum shopping” and “libel tourism” for choosing to file in Virginia, which has a weak “anti-SLAPP” law (SLAPP stands for Strategic Lawsuits Against Public Participation.) If the lawsuits were filed in California, where Nunes and the defendants live, he might be required to pay the defendant’s legal bills and other damages if the lawsuits are later deemed to be without merit and aimed at chilling the defendant’s free speech rights. Nunes filed yet another lawsuit against the media in 2019, when in September 2019 [he sued Hearst Magazines and journalist Ryan Lizza](#) for \$75 million for an allegedly defamatory story published in *Esquire* magazine in 2018 about Nunes’ family farm. The lawsuit was filed in Iowa, a state without an anti-SLAPP statute.

Sandy Hook parents win defamation lawsuit against conspiracy theorists: Families of the 20 children and six adults who were killed in a mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut in 2012, have filed lawsuits against major peddlers of a conspiracy theory that purports the shooting never happened. In October 2019, a Wisconsin jury [awarded \\$450,000 in damages](#) to Leonard Pozner, whose son Noah was killed in the shooting, against author James Fetzer, for defamation contained in Fetzer’s book, *Nobody Died at Sandy Hook: It was a FEMA Drill to Promote Gun Control*. Separately, families are suing Alex Jones, the host of the InfoWars show and website, for libel in lawsuits in Connecticut and Texas. For years, Jones claimed the Sandy Hook shooting was faked by actors. Viewers of InfoWars have harassed and threatened the Sandy Hook families. In December 2019, [Jones was ordered to pay \\$100,000 in fees](#) for failing to provide witnesses and documents in the Texas case.

Zervos v. Trump: New York’s highest court, the Court of Appeals, will hear [President Donald J. Trump’s appeal to dismiss a libel lawsuit](#) against him brought by former Apprentice contestant Summer Zervos. In January 2020, the high court agreed to hear Trump’s appeal within weeks of a deadline for him to submit to a deposition. In March 2019, New York’s intermediate-level appeals court ruled that the Supremacy Clause of the U.S. Constitution does not provide immunity for the president in the case. Zervos has said Trump made unwanted sexual advances on her at his office in New York and at the Beverly Hills Hotel in Los Angeles in 2007. Zervos sued Trump following his repeated comments denying the allegations and calling the woman making them “liars.” Lower court judges have said Zervos demonstrated a reasonable case that Trump’s repeated statements calling the allegations “phony stories,” “totally false,” and “fiction” are not protected statements of opinion or rhetorical hyperbole and therefore are actionable statements in the defamation context. Trump is also [facing libel lawsuits from other women](#) who have accused him of sexual misconduct, including the writer E. Jean Carroll.

Jury awards \$44 million in damages against Oberlin College: Oberlin College, a private liberal arts college in Ohio, was hit with an initial \$44 million judgment in June 2019 after [losing a defamation lawsuit](#) filed by a local bakery. The case began after an incident at Gibson's Bakery, a popular local store, in which an employee suspected a customer was using a fake ID, and then spotted bottles of wine hidden under the customer's coat. The clerk chased the customer out of the store and tackled him. The customer later pled guilty to several criminal charges, according to news reports. The customer was a black student at Oberlin, and the incident sparked protests against the bakery and accusations of racism. The bakery and two of its owners sued the college, accusing it and its administrators of stoking the racism allegations. A jury sided with the bakery, awarding \$11 million in compensatory damages and \$33 million in punitive damages. The judgment was [reduced to \\$31 million](#) because of legal caps, according to news reports. Oberlin College planned to [appeal](#) the judgment, and the bakery planned to [appeal](#) the judge's reduction of damages.

Notable newsgathering and FOI cases

Journalist's home raided: In May 2019, San Francisco city police used a sledgehammer to break into the front gate of the home of freelance journalist Bryan Carmody. The police had obtained search warrants for Carmody's home looking for evidence of who leaked an autopsy report to Carmody about the death of a public defender. Carmody said he spent six hours in handcuffs while [police searched his home](#) and confiscated computers, tablets and cellphones. Five different judges approved the search warrants, which were later quashed after lawyers at Davis Wright Tremaine sought to get them unsealed. San Francisco's police chief [apologized for the raid](#), admitting his department failed to appropriately consider Carmody's status as a journalist in its investigation. The Reporters Committee for Freedom of the Press [has filed a Freedom of Information Act lawsuit](#) to obtain records showing why the FBI was present during the search. Experts said the raid appeared to violate California's shield law, which provides robust protection for journalists' source information.

Access to police misconduct records: Journalists continue to litigate cases over disclosure of police misconduct records in wake of California's new law mandating release of those records. The state Legislature [passed two landmark police transparency laws](#) that went into effect 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. The Attorney General, Xavier Becerra, refused to turn over local police records in the possession of his office. In January 2020, in [Becerra v. Superior Court](#), a state appeals court upheld a lower court ruling ordering the Department to release the records in its possession.

Judge stops White House press pass suspension: The Trump administration lost an initial legal battle over its suspension of a White House press pass for journalist Brian Karem, who works as a correspondent for *Playboy*. In July, the Trump administration suspended Karem's credentials after he got into a dispute with former Trump aide Sebastian Gorka at an event outside the White House. Karem sued. In September 2019, a federal district court in Washington D.C., in [Karem v. Trump](#) granted Karem's motion for a preliminary injunction ordering Karem's press pass be restored. The judge said the ban was not based on a fair notice of standards of professional behavior and therefore violated Karem's due process rights as a journalist. The case is continuing in the courts, and the Trump administration appealed the preliminary injunction. In January 2020, the Reporters Committee and 44 media organizations [filed an amicus curiae brief](#) with the Court of Appeals for the

District of Columbia Circuit in support of Karem. In 2018, CNN won a legal battle against the White House after officials revoked press pass credentials for CNN reporter Jim Acosta. In *CNN v. Trump*, a federal judge ruled that the White House failed to provide notice or an appeal process when it banned Acosta from the White House grounds after he provoked Trump's ire at a press conference. The White House restored Acosta's press pass after the judge's initial ruling, and CNN dropped the lawsuit.

Journalists as mandated reporters under Title IX? Journalists working for NPR in Illinois faced the prospect of sanctions for not reporting to state officials information they received from sources about sexual misconduct at the University of Illinois. In 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. The reporting included reports from victims, and as a result, the 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, and therefore were required to report victim accounts of sexual misconduct to state officials. The Reporters Committee for Freedom of the press [wrote in a letter to the university](#) that the university's position "undermines both freedom of the press and campus safety" and violates Illinois's reporter's privilege statute.

Notable Internet and Social Media Issues

Calls to revise Section 230: Calls to revise one of the most important laws regulating the internet continue to grow louder, including calls for government regulation of social media companies such as Facebook, Twitter and YouTube. In 1996, Congress passed Section 230 of the Communications Decency Act, which provides both a "shield" and a "sword" for internet companies, giving them broad immunity for content posted by users on their websites and the ability to moderate content without being deemed a "publisher" of material on their site posted by others. The law was passed in response to lower court decisions that found internet companies financially responsible for lawsuits over content posted by their users. Lawmakers feared that legal liability would hamper innovation. Over the years, Section 230 has provided robust immunity for internet companies. Now, lawmakers worry the law incentivizes harmful content. In March 2018, Congress passed two laws, FOSTA-SESTA, that amended Section 230 to provide exemptions from liability for websites that facilitated sex trafficking. At the time, Oregon Senator Ron Wyden [said](#), "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." [Several lawsuits are challenging](#) whether FOSTA-SESTA violates the First Amendment.

Online extremism legislation debated: The House of Representatives in 2019 debated whether and how to combat growing political extremism on the internet. In October 2019, the Homeland Security Committee [unanimously approved](#) the National Commission on Online Platforms and Homeland Security Act (H.R. 4782), which would create 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. "The tension highlights the enormous challenges facing lawmakers concerned about violence inspired by white supremacist attitudes, which are often incubated and spread online. While there are several fringe networks known as breeding grounds for neo-Nazis and white extremists, many of the top proponents of those attitudes maintain profiles on top social networks like Facebook and Twitter.

And critics say the Silicon Valley giants reward inflammatory content through an emphasis on attracting attention and interaction,” [The Hill reported](#) in October.

Data scrapping and privacy: In September 2019, a panel of the Ninth Circuit Court of Appeals issued what was described as a [“hugely important” decision](#) involving data collection on the internet. In [hiQ Labs v. LinkedIn](#), the Ninth Circuit upheld a district court’s grant of a preliminary injunction in favor of a company that scraped publicly accessible data from LinkedIn, despite the practice being prohibited in LinkedIn’s user agreement. The 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. “(T)he court’s reasoning in *hiQ* is a promising development for journalists and scrapers, mainly because the court seemed to narrow the interpretation of ‘without authorization,’” [writes](#) the Reporters Committee for Freedom of the Press. One key factor in the *hiQ Labs* ruling is that the data scrapped came from public LinkedIn profiles, not information that requires a log-in to access. “If, under *hiQ*, the test is whether the information is password-gated or otherwise restricted, versus open to all on the public internet, that seems to be a workable bright line in an area of law sorely lacking in them,” the Reporters Committee wrote.

California new data privacy law takes effect: The nation’s toughest data privacy law, the California Consumer Privacy Act of 2018, went into law on January 1, 2020. The law grants consumers a right to know what information websites collect and share about them. Citizens can also bar websites from selling data about them, although websites can charge more for services to citizens who don’t want their data shared. The California 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. However, advocates are pushing for a [2020 ballot measure](#) to expand the statute by adding more measures to protect the sale of information about “sensitive personal information,” including data on a person’s race, health, and recent locations, and also provide greater protections for children’s data.

California Legislature passes ban on deepfakes: California lawmakers are trying to combat falsehoods from playing a major role electioneering communications by [passing a law banning deepfake videos](#). 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, while a second bill, Assembly Bill 602, provides a cause of action for victims of pornographic deepfakes. Experts say fake sex videos, in which people’s faces are digitally transposed in sex scenes, comprise the majority of deepfakes to date. Both bills were signed into law by Gov. Gavin Newsom and took effect Jan. 1, 2020. Experts say that technological advances make it easier to produce sophisticated deepfakes. Because people tend to believe audio and video recordings, experts say deepfakes are more pernicious than other types of disinformation. The new law prohibits the distribution of “materially deceptive audio or visual media” done with “actual malice” and “with the intent to injure a candidate’s reputation or to deceive a voter in voting for or against a candidate.” The law also requires the videos must falsely appear to be authentic and that they cause reasonable people to have a “fundamentally different understanding” than the original, unedited footage. The law exempts materials that are identified as having been manipulated, and exempts news organizations and videos that constitute satire or parody. Candidates subject to deepfakes can seek injunctions barring distribution, and they can seek damages, attorney’s fees, court costs.

Additional Readings/Watching:

Notable books published in 2019:

- Henry Reichman, *The Future of Academic Freedom* (2019)
- Stanley Fish, *The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth and Donald Trump* (2019)
- Lee C. Bollinger and Geoffrey R. Stone, *The Free Speech Century* (2019)
- Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (2019)
- Neal Devins and Lawrence Baum, *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (2019)
- Stephen J.A. Ward, *Ethical Journalism in a Populist Age: The Democratically Engaged Journalist* (2019)
- David E. McGraw, *Truth in Our Times: Inside the Fight for Press Freedom in the Age of Alternative Facts* (2019)

Referenced studies:

- [“State of the First Amendment,”](#) First Amendment Center of the Freedom Forum Institute.
- [“Trusting the News Media in the Trump Era,”](#) Pew Research Center.

“Online Legalities” columns

- [“Deepfakes ban a puzzler,”](#) *California Publisher*, Winter 2020.
- [“As California privacy law takes effect, advocates seek more protections,”](#) *California Publisher*, Fall 2019.
- [“The public has a right to know about police misconduct,”](#) *California Publisher*, Summer 2019.
- [“Libel lawsuits targeting vile conspiracy theories,”](#) *California Publisher*, Spring 2019.

NOTE: To access the hyperlinks referenced in this document, an electronic version of this file is available at www.jasonmshepard.com/medialawupdate.