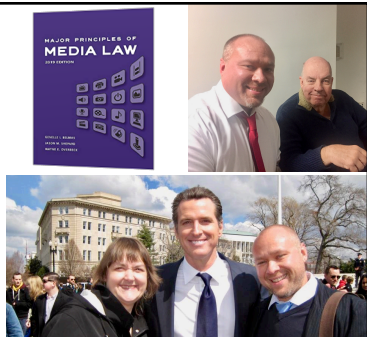




Media Law Update, 2019

Jason M. Shepard, Ph.D.
Chair, Department Of Communications, Cal State Fullerton
JACC Faculty Midwinter Conference, Feb. 23, 2019

Media Law Update



A JACC-CSUF Tradition since 1979



2019: 100th anniversary of modern FA

Espionage Act of 1917 and Sedition Act of 1918

- Congress suppresses "radical" expression during "national hysteria" over WWI

Schenck v. U.S., 1919

- Holmes' opinion: "The question is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree."

Frohwerk v. U.S. and Debs v. U.S., 1919

- Upheld convictions of anti-war speakers/writers

Abrams v. U.S., 1919

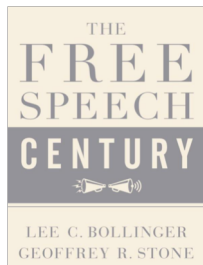
- Holmes and Brandeis dissent, reject "bad tendency" test: "time has upset many fighting faiths ..."



Geoffrey R. Stone
Edward H. Levi Distinguished Service Professor
University of Chicago

Significance of 1919 cases

- greater attention to costs and dangers of speech suppression
- Judges gave deeper analysis about free speech
- Showed power of courts to protect civil liberties
- Brandeis and Holmes dissents shaped future court precedents
- Soon, Supreme Court "incorporated" First Amendment to apply to states through the Fourteenth Amendment



The Free Speech Century

1. The Nature of First Amendment Jurisprudence
2. Major Critiques and Controversial Areas of First Amendment Jurisprudence
3. The International Implications of the First Amendment
4. New Technologies and the First Amendment of the Future

The First Amendment and Public Opinion

"Free Expression on Campus: What College Students Think About First Amendment Issues"

- Gallup-Knight Foundation study in March 2018
- "U.S. college students show strong support for the First Amendment, but favor some restrictions on free speech rights to foster an environment where diverse perspectives are respected."

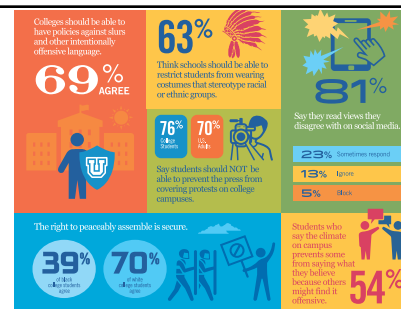
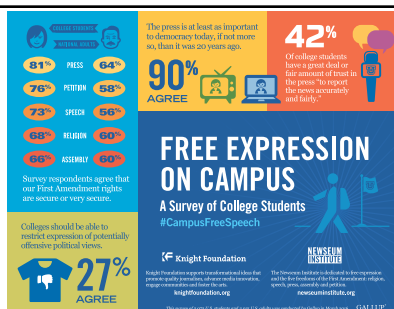
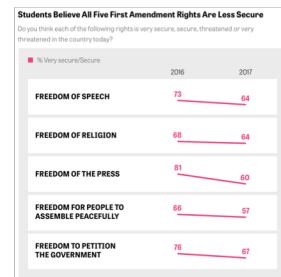
"The Future of the First Amendment"

- Knight Foundation Survey of high school students and teachers in December 2018
- "High school students continue to show strong support for First Amendment freedoms, but they don't trust all of the expression it protects. They are increasingly skeptical of the ability of news media to report fairly and accurately. This is a wake-up call from an emerging generation," said Sam Gill, Knight Foundation vice president for communities and impact.

Key findings from college students

1. Free expression is important, but so is diversity
2. Students support free speech, but increasingly favor limits
3. Confidence in the security of First Amendment rights is dropping
4. Political conservatives are seen as less able to express their views
5. Some students say shouting down speakers and using violence is sometimes acceptable
6. Social media can stifle free expression
7. Students believe social media companies should be responsible for limiting hate speech
8. Trust in the media varies depending on political affiliation

How secure are First Amendment rights?

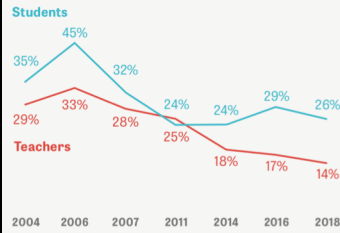


Key findings from high school students

1. Students express strong support for the First Amendment, but do favor some limits to free speech
2. News engagement and trust has declined: In addition to low levels of trust in news, students report lower news consumption and engagement
3. Student trust in citizen journalism is on the rise
4. Students believe social media has had a negative effect on free expression
5. Students believe that the internet is fueling hate speech
6. Students don't view "fake news" as a threat to democracy
7. High school students are more likely than college students to believe hate speech should be protected by the First Amendment

Steady support for the First Amendment

Believe "the First Amendment goes too far in the rights it guarantees"



High school students



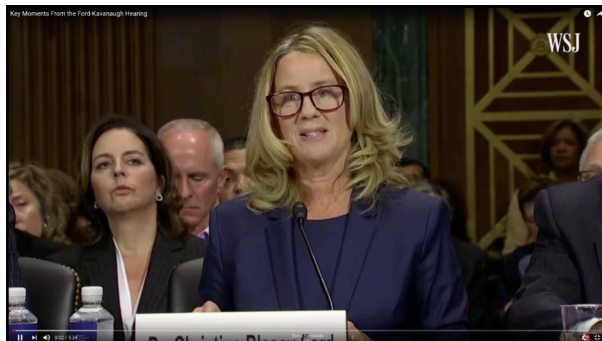
U.S. Supreme Court – 2018-2019 Term

Kavanaugh replaces Kennedy

KENNEDY RETIRES

PRESIDENT TRUMP
NOMINATES

BRETT KAVANAUGH



"Most aggressive defender of 1st Amendment"



Justice Ginsburg is still alive ...



First Amendment Cases, Last Term

Masterpiece Cakeshop v. Colorado Civil Rights Union

- The Court declined a broad ruling on the question of whether a cake baker could refuse service to a gay couple; instead ruling 7-2 that a state agency demonstrated hostility toward the baker's claims

Lozman v. City of Riviera Beach

- The Court ruled that 8-1 that a citizen was not barred from advancing a First Amendment retaliatory arrest claim despite police having probable cause for the arrest.

Minnesota Voters Alliance v. Mansky

- In a 7-2 decision, SCOTUS ruled that a Minnesota law banning citizens from wearing clothing with "political" terms in polling places on election day was "unreasonable" under the Court's standards for regulating speech in nonpublic forums.

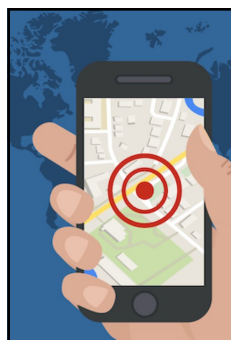
National Institute of Family and Life Advocates v. Becerra

- SCOTUS ruled 5-4 that a CA law is likely unconstitutional compelled speech by anti-abortion "crisis pregnancy centers" with a requirement that they inform patients about abortion services by the state.



Janus v. AFSCME (2018)

- Do mandatory union dues violate the First Amendment?
- Yes, in a 5-4 decision written by Justice Alito
- Majority said it was a violation of the First Amendment to force individuals to endorse through union dues ideas with which they disagreed,
- applied "exacting scrutiny" to determine that the state interests in regulations weren't important enough to outweigh the First Amendment interests.
- Overtaken the precedent in *Abood v. Detroit Board of Education*.
- Dissent: Justice Kagan (joined by Ginsburg, Breyer and Sotomayor):
- "The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years ... And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."



Carpenter v. U.S. (2018)

- Is it a violation of the Fourth Amendment to allow the government to conduct a warrantless seizure and search of historical cell-phone records?
- Yes, SCOTUS ruled 5-4
- Majority, written by Chief Justice Roberts:
- "A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales ... Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."

Copyright cases this term

- Two copyright cases raising narrow questions of statutory interpretation that could resolve disputes among federal circuits.
- Fourth Estate Public Benefit Corp. v. Wall-Street.com*, No. 17-571
- Dispute over the meaning of when the registration of a copyright "has been made" within the meaning of the federal Copyright 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 copyright claim "has been made" by the act of filing, or until the office has acted on the application.
- Rimini Street Inc. v. Oracle USA Inc.*, No. 17-1625
- Dispute over what costs the winning party is able to recover.
- resolving potential conflicts between two separate parts of the copyright statute whose interpretations have varied among the federal circuits.

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.
- "This could be a monumental FOIA case. It could be very good, or this could be disaster for FOIA, depending on what happens here," said Jonathan Ellis, an investigative reporter with the Argus Leader.





Trademarks: *Iancu v. Brunetti* (2019)

- The Supreme Court will decide whether the Lanham Act's ban on "immoral" or "scandalous" trademarks is facially unconstitutional under the First Amendment.
- 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.

Two other FA cases of interest this term

Retaliatory Arrest: *Nieves v. Bartlett*

- Whether probable cause defeats a First Amendment retaliatory-arrest claim

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

- Is a WWI memorial with a cross an unconstitutional expression of religious support?



Transgender not defamatory

- Does falsely reporting that a person is transgender have a natural tendency to injury one's reputation? NO, judge rules
- Richard Simmons sued American Media, Inc. (publisher of National Enquirer and Radar Online) in May 2017 after June 2016 stories alleging he is transgender
- Simmons lost the case on a preliminary question and was ordered to pay \$130,000 for AMI's legal fees under CA's anti-SLAPP statute
- December 2018: settled reached, Simmons dropped appeal



Trump's 'rhetorical hyperbole' not libelous

- Stormy Daniels sued Trump for libel in April 2018 after Trump tweet suggested Daniels made up claim a man threatened her to keep quiet about her affair with Trump
- Trump sought dismissal under Texas anti-SLAPP statute, judge sides with Trump
 - "one-off rhetorical comment, not a sustained attack on the veracity on the Plaintiff's claims"
 - "the tweet in question constitutes 'rhetorical hyperbole' normally associated with politics and public discourse"
- Daniels ordered to pay Trump's legal fees, nearly \$300,000
- Trump represented by Charles Harder, who represented Hulk Hogan in landmark privacy lawsuit that bankrupted Gawker.

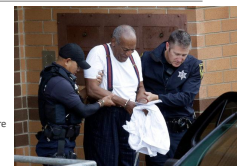
Trump sued for libel after calling women liars

- 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
- Judge: "His statements can be proved true or false, as they pertain to whether plaintiff made up allegations to pursue her own agenda. Most importantly, in their context, defendant's repeated statements ... cannot be characterized as opinion, heated rhetoric or hyperbole"



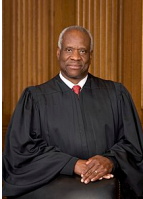
Cosby denials and libel standards

- In 2014, Kathrine McKee alleged Cosby had assaulted her in a Detroit hotel room in 1974.
- After Cosby's attorney denied the allegations, McKee filed a lawsuit for defamation.
- A district court ruled Cosby's denial was protected opinion.
- 1st Circuit Court of Appeals upheld dismissal
 - Said McKee would be a limited purpose public figure and therefore would have to prove Cosby's statements were made with actual malice
- Feb. 2019: SCOTUS denied petition for certiorari in *McKee v. Cosby*, No. 17-1542



Thomas: Time to revisit *NYT v. Sullivan*

- In *McKee v. Cosby*, Justice Clarence Thomas wrote a concurring statement calling on the Court in an appropriate case to reconsider the *New York Times v. Sullivan* actual malice standards
- Said *Sullivan* precedent and subsequent opinions applying it "were policy-driven decisions masquerading as constitutional law"
- "There appears to be little historical evidence suggesting that the *New York Times* actual-malice rule flows from the original understanding of the First or Fourteenth Amendment."
- Campaigning for president at a rally in Texas in 2016, Trump said: "We're going to open up libel laws, and we're going to have people sue you like you've never got sued before."



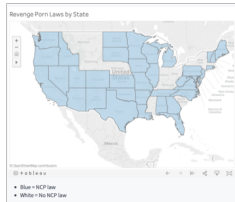
Sandy Hook parents sue Alex Jones for libel

- 20 children and 6 adults killed in mass shooting at the Sandy Hook Elementary School in Newtown, Connecticut in 2012
- Several suing Alex Jones, the host of the InfoWars show and website, for libel
- Jones claimed the shooting was faked by actors
- Viewers of InfoWars have harassed and threatened the Sandy Hook families
 - One woman was sentenced to five months in prison for her threats to the families.
- "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.
- February 2019, Jones ordered for deposition



Revenge porn laws

- Study: 1 in 8 adults have been victims of, or threatened with, revenge porn (public posting of sexually explicit pictures without the person's consent)
- 40 states and the District of Columbia have laws prohibiting distribution of "nonconsensual pornography."
- In 2018, Vermont law upheld as being narrowly tailored to serve a compelling government. In Texas, appeals court struck down law because as too broad.
 - Key difference: intent to harm (i.e., seek revenge).
- CA Sen. Kamala Harris introduced federal bill, called the Ending Nonconsensual Online User Graphic Harassment (ENOUGH) Act that would criminalize the distribution of nonconsensual pornography.



de Havilland v. FX

- Actress Olivia de Havilland, 101, sued for right of publicity, misappropriation and false light invasion of privacy over docudrama "Feud: Bette and Joan"
- Trial court allowed case to proceed, but CA appellate court overruled, saying First Amendment protected FX from lawsuit under CA anti-SLAPP statute
- Question for SCOTUS: "Are reckless or knowing false statements about a living public figure, published in docudrama format, entitled to absolute First Amendment protection from claims based on the victim's statutory and common law causes of action for defamation and right of publicity, so as to justify dismissal at the pleading stage?"
- SCOTUS declines to hear case in January 2019



Prior restraints against journalists

- The *LA Times* faced 3 injunctions in 2018 prohibiting reporting:
 - Order barring reporting details of a plea reached by dirty cop who had pleaded guilty
 - Two others prohibited publishing photos or describing the appearance of suspects from open court proceedings
 - Judges reversed themselves
- Across the country, journalists faced prior restraints or threats
 - Las Vegas Review-Journal* autopsy reports
 - South Florida Sun Sentinel* report about the mass shooting
 - In Wisconsin, AG injunction against former student journalist over public records
 - Monterey County Weekly memos about city manager firing
- Good news: journalists prevailed in all cases, thanks in part to media lawyers defending core First Amendment principles



Press pass denied to CNN reporter

- Nov. 2018: White House denied a CNN reporter's access to White House grounds after he asked questions at a press conference the President did not like.
- CNN quickly filed a lawsuit in federal court claiming the actions violated the First Amendment.
- In *CNN v. Trump*, U.S. District Court Judge Timothy J. Kelly issued a preliminary ruling, ordering the Trump administration to restore the credentials of the reporter, Jim Acosta.
- denial was likely a violation of Acosta's due process rights.
- CNN dropped its lawsuit after the White House restored Acosta's access rights
- issued new guidelines for reporters actions during press conferences.



DOJ seizes reporter's emails and phone records

- Ali Watkins, reporter for NY Times, had her email and phone records secretly subpoenaed as part of a federal investigation into allegations of leaking by James Wolfe, a senior aide to the Senate Intelligence Committee.
- Watkins had 3-year affair with Wolfe while she was in her early 20s and working for McClatchy, HuffPost, Politico and BuzzFeed.
- In December 2018, Wolfe was sentenced to two months in prison after pleading guilty to lying to investigators.



Leakers get stiff prison sentences

- As of October 2018, at least five journalists' sources have been indicted by the Trump administration.
- Reality Winner, former gov't contractor, sentenced to 5+ years for leaking information about Russian attempts to hack state voting systems during the 2016 presidential election.
- Terry J. Albury, former FBI agent, sentenced to 4 years for sending confidential documents about FBI practices in recruiting confidential informants.
- Natalie Mayflower Sours Edwards, senior treasury official, charged with two counts of unauthorized disclosure of financial records, for allegedly leaking to BuzzFeed information from financial records involving Trump's former campaign manager Paul Manafort and his associate Rick Gates.

Leaks more dangerous in digital era?



Secret Wikileaks indictment revealed?

- Wikileaks publisher Julian Assange, may be facing a secret criminal indictment in the U.S.
 - news that was inadvertently revealed in an unrelated court filing in November 2018.
- Assange is central figure in the investigations into Russian collusion in the 2016 election of Donald Trump.
- Since 2012, Assange has lived in the Ecuadorian embassy in London, facing potential arrest if he leaves the building.
- An arrest of Assange for publishing truthful information has long been a concern for American press freedom defenders for the potential precedent such a prosecution could set.



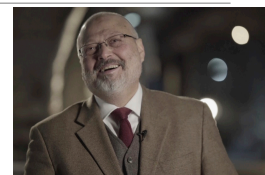
Twitter designated a public forum

- Can government officials block critics on their social media accounts?
- In three recent cases, federal judges have said no.
- May 2018, a U.S. district court judge ruled that Donald Trump's practice of blocking critics on Twitter violated the First Amendment.
- The lawsuit was brought by the Knight First Amendment Institute at Columbia University. Trump is appealing the decision to the Second Circuit Court of Appeals.
- Jan. 2019, the Fourth Circuit Court of Appeals ruled that a county official in Virginia violated the First Amendment when she briefly blocked constituents on her Facebook page.
- Jan. 2019, in Wisconsin, a federal judge ruled that the First Amendment prohibited state legislators from blocking constituents on Twitter.



FOIA lawsuit over Khashoggi death

- Knight First Amendment Institute at Columbia University filed a lawsuit seeking records about whether U.S. government was aware of threats against Washington Post columnist Jamal Khashoggi before he was murdered inside the Saudi consulate in Istanbul in October 2018.
- Lawsuit seeks release of records under FOIA that would shed light on whether the U.S. government notified Khashoggi of threats, as it is required to do so under intelligence agency rules.



Music Modernization Act

- President Trump signed into law the Music Modernization Act in Oct 2018. The bill:
 - Creates new systems for royalty distribution for music and audio creators as a result of new technologies and digital streaming services.
 - Creates a non-profit governing agency to establish a database of owners of the mechanical license of sound recordings (the owner of the copyright to the composition and lyrics).
 - Sets blanket royalty rates under a compulsory license for various copyright holders.
 - Modifies the process to resolve royalty disputes.
 - Extends federal copyright to songs recorded prior to 1972 until 2067.
 - The law was supported by digital streaming services and leaders of the recording industry.



New works enter public domain

- Jan. 1, 2019 marked the first date in years that a mass body of work – works published in 1923 – entered the public domain of copyright law.
- Because of regular extensions of copyright duration in recent generations, the last time this occurred was in 1998, when works published in 1922 entered the public domain.
- An extension of copyright duration passed in 1998 created a 20-year drought.
- "The public domain has been frozen in time for 20 years, and we're reaching the 20-year thaw," says Jennifer Jenkins, director of Duke Law School's Center for the Study of the Public Domain.



Girl Scouts sue Boy Scouts

- Nov. 2018: the Girl Scouts filed a lawsuit in the U.S. District Court for the Southern District of New York
 - claiming the Boy Scouts is violating trademark law by using names for programs like "Scouts BSA" and "Scout Me In" in an effort to be gender neutral in its recruitment and programming.
 - The use of the generic term "Scout" is causing consumer confusion undermining the Girl Scouts business interests, according to the complaint.
 - As part of its lawsuit, the Girl Scouts is seeking an order requiring the Boy Scouts to stop using the term "Scouts" without "Boy" before it, based on trademark law in New York and under the federal Lanham Act.



CA sues, passes law over net neutrality

- FCC rolls back Obama-era "net neutrality" laws in 2018
 - Net neutrality rules prohibit broadband and wireless companies from slowing service speeds for certain content or providing faster speeds for others.
- CA joined other states in lawsuit against federal government over the new FCC rules
- Also, CA passed its own net neutrality law in Sept. 2018
- CA law prohibits companies from blocking, slowing down or charging more for some websites over others.
 - opposed by telecom companies
 - criticized as violation of supremacy clause of the constitution -- in cases of interstate commerce, federal law preempts state law
- DOJ filed a lawsuit over CA law, CA agreed not to enforce while lawsuit is pending.



California passes new data privacy laws

- California Consumer Privacy Act of 2018 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 is set to take effect in 2020, and some watchdogs say additional fixes are needed.
- "The exact impact remains in flux, since the new rules will not take effect until 2020 and we anticipate that the California legislature will consider many changes to the new law in the months and years to come," said Lee Tien, a senior staff attorney at the Electronic Frontier Foundation.



Hassell v. Bird

- Does Yelp have to remove a defamatory review?
- California Supreme Court says no, based on Section 230 of CDA
- SF lawyer Dawn Hassell sued former client Ava Bird for defamation over reviews Bird posted on Yelp
- Hassell said posts were false and injurious to her business; judge sided with Hassell and ordered removal

Thank you!

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