The Right to Scrape – Work in Progress (Job Talk Paper)

Separation of Powers and Federalism for Online Speech Platforms – Work in Progress

Facebook v. Sullivan: Building Constitutional Law for Online Speech
93 S. CAL. L. REV. (forthcoming 2019) (co-authored with Kate Klonick)

In the United States, there are now two systems to adjudicate disputes about harmful speech. The first is older and more established: the legal system in which judges apply constitutional law to limit tort claims alleging injuries caused by speech. The second is newer and less familiar: the content-moderation system in which platforms like Facebook implement rules that govern online speech. These platforms aren’t bound by the First Amendment, but they rely on tools used by courts to resolve tensions between regulating harmful speech and preserving free expression—particularly the entangled concepts of “public figures” and “newsworthiness.” This article offers an empirical analysis of how judges and content moderators have used these two concepts to shape the boundaries of free speech. By exposing the similarities and differences between these systems, this article offers lessons for both courts and platforms as they confront new challenges posed by online speech. This comparative analysis also reveals the structural role that platforms play in today’s speech ecosystem, where they act as legislature, executive, judiciary, and press—but without any separation of powers to establish checks and balances. Platforms should separate their powers and create court-like institutions to provide transparent decisions and consistent rationales.

Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse
78 MD. L. REV. (forthcoming 2019)

From Donald Trump to Lindsay Lohan to Manuel Noriega, real people who are portrayed in expressive works are increasingly targeting creators of those works for allegedly violating their “right of publicity”—a state-law tort that prohibits the unauthorized use of a person’s name, likeness, and other identifying characteristics. This Article provides a new framework to reconcile publicity rights with a robust commitment to free speech. Courts should abandon “educative” listener-based models of the First Amendment and instead adopt an approach that also protects the speaker-creator as a central part of enabling public discourse. As we move into an era of new technology and innovation—from “deep fakes” to revenge pornography—we need a coherent framework to avoid the confusion that currently pervades the doctrine. This Article argues that courts should apply a framework that not only empowers free expression, but also leaves space to consider the narrow privacy-based interests that we should all have in preventing certain uses of our images.
ESSAYS & COMMENTS

Fumbling the First Amendment: The Right of Publicity Goes 2–0 Against Freedom of Expression

Two circuits in one summer found in favor of college athletes in right-of-publicity suits filed against the makers of the NCAA Football videogame. Both panels split 2–1; both applied the transformative-use test; both dissenters predicted chilling consequences. By insisting that the likeness of each player be “transformed,” the Third and Ninth Circuits employed a test that imperils the use of realistic depictions of public figures in expressive works. This standard could have frosty implications for artists in a range of media: docudramas, biographies, and works of historical fiction may be at risk. This Comment examines the tension between the right of publicity and the First Amendment and argues for a test that ensures greater protection for creators of expressive works.

The Tools of Political Dissent: A First Amendment Guide to Gun Registries

In states that insist on gun registration, opponents have had to mold constitutional arguments to challenge registries in the courts. One such argument grows from the First Amendment. Gun ownership, like speech, can be a tool of political dissent. Both guns and speech empower individuals to resist governmental oppression, at least in theory. Yet both become blunt tools if the government imposes registration requirements that chill the right. So, the argument goes, the tools of political dissent must remain unregistered if they are to provide a robust protection against tyranny. This Essay argues that the First Amendment could become a powerful analog in Second Amendment challenges to gun registries by examining three First Amendment cases that could provide an analytical blueprint for legislators and litigants assessing the constitutionality of gun registries.

OTHER WRITINGS

How to Make Facebook's 'Supreme Court' Work
New York Times (2018) (op-ed, co-authored with Kate Klonick, discussing Facebook’s proposed oversight board)

How Supreme a Court?
Slate (2018) (article discussing constitutionalism and separation of powers on social media)

Speech v. Speakers
Slate (2018) (article discussing new Twitter rules that punish users for off-platform speech and association)

TEACHING EXPERIENCE

New York Law School
Summer 2018, London, UK
Appointed as adjunct professor to teach Cybercrime with Professor Mary Anne Franks. Explored topics including digital privacy, hacking, online speech, cyberterrorism, cybersecurity, and intermediary liability.

Yale Law School
Spring 2018, New Haven, CT
Taught class on Current Issues in Internet Law with Professor Kate Klonick. Focused on amendments to Section 230 of the Communications Decency Act, changes to net-neutrality rules, and developments in platform self-regulation.

Michigan Law School
Spring 2015, Ann Arbor, MI
Created online class in Transnational Law with Professor Mathias Reimann. Filmed video lectures, wrote and graded assignments, and met with students to discuss course materials.

I have also guest lectured at Michigan Law School (Transnational Law), St. John’s Law School (Information Privacy Law & Internet Law), and Seton Hall Law School (Trademark Law and Unfair Competition).
PRACTICAL EXPERIENCE

Hon. M. Margaret McKeown, U.S. Court of Appeals, 9th Circuit  
Law Clerk, 2016–17, San Diego, CA

Hon. Thomas Griesa, U.S. District Court, S.D.N.Y.  
Law Clerk, 2015–16, New York, NY

Federal Public Defender, N.D. Ohio  
Student-Attorney, 2015, Cincinnati, OH

Keker & Van Nest LLP  
Summer Associate, 2014, San Francisco, CA

Hon. William Alsup, U.S. District Court, N.D. Cal.  
Extern, 2013, San Francisco, CA

Alexi Giannoulias Campaign for U.S. Senate  
Emerging Leaders Fellow, 2010, Chicago, IL

PRO BONO LITIGATION

Ventura v. Kyle, 825 F.3d 876 (8th Cir. 2016)  
Helped draft “First Amendment Scholars” amicus brief about Governor Jesse Ventura’s defamation suit against Chris Kyle, author of American Sniper; brief joined by Dean Erwin Chemerinsky and Professor Vince Blasi, among others

Co-authored petition for certiorari about criminal defendant’s Sixth Amendment right to confrontation

Conducted research for petition for certiorari, merits briefing, and oral argument in landmark case about constitutional right to same-sex marriage

United States v. Webster, 615 F. App’x 362 (6th Cir. 2015)  
Presented oral argument in appeal about sentencing enhancements in a cybercrime case involving online fraud

HONORS & AWARDS

Mellon Fellowship (2017)  
Information Society Project Resident Fellowship (2017)

Clara Belfield & Henry Bates Overseas Fellowship (2017)  
Henry M. Bates Award (2015)

Order of the Coif (2015)  

Best Oralist, Campbell Moot Court (2014)  
Certificate of Merit, Torts (2013)

Kirkland & Ellis Diversity Scholarship (2012)  
Bobby Jones Scholarship (2010)

SKILLS & INTERESTS

Languages: French (fluent); Spanish (competent); Italian & Arabic (basic)

Travel: Visited 48 states while writing travel-photography blog; hitchhiked from Europe to Africa to raise money for charity

Other Interests: Film photography; rugby and squash; Harry Potter audiobooks

BAR ADMISSIONS

U.S. Court of Appeals for the Ninth Circuit, 2017

California, 2015
PRESENTATIONS

Constitutional Law for Online Speech
University of Oxford, Department of Politics and International Relations, *Paper Presenter* (scheduled 2019)

Free Speech and the Internet
Stanford Law School, Constitutional Law Center, *Panelist* (scheduled 2019)

How Should Major Tech Platforms Engage with Western Democracies?
Stanford University, Hoover Institution, *Paper Presenter* (scheduled 2019)

Freedom of Expression Scholars Conference

Constitutionalizing Speech Platforms

Privacy Revolution

Charting the Way Forwards for Information Fiduciaries
Stanford University, Center for Advanced Study in Behavioral Sciences, *Participant* (2019)

Who’s Afraid of Big Tech?

Works-in-Progress Intellectual Property Colloquium

Truth Decay: Deep Fakes and the Implications for Privacy, National Security, and Democracy

NYU Tri-State Region IP Workshop

Northeast Privacy Scholars Workshop
Fordham Law School, Center on Law & Information Policy, *Discussant* (2018)

Digital Fiduciaries Act of 2018 – Drafting Workshop

Freedom of Expression Scholars Conference

MEDIA

Mark F. Walsh, *Facebook Plans to Create a Judicial-like Body to Address Controversial Speech*
ABA JOURNAL (May 1, 2019) (discussing Facebook’s attempts to constitutionalize its platform)

Laurence Dodds, *Facebook and Instagram Finally Ban White Nationalism Posts*
THE TELEGRAPH (Mar. 27, 2019) (discussing Facebook’s decision to ban white nationalism on its platform)

Caleb O. Brown, *Social Media’s Content Challenge*
CATO INSTITUTE DAILY PODCAST (Mar. 25, 2019) (discussing content moderation on social media)

Laurence Dodds, *Can Mark Zuckerberg’s ‘Supreme Court’ End Facebook’s Era of Absolute Monarchy?*
THE TELEGRAPH (Feb. 18, 2019) (discussing proposed creation of Facebook’s “Supreme Court”)

Scott Rosenberg, *Facebook’s Constitutional Moment*
AXIOS (Feb. 14, 2019) (discussing constitutionalism at Facebook and my article, *Facebook v. Sullivan*)

Molly Roberts, *Facebook Has Declared Sovereignty*
WASHINGTON POST (Feb. 5, 2019) (discussing private governance and my article, *How Supreme a Court?*)
Elizabeth Harris, *Fortnite Makers Sued For 'Stealing Floss Dance' From Backpack Kid*
THE INDEPENDENT (Jan. 19, 2019) (discussing propertization of culture)

*Racing Game Forza Pulls Dances amid Fortnite Legal Action*
BBC NEWS (Jan. 16, 2019) (discussing copyright and privacy claims brought against *Fortnite* videogame)

Elizabeth Harris, *A Real-World Battle Over Dancing Avatars: Did Fortnite Steal the Floss?*
NEW YORK TIMES (Jan. 11, 2019) (discussing possible legal protections for dance moves in videogames)

Max Fisher & Amanda Taub, *How Far Should Facebook Go in Regulating Users’ Speech?*
NEW YORK TIMES (Jan. 10, 2019) (discussing content moderation on Facebook)

Kathryn Lundstrom, *Can Public Officials Block Users on Facebook? This Texas Case Could Help Answer That*
TEXAS TRIBUNE (Dec. 6, 2018) (providing background on whether Facebook is a First Amendment "public forum")

Brian Frye, *Thomas Kadri on the Right of Publicity & Free Speech*
IPSE DIXIT (Oct. 26, 2018) (discussing the right of publicity and my article, *Drawing Trump Naked*)

Alan Greenblatt, *Sorry Politicians, You Can’t Block Critics on Twitter*
GOVERNING (Sept. 2018) (discussing First Amendment issues with politicians blocking critics on social media)

Justine McDaniel, *Why Cody Wilson, the Man behind the 3D-Printed Gun, Says He’ll Keep Fighting — and Win*
PHILADELPHIA ENQUIRER (Aug. 8, 2018) (discussing First Amendment implications of 3D-printed guns)

David Jesse, *Possible Supreme Court Pick Kethledge’s Ties to University of Michigan*
DETROIT FREE PRESS (July 9, 2018) (discussing potential Supreme Court nominee)

Patrick Skahill, *Connecticut Joins Other States Challenging FCC’s Net Neutrality Ruling*
NPR (Jan. 18, 2018) (discussing legal challenges to FCC’s ruling on net neutrality)

Martha Lewis, *The Net Neutrality Episode!*
WPKN (Dec. 30, 2017) (discussing history and concerns surrounding new rules on net neutrality)

Brandi Buchman, *Tech Experts Bemoan Thursday Vote to Kill Net Neutrality*
COURTHOUSE NEWS SERVICE (Dec. 13, 2017) (discussing FCC’s proposed changes to rules on net neutrality)

Amber Hu, *Campus Weighs in on Net Neutrality*
YALE DAILY NEWS (Dec. 5, 2017) (discussing potential consequences of FCC’s new position on net neutrality)
REFERENCES

Professor Robert Post
Sterling Professor of Law
Yale Law School
(203) 432-1660 • robert.post@yale.edu

Professor Jack Balkin
Knight Professor of Constitutional Law & the First Amendment
Yale Law School
(203) 432-1620 • jack.balkin@yale.edu

Professor Don Herzog
Edson R. Sunderland Professor of Law
Michigan Law School
(734) 647-4047 • dherzog@umich.edu

Professor Mathias Reimann
Hessel E. Yntema Professor of Law
Michigan Law School
(734) 763-6331 • purzel@umich.edu

Dean Mark West
Dean & Nippon Life Professor of Law
Michigan Law School
(734) 764-0514 • markwest@umich.edu

Professor Daniel Halberstam
Associate Dean & Eric Stein Collegiate Professor of Law
Michigan Law School
(734) 763-4408 • dhalber@umich.edu

Professor Gil Seinfeld
Associate Dean & Professor of Law
Michigan Law School
(734) 647-3729 • gsein@umich.edu

Professor Len Niehoff
Professor from Practice
Michigan Law School
(734) 763-5145 • lenniehoff@umich.edu

Judge M. Margaret McKeown
U.S. Court of Appeals, Ninth Circuit
(619) 557-5296

Judge Thomas Griesa (deceased)
U.S. District Court, Southern District of New York
Letter of reference available upon request