Platforms as Blackacres – Work in Progress

Online platforms create the infrastructure of the modern public sphere. Yet despite the internet’s importance in our daily lives, courts have struggled to agree on the right analogies and principles to determine our rights in cyberspace. While the Supreme Court has dubbed platforms the “modern public square,” lower courts have treated platforms like private blackacres by granting them rights to prevent cyber-trespass. This Article argues that treating all platforms as parcels of private property is problematic. In the real world, legal rights vary between private and public spaces. We need a similar doctrine for cyberspace to protect both free speech and privacy in the digital age. In short, cyber-trespass law should not deter people from gathering information on the public internet—that is, websites that are accessible to the general public. This division between the public and private internet is sound as a matter of statutory interpretation; required as a matter of constitutional law; and preferable as a matter of policy.
Structural Constitutionalism for Speech Platforms – Work in Progress

For years, Facebook alone has governed expressive rights on its platform, acting as legislature, executive, and judiciary in disputes about online speech. But that’s about to change: the platform is creating an independent “Supreme Court” for content moderation. Seizing on this moment, some are calling for an industry-wide board to oversee all speech platforms. This Article scrutinizes platform oversight boards through two analogies to structural constitutionalism: separation of powers and federalism. It first claims that, by devolving power within a platform’s speech-governance regime, truly independent oversight boards can check the power wielded by these influential private companies. The Article then challenges the idea of an industry-wide board, arguing that centralizing power and homogenizing policies will create social harms. Much as states in federal systems serve as laboratories of experimentation, platforms should be encouraged to experiment with different schemes. Together, these analogies to structural constitutionalism reveal how oversight boards can best promote public accountability, market competition, and free speech.

Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech

93 S. CAL. L. REV. (forthcoming 2019) (with Kate Klonick)

In the past, disputes about harmful speech were adjudicated by judges who applied the First Amendment to tort claims for defamation, invasion of privacy, and intentional infliction of emotional distress. Nowadays, platforms like Facebook increasingly create the 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 exposes the similarities and differences between how judges and content moderators have used these two concepts to shape the boundaries of free speech. This comparative analysis also reveals the problematic structural role that platforms play in today’s speech ecosystem, where they act as legislature, executive, judiciary, and press—but without any checks and balances. To address this worrying consolidation of power, platforms should separate their powers and create independent bodies that 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 listener-based models of the First Amendment and instead adopt an approach that also protects the speaker’s right to participate in 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.

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

112 MICH. L. REV. 1519 (2014)

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 begrudgingly 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.

POPULAR PUBLICATIONS

How Supreme a Court?
Slate (Nov. 19, 2018) (discussing structural constitutionalism on social media)

How to Make Facebook’s ‘Supreme Court’ Work
N.Y. Times (Nov. 17, 2018) (analyzing Facebook’s proposed Oversight Board) (with Kate Klonick)

Speech v. Speakers
Slate (Jan. 18, 2018) (critiquing Twitter rules that punish users for off-platform speech and association)

TEACHING

New York Law School
Cybercrime (co-taught course with Mary Anne Franks), Summer 2018

Yale Law School
Current Issues in Internet Law (co-taught reading group with Kate Klonick), Spring 2018

University of Michigan Law School
Transnational Law (co-created and administered course with Mathias Reimann), Spring 2015

Additional guest lectures at University of Michigan Law School, University of Oxford, St. John’s Law School, and Seton Hall Law School

PRESENTATIONS AND WORKSHOPS

Participant, Facebook Oversight Board: Berlin Workshop
Facebook, June 2019

The Legal Implications of Digital Falsifications
Carnegie Endowment for International Peace, June 2019

Structural Constitutionalism for Speech Platforms
University of Oxford, Department of Politics and International Relations, May 2019
University of Oxford, Blavatnik School of Government, May 2019
Stanford Law School, Constitutional Law Center, May 2019

The Right to Scrape
Stanford University, Hoover Institution, May 2019

Participant, Social Media Governance Initiative Conference
Yale Law School, Justice Collaboratory, May 2019
**Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech**
Yale Law School, Freedom of Expression Scholars Conference, April 2019
Harvard Law School, Berkman Klein Center, April 2019
Cato Institute, March 2019

**Discussant, A Skeptical View of Information Fiduciaries by Lina Khan & David Pozen**
Yale Law School, Freedom of Expression Scholars Conference, April 2019

**Discussant, Bad Actors by Sarah Haan**
Yale Law School, Freedom of Expression Scholars Conference, April 2019

**Privacy Class Actions: A View from the United States**
McGill University, Privacy Revolution Conference, March 2019

**Participant, Data Care Act: Drafting Workshop**
Stanford University, Center for Advanced Study in Behavioral Sciences, March 2019

**Drawing Trump Naked: Curbing the Right of Publicity to Protect Public Discourse**
Houston Law Center, Works-in-Progress Intellectual Property Colloquium, February 2019
Maryland Carey School of Law, Maryland Law Review Symposium, February 2019
NYU Law School, NYU Tri-State Region IP Workshop, January 2019
Yale Law School, Freedom of Expression Scholars Conference, April 2018

**Opening Remarks, Measuring the Chilling Effect**
Columbia University, Knight First Amendment Institute, November 2018

**Discussant, Supracompetitive Privacy by Greg Day & Abbey Stemler**
Fordham Law School, Northeast Privacy Scholars Workshop, November 2018

**Opening Remarks, Freedom of Expression in an Age of Surveillance**
Yale Law School, Information Society Project, September 2018

**Participant, Digital Fiduciaries Act: Drafting Workshop**
Harvard Law School, Berkman Klein Center, June 2018

**Discussant, The Right of Publicity: Privacy Reimagined for a Public World by Jennifer Rothman**
Yale Law School, Freedom of Expression Scholars Conference, April 2018

**Discussant, Graffiti, Speech, and Crime by Jenny Carroll**
Yale Law School, Freedom of Expression Scholars Conference, April 2018

**MEDIA**

**Press**

**Podcasts & Radio**
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