

Banned, *Blocked*,

Punished, **Flamed** and

Fake News: An
Overview of the First
Amendment on Social
Media

Hello!



(Me pre- COVID)

Kyle Kaiser

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Any opinions expressed are my own and not of any person or organization, including the Utah Attorney General or the Utah Attorney General's Office. This presentation does not contain any legal advice.



(Me post- COVID)



Social Media Universe





7 million

Monthly broadcasters; 37.5 million monthly active users



430+ million

Active monthly users



800 million

Active monthly users

Mo' users, mo' problems

The 5th • Analysis

No, Twitter is not violating Trump's freedom of speech

But what about Trump's apparently retaliatory executive order?

By Amber Phillips

May 29, 2020 at 8:07 a.m. EDT

Donald J. Trump @realDonaldTrump

There is NO WAY (ZERO) that Mail-in Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone....

Get the facts about mail-in ballots

Donald J. Trump @realDonaldTrump · 3h

This tweet violated the Twitter Rules about glorifying violence. However, Twitter has determined that it may be in the public's interest for the Tweet to remain accessible. [View](#)



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Ingredients.
A Cleaner
Future.
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The Salt Lake Tribune

Animal Control Officer
www.summitcounty.org

Two Kearns High football players suspended after posting video of gay pride flag burning

Coch reacts after football player burns Pride flag



LIVE 13 EXCLUSIVE FOOTBALL PLAYER BURNS PRIDE FLAG IN VIDEO

Summit County is currently hiring for the following position
Animal Control Officer
www.summitcounty.org

→ The Plan

- First Amendment Background
- First Amendment Issues on Social Media
 - Criminal penalties / restrictions on parolees' rights
 - Blocking / banning on government pages
 - Social media in schools
 - Social media & employment law
 - Liability of social media companies
- Questions



1. First Amendment Background

What you need to know

“

“Congress shall make no law ...abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for a redress of grievances.”

- U.S. Const. amend. I

“

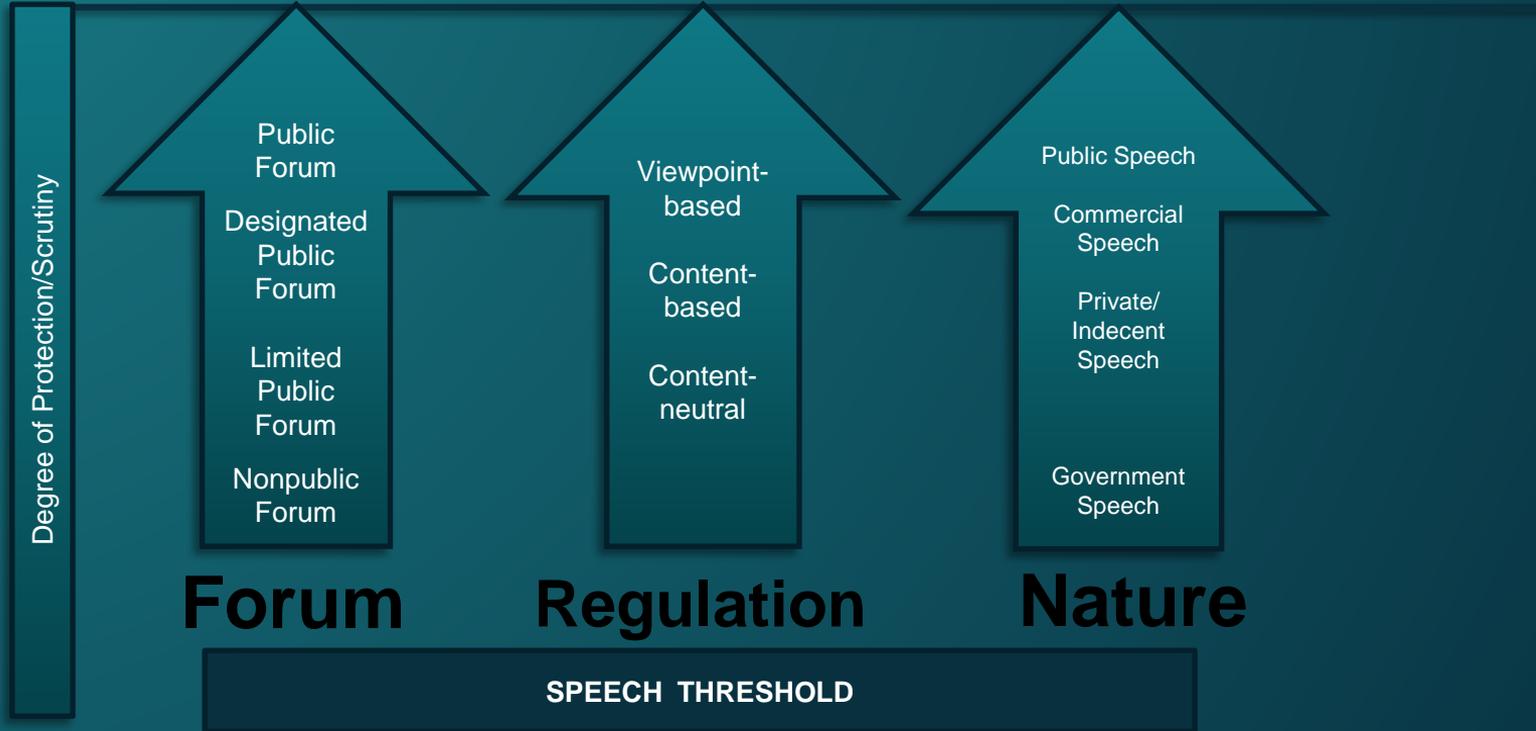
“All men have the inherent and inalienable right...to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.”

- Utah Const. art. 1 § 1

“No law shall be passed to abridge or restrain the freedom of speech or of the press ...”

- Utah Const. art. 1 § 15

First Amendment Speech Analytical Framework



Then Enter the Internet ...

- What's a "forum"?
- Public/Private Problems
- Interactivity
- Ubiquity
- Social Media Only Adds to the Complexity

Then Enter the Internet...

- There must be *some* protection

“

“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace — the “vast democratic forums of the Internet” in general, and social media in particular. . . .”

- *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)

Then Enter the Internet ...

- But we have to be careful...
 - *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (Alito, J. concurring in the judgment)

“Cyberspace is different from the physical world, and if it is true, as the Court believes, that “we cannot appreciate yet” the “full dimensions and vast potential” of “the Cyber Age,” *ibid.*, we should proceed circumspectly, taking one step at a time.”



2. 1st Am. Issues on social media

How this all plays out.



2.1 – Criminal Law

Speech, punishment, sentencing, and beyond

Criminal Law

- Some speech is not protected and can be criminally punished, even if it's on the internet
- First Amendment issues with conditions of probation, supervised release, or even post-release.

Utah AG: ICAC operation results in 13 arrests in Utah County of alleged child predators

by Jennifer Weaver | Monday, May 20th 2019

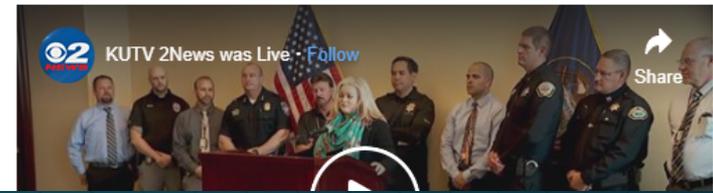
AA



ICAC operation results in 13 individuals being arrested for attempting to meet and engage in sexual contact with underage boys and girls. (Photo: KUTV)



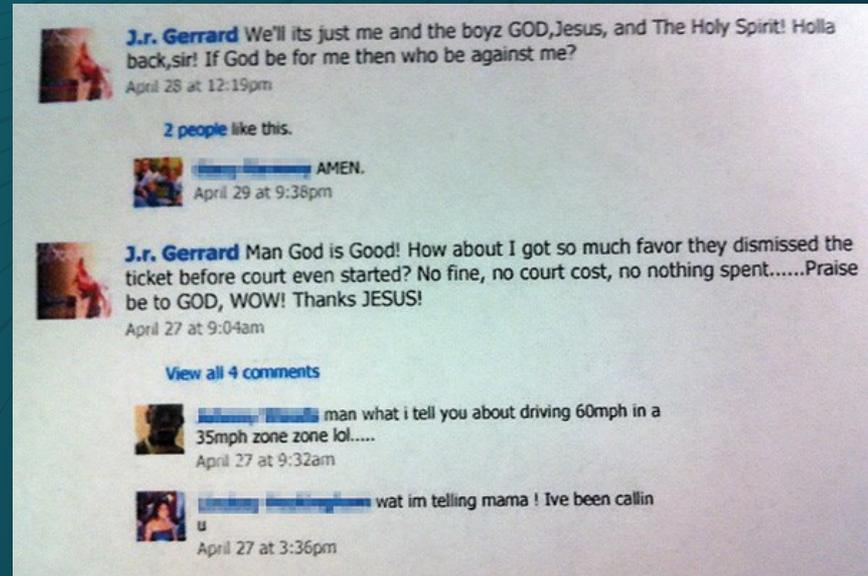
(KUTV) — Utah Attorney General Sean D. Reyes and members of the Internet Crimes Against Children (ICAC) Task Force announced Monday that as a result of their latest operation targeting child predators, 13 individuals have been arrested for attempting to meet and engage in sexual contact with underage boys and girls.





→ Criminal Law - Packingham

- Lester Packingham posted this to Facebook
- N.C. law prohibited sex offenders from accessing websites where “offender knows that the site permits minor children to create or maintain personal Web pages.”





→ Criminal law - Packingham

- SCOTUS holds the statute unconstitutional
 - First Amendment right to access the Internet
 - Statute could apply to lots of websites, including places like Amazon.com, Washingtonpost.com, and Webmd.com, but certainly applied to Facebook
 - General government interest in protecting citizens from sex offenders was not sufficiently tailored

“

“North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring vast realms of human knowledge.”

- *Packingham*, 137 S. Ct. at 1737

→ Criminal law – Packingham Effect

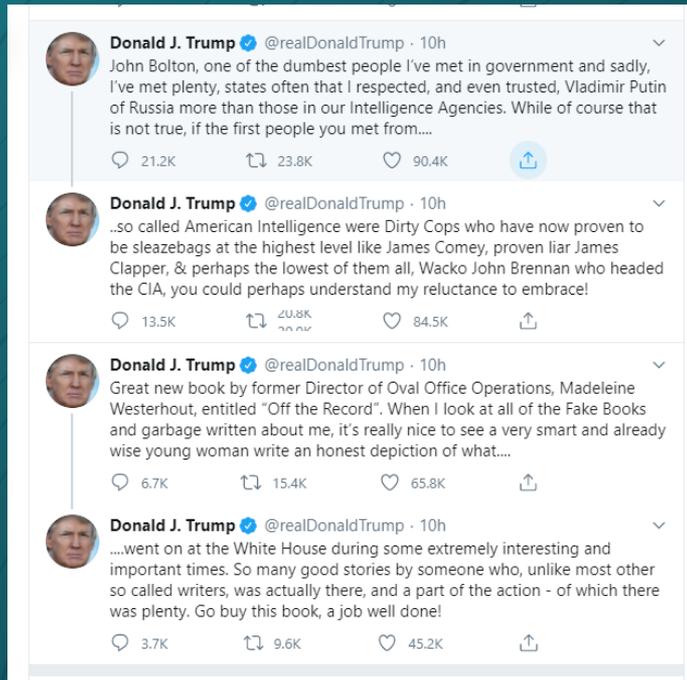
- Broad statements about the Internet
 - Helpful outside that realm?
- In criminal law / sentencing / probation / supervision, Courts have read *Packingham* narrowly
 - Doesn't apply to probationers
 - Doesn't apply to parolees
 - Only applies to overbroad / vague conditions not set by court
 - May require Court to provide justifications



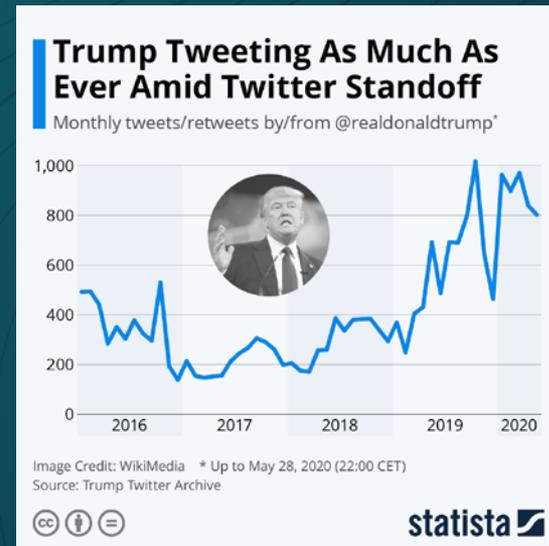
2.2 – Government Blocking / Banning

First Amendment Right to comment?

The Twer-in-Chief



- ~85 million followers
- 54,000+ tweets



... Not the only one

Sean Reyes, Utah's Attorney General
@SeanReyesUT · Personal Blog

Home About Photos Videos More

About See All

1 Sean D. Reyes serves as Utah's 21st Attorney General

3,498 people like this including 8 of your friends

11,883 people follow this

(801) 556-8423

info@seanreyes.com

Always Open

Personal Blog

PHOTOS See All

PINNED POST

Sean Reyes, Utah's Attorney General
August 1 at 1:48 PM · 🌐

Honored to be part of dedication of Utah's first Gold Star Families Monument! Recognizing patriots who gave ultimate sacrifice dating back to WWI and as recently as last month. Thank you Woody Williams, Jennie Taylor and so many others. Love, prayers and extreme gratitude to our Gold Star Families for their loss.

Daniel Burton and 116 others · 4 Comments · 4 Shares

Who exactly is getting "protected"? And who is Reyes protecting them from? Like · Reply · 7w

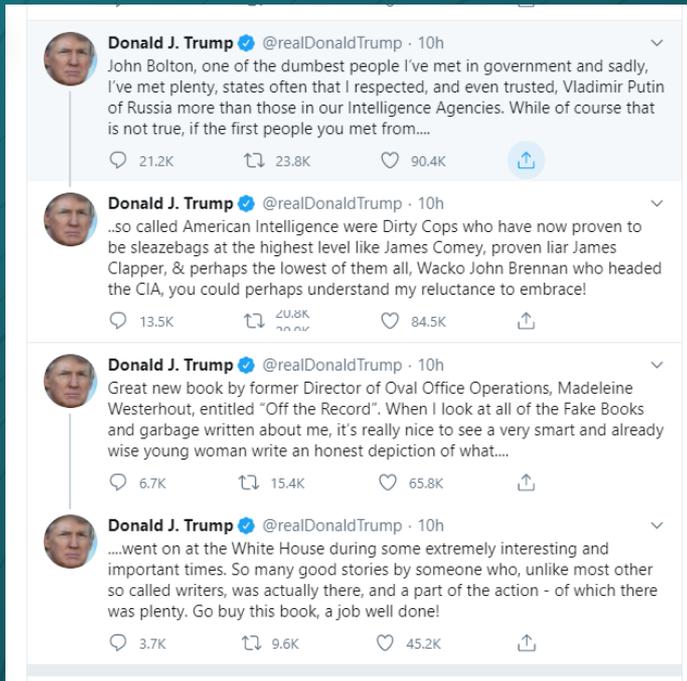
Is this really pro-campaign? Like · Reply · 7w

I'm going to be sending in my ballot and I voted for Sean. Like · Reply · 7w

Sorry, but the current spread of COVID-19 is all on the Republican Party, so I will vote my displeasure this November. If I live that long. Like · Reply · 7w

He co chaired trump's Utah election effort. Enough reason to vote for anybody else. Like · Reply · 7w

The Twer-in-Chief



Donald J. Trump @realDonaldTrump · 10h
John Bolton, one of the dumbest people I've met in government and sadly, I've met plenty, states often that I respected, and even trusted, Vladimir Putin of Russia more than those in our Intelligence Agencies. While of course that is not true, if the first people you met from....

Donald J. Trump @realDonaldTrump · 10h
...so called American Intelligence were Dirty Cops who have now proven to be sleazebags at the highest level like James Comey, proven liar James Clapper, & perhaps the lowest of them all, Wacko John Brennan who headed the CIA, you could perhaps understand my reluctance to embrace!

Donald J. Trump @realDonaldTrump · 10h
Great new book by former Director of Oval Office Operations, Madeleine Westerhout, entitled "Off the Record". When I look at all of the Fake Books and garbage written about me, it's really nice to see a very smart and already wise young woman write an honest depiction of what....

Donald J. Trump @realDonaldTrump · 10h
...went on at the White House during some extremely interesting and important times. So many good stories by someone who, unlike most other so called writers, was actually there, and a part of the action - of which there was plenty. Go buy this book, a job well done!



Dani Bostick @danibostick
Following

Replying to @realDonaldTrump @USGA @usopengolf

I look forward to a day when Russia cannot meddle in our elections

8:08 PM - 15 Jul 2017

21 Retweets 565 Likes

85 21 565

Karen Momany @karenmomany · 16 Jul 2017
Replying to @danibostick @realDonaldTrump and 2 others
Why don't you ask obama?

Char Lewchak @CLewchak · 16 Jul 2017
Replying to @danibostick @realDonaldTrump and 2 others
I look forward to the day when there is an intelligent person as POTUS

→ Public Officials' arguments

- Personal account
- “Private property”
- Terms & conditions
- Government speech
- No First Amendment right to be heard
- Accessible even if you're blocked

→ *Knight First Amendment Institute v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y.2018)

- Personal account
- “Private property”
- Terms & conditions
- Government speech
- No First Amendment right to be heard
- Accessible even if you’re blocked
- *Not this one, bucko.*
- *Doesn’t Matter*
- *YOU are taking the action*
- *Not in the “interactive space”*
- *Ignoring and blocking are different; right to be seen*
- *Different in kind*



→ *Knight, ctd.*

- Unique facts
- Admitted viewpoint-based discrimination
- Affirmed 928 F.3d 226 (2d Cir. 2019)
- Rehearing en banc denied, with dissent by Judges Park and Sullivan, 953 F.3d 216 (2d Cir. 2020)



→ Other cases

- *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019)
 - (government official who solicited community input violated First Amendment by deleting comments)
- *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298
 - (government social media policy created limited purpose public forum; deletion of comments based on the policy was permissible)

Result: Social Media Policies

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SEAN D. REYES
UTAH OFFICE OF THE ATTORNEY GENERAL

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Recent News

-  SECURE Strike Force Charges Convicted Sex Offender with Human Trafficking of a Child
August 11, 2020
-  Celebrating Utah Pacific Island Heritage Month
August 11, 2020
-  AG Reyes Urges Federal Government Action to Increase Access and Affordability for Remdesivir
August 6, 2020
-  Landmark Settlement Case Announced in Gold King Mine Legal Case
August 5, 2020
-  Attorney General Reyes Partners with NBWA, Launches Campaign to Combat Human Trafficking
July 30, 2020
-  Modern-Day Slavery: Recognizing World Day Against Trafficking in Persons
July 30, 2020
-  AG Reyes Statement on Big Tech Companies Appearing for Antitrust Hearing
July 29, 2020
-  Two Congressional Bills Supported by Utah AG Headed to the President
July 22, 2020
-  SECURE Strike Force Arrests Two Men, Seizes Drugs and Weapons
July 17, 2020
-  ICAC Task Force Files Charges Against West Valley Man
July 16, 2020
-  FCC Unanimously Designates 988 as New Three-Digit Suicide Hotline
July 16, 2020
-  Attorney General Reyes Statement on U.S.

Social Media Policy

STANDARDS

The purpose of the Utah Attorney General's Official social media platforms is to provide information of public interest to Utahns and other members of the general public. The posts, photos, tweets, and other original content and direct reposts are controlled by the Office of the Utah Attorney General and are provided to fulfill that purpose. We encourage commenters to engage by submitting comments and questions regarding the posted topics and by sharing the AG's Office's information with others.

The AG's Office welcomes participation on the issues presented and encourages commenters to use family-friendly content and civil tone.

Comments may be moderated or removed if they contain, constitute, or link to:

- Off-topic discussions unrelated to AG's Office programs, services, projects, issues, events, or activities;
- Undertaking, or encouraging, illegal activity or violence;
- Content that promotes, fosters, or perpetuates discrimination against protected classes;
- Content that violates legal ownership interest of any other party, such as copyright or trademark infringement;
- Content containing improperly disclosed private, protected, or confidential information as defined by State law;
- Content that may tend to compromise the safety or security of the public or public systems;
- Profanity, nudity, indecency, or obscenity;
- "Spam," advertisements, promotions, solicitations of commerce or products; or links to promote a candidate;
- Sexual harassment content;
- Slanderous or defamatory attacks, or personal harassment of another poster
- Disruptively repetitive content.

GUIDANCE AND TENOR

The AG's Office will promote a level of commenting decorum conducive to a culture of participatory local self-governance. Except as described in this Policy, the AG's Office does not discriminate on the basis of identity or anonymity of the commenter, or the commenter's viewpoint. Comments that express disagreement with a particular position will not be removed, so long as the comment meets the standards listed above.

VIOLATIONS

The standards outlined above will be monitored and enforced. Violators of this policy may have their comments removed from the AG's Office official social media platforms as described below. Continued or egregious violations of this policy may prompt the agency to further restrict an individual's ability to participate on official social media platforms, as described below.

PROCESS FOR REMOVING COMMENTS OR BANNING USERS



2.3 – Social media in schools

Won't somebody please think of the children?

→ Social Media & Schools

- Can a school regulate access to social media on school grounds?
- Can a school punish students for social media posts undertaken outside of school?
- What about extra-curricular activities?

→ Social Media & Schools – School Grounds

- Can a school regulate access to social media on school grounds?
 - Yes. *See United States v. Am. Library Ass'n*, 539 U.S. 194 (2003)
 - But the regulation should probably be based on access policy, not content.



→ Social Media & Schools – Outside of School

- Can a school punish students for social media posts undertaken outside of school?
 - Depends on whom you ask, and depends on the post.
 - *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (student couldn't be punished for fake, derogatory, MySpace profile of school principal)
 - *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013) (school could expel student for sending social media messages planning a school shooting)
 - *B.L. v. Mahanoy Area Sch. Dist.* 964 F.3d 170 (3d Cir. 2020) (refusing to apply *Tinker* to off-campus, social media speech)
 - School's responsibility to protect from violence/harassment?



→ Social Media & Schools – Extra-Curriculars

- What about extra-curricular activities?
 - It depends on whom you ask.
 - *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008)
 - *Jhnson v. Cache Cnty. Sch. Dist.*, 323 F. Supp. 3d 1301 (D. Utah 2018)
 - *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019), *aff'd* 964 F.3d 170 (3d Cir. 2020)

→ Social Media & Schools

- Note, colleges and universities are different.
 - *See, e.g., Hunt v. Bd. of Regents of Univ. of N.M.*, 792 F. App'x 595 (10th Cir. 2019)
- Also note, *qualified immunity*.



2.4 – Social media & employment

What you say on Twitter will get you fired.



→ Employment & Social Media

- *Pickering / Garcetti / Connick* test
 - Matter of Public Concern?
 - Spoken in employee's role?
 - Balance speaker's vs. employer's interest.
 - Applies on social media
 - *See Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016)
- “Like” is speech.
 - *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013)



2.5 – Website liability

Why don't we just sue Facebook?

Public Enemy No. 1?



→ But they sometimes act...

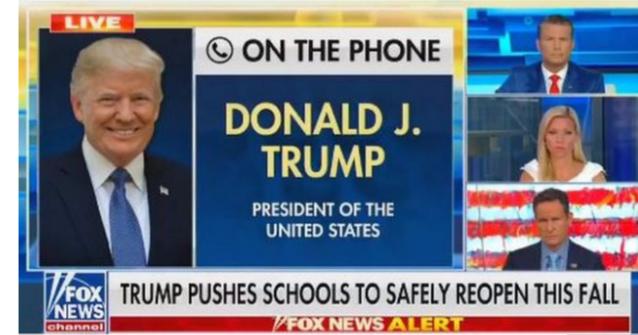
US Election 2020

Facebook and Twitter restrict Trump accounts over 'harmful' virus claim

6 August 2020

f     Share

Coronavirus pandemic



A clip from President Trump's Fox News interview was posted to his Facebook page

Facebook and Twitter have penalised Donald Trump and his campaign for posts in which the president claimed children were "almost immune" to coronavirus.

Facebook deleted the post - a clip from an interview Mr Trump gave to Fox News - saying it contained "harmful Covid misinformation".

Twitter followed by saying it had frozen a Trump campaign account until a tweet of the same clip was removed.

US public health advice makes clear children have no immunity to Covid-19.

What did Facebook and Twitter say?

A Facebook spokesperson said on Wednesday evening: "This video includes false claims that a group of people is immune from COVID-19 which is a violation of our policies around harmful COVID misinformation." 42



→ Why not sue directly?

- “**CONGRESS** shall make no law ...”
 - “[A] private entity may qualify as a state actor when it exercises powers ...traditionally and exclusively performed” by the government... Merely hosting speech by others it not a traditional, exclusive public function ...”
Manhattan Community Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).
 - *Marsh v. Alabama*, 326 U.S. 501 (1946) (Company towns).
 - *Cf., e.g., Lloyd v. Tanner*, 407 U.S. 551 (1972) (Malls).



→ Why not sue directly?

- Facebook, YouTube, Twitter, Google, and others have avoided definition as a state actor
 - *See Wilson v. Twitter*, No. 3:20-cv-0054, 2020 WL 3410349 (S.D. W. Va. May 1, 2020) (collecting cases)
- *Yet*, they retain rights to make “editorial decisions”...



→ Why not sue (for other stuff) directly?

- Section 230 of the Communications Decency Act (47 U.S.C. § 230(c))
 - An “interactive computer service” is not a “speaker or publisher of any information provided by another information content provider”
 - No liability for a provider voluntarily taking action to “restrict access to or availability of” obscene, violent, harassing “or otherwise objectionable” material.



→ Why not sue (for other stuff) directly?

- Social media websites qualify under § 230
 - *Force v. Facebook, Inc.* 934 F.3d 53 (2d Cir. 2019) (CDA immunized Facebook from liability for damages caused by Hamas terrorist activity, which Facebook gave “a forum with which to communicate and for actively bringing Hamas’ message to interested parties” even though Facebook’s “matchmaking” algorithms predict and show third-party content of interest to users).

→ The future?

- Unlikely that social media is a state actor
- Amendments to CDA liability?
- Other regulations?
- “Joint action” with government?
 - 42 U.S.C. § 1983 “under color of” law
 - *See, e.g. Tsao v. Desert Palace, Inc.*, 698 F.3d 1128 (9th Cir. 2012)

Opinions

Mark Zuckerberg: The Internet needs new rules. Let's start in these four areas.



Facebook, Messenger and Instagram apps on an iPhone screen. (Jerry Kane/AP)

Opinion by **Mark Zuckerberg**

March 30, 2019 at 1:00 p.m. MDT

+ Add to list

Mark Zuckerberg is founder and chief executive of Facebook.

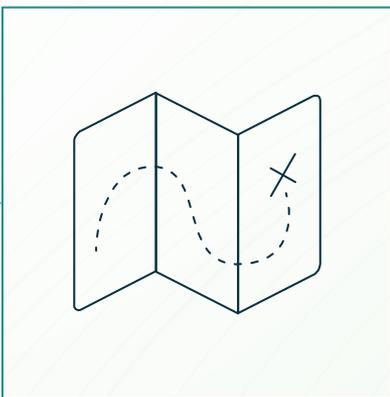
Technology is a major part of our lives, and companies such as Facebook have immense responsibilities. Every day, we make decisions about what speech is harmful, what constitutes political advertising, and how to prevent sophisticated cyberattacks. These are important for keeping our community safe. But if we were starting from scratch, we wouldn't ask companies to make these judgments alone.

I believe we need a more active role for governments and regulators. By updating the rules for the Internet, we can preserve what's best about it — the freedom for people to express themselves and for entrepreneurs to build new things



Questions?





Thanks!

Kyle Kaiser, kkaiser@agutah.gov

Special thanks to Michael Morris for research assistance

Special thanks to all the people who made and released these awesome resources for free:

- ▣ Presentation template by [SlidesCarnival](#)
- ▣ Photographs by [Unsplash](#)

→ End of the show!

→ End of the show!

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