



JOHNS HOPKINS

WHITING SCHOOL  
of ENGINEERING

# Cyber Operations, Risk, and Compliance

1<sup>st</sup> Amendment, Freedom of Speech, Privacy, Defamation

## Academic Freedom, Expressing Unpopular Causes, Viewpoint Discrimination (and being at will employed) 4th and 5th Slides

- Among the more recent controversies regarding the 1<sup>st</sup> Amendment is that of “academic freedom” and more broadly campus free speech, e.g. should faculty, esp. with tenure, be permitted to say whatever they wish in furtherance of education even if their comments are very unpopular and/or cause students to feel invaded in their “safe places” and/or made to feel uncomfortable.
- Faculty have been removed or guest speakers banned from on campus events in consequence of the speakers’ opinions and viewpoints. Frequently, the pretext for such removal, firing or ban arises incident to perceived insensitivities and/or hostility to racial, gender, identity and/or factors deemed important to students.
- Just about all USA colleges or universities, pursuant to AAUP standards, pledge to adhere to the precepts of academic freedom and campus tolerance of controversial opinions, despite contentions contra. (See FIRE.org).

## Academic Freedom, Expressing Unpopular Causes, Viewpoint Discrimination (and being at will employed) 4th and 5th Slides Cont.

- “Viewpoint Discrimination” online is the opposite side of the coin from a ban by and on social media; here, someone, usually a politician, but not always, blocks or bans someone from accessing the former’s own web site due to the disagreeable or offending comments posted by that other person. Some have condemned this practice as contrary to a public official’s duty to their voters.
- **Note:** If someone is employed in an at-will capacity, that is, can be fired with or without cause so long as not done for an illegal purpose, you may find yourself working for an organization which endorses a host of activities about which you disagree. (Same if your union or professional group makes endorsements you disagree with.) **Commercial free speech is not co-extensive with political free speech.** Thus, taking exception with your employer’s policies can lead to discipline or even worse! The point is that posting presumably “private” comments on your personal social media can have negative consequences and any at will worker is always vulnerable to discharge. Same if you openly proclaim hostility to a well-established employer policy.

# Supreme Constitutional Protection: 1<sup>st</sup> Amendment Liberties

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- The 1<sup>st</sup> Amendment to the Bill of Rights to the US Constitution provides that **government** shall make no law infringing upon one's freedom of expression/speech (as well as other invaluable protections for our freedom...)
- All state constitutions and those of most members of the UN contain similar safeguards and language, albeit pundits debate the extent to which such freedoms are respected. (See e.g. the Maryland Declaration of Rights; the UK Official Secrets Act.)
- This Amendment is directed at **governmental suppression of free speech, not restrictions imposed by private actors and organizations**. (Thus, the raging debate about the alleged bias and censorship by Twitter, Facebook and other social media and whether, despite being in private hands, they are the 21<sup>st</sup> century's "public town square".

## Supreme Constitutional Protection: 1<sup>st</sup> Amendment Liberties Cont.

- The 1<sup>st</sup> Amendment does not condone nor validate obscenity, defamation nor words and practices which are clearly dangerous or detrimental to public safety. (e.g. shouting fire in a crowded theater.) **QUERY:** Do opponents of COVID vaccination deserve to be treated as those shouting in a crowded theater?
- The Courts have construed the 1<sup>st</sup> Amendment to allow properly placed restrictions on certain speech, coupled with conduct, which may undermine national security or impair war time mobilization. (Compare the *Brandenberg v. Ohio* standard with prior SCOTUS decisions.)
- The Cyber Community has been at the forefront of current controversies about the boundaries and responsibilities attributable to them, e.g. as I write this Elon Musk (April, 2022) has just become the single largest shareholder of Twitter, .....Stay Tuned.....

# Defamation Introduced

1. Online defamation (slander, libel) is a source of increasing claims and concerns, especially as more people voice their “opinions” and assessments online. (Unlike the EU, under the GDPR, our comments, for better or worse, can be a permanent part of the USA blogosphere.....)
2. Defamation may be defined as a deliberate injurious falsehood of allegedly factual content conveyed to an unprivileged third party. (See the excellent defamation flowchart included in the course materials). There are numerous nuances.
3. Some falsehoods are per se defamatory without proof of economic injury, e.g., allegations of professional incompetence. Most however require some economic injury to file suit.
4. The truth of any statement is an absolute defense to defamation, but not to invasion of privacy claims, which are a distinct theory of liability. (See included opinion from NYS)
5. Some ostensibly defamatory comments may contain an absolute or qualified privilege. (See the landmark NY Times v. Sullivan SCOTUS opinion.)
6. Do not confuse anyone’s rights to merely state their opinions, no matter how injurious or uninformed, with the elements of a defamation case. (Where would “Rate Your Professor” and “Yelp” and “Trip Advisor”, etc. etc. be if all opinions were defamatory.....albeit some can be so alleged.
7. Thus far, the courts have been sympathetic to consumer-based evaluations of professional conduct.

# Online Privacy, Medical Confidences, GDPR

- Are you concerned about cookies, tracking devices, ISP and social media data collection, market preferences data sought or bought by e-marketers, movie app's knowledge of what upcoming films might be of interest to you, your search engine history saved for posterity (or the prying eyes of someone without scruples)? You get the point: perhaps online privacy is a chimera, for better or worse. (OK, so Amazon "knows" I prefer history books.....)
- The cliché is that everything online is there forever. The European Union takes a different view and enacted the GDPR to allow citizens to erase their histories and delete material deemed offensive or insulting or embarrassing to them. This law has placed major logistical obligations upon any cyber operation doing business within the EU. (So, do I want a Nazi war criminal, albeit still alive @ 90 years old, to delete his youthful exuberant membership in the SS.....)
- Medical privacy is an important issue both because of the sensitivities of patients but also because of the potential for data breaches and misuse of data. Under HIPPA, coupled with federal and state privacy laws, medical records are considered the property of the patient (albeit not always available without charge.....).

# Online Privacy, Medical Confidences, GDPR Cont.

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- As electronic health records become ubiquitous and health insurance/payment systems become ever more integrated, concerns about data privacy have only increased, especially as concerns mental health and genetic testing data. As a veteran, e.g., I know that the US Government has access to a monumental amount of medical and other data about me but it's a choice I made to access their health system, which is often excellent.
- I urge everyone to ask their health care providers, especially HMOs or large group practices with EHRs, what privacy safeguards are in place, with whom is data shared and what occurs in the event of any violation of federal or state breach laws.





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