

CONSTITUTIONAL LAW
FINAL EXAMINATION
Spring 2019

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EXAM INSTRUCTIONS

This is a three- hour exam. There is one essay question to be answered in Question 1, four short answer questions in Questions 2, and 20 Multistate Bar Exam-type questions in Question 3. Each question will count for 1/3 of your exam grade. The credit for the 2 quizzes and the practice exam represent a total of 10% of your grade for the course and the final exam represents 90%. (Extra credit may be added for your class participation).

Unless expressly stated, assume that there are no Federal or State statutes on the subjects addressed.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

*****1*****

Professor's Answer Outline Not available

MONTEREY COLLEGE OF LAW
Welsh, Professor
Final Examination Spring 2019

Question No. 1

A rap music artist named Jamal, whose legal name was Henry Jones, was charged with making terrorist threats, disturbing the peace, and intimidating witnesses after he uploaded a rap song on his "rap persona" Facebook page entitled "F---k The Police". The song contained graphic lyrics depicting acts of violence toward police officers. It also contained a statement that the Mayor, the Police Chief, and the two named Police Officers are members of the Ku Klux Klan and secretly burned crosses in their backyards. Jamal had no prior criminal record. The Mayor, the Police Chief and the two Officers were not members of the KKK, but they had all attended a private party where a replica of a KKK cross was burned in the Mayor's backyard as a joke.

In a separate lawsuit, the Mayor, the Police Chief and the two Police officers sued Jamal for defamation, invasion of privacy and Intentional Infliction of Emotional Distress.

What arguments can Jamal raise in his defense to challenge the constitutionality of his prosecution as a violation of his rights protected by the First Amendment? How will the Prosecutor respond? Analyze each issue and conclude.

What arguments can Jamal raise in his defense to challenge the constitutionality of the tort lawsuit? How will the plaintiffs respond? Analyze each issue and conclude.

For all issues, state how the U.S. Supreme Court should rule on them and why.

Question No. 2

Please write a short answer to these four questions. Each question is worth 25 points.

A. A state law prohibits discrimination on the basis of race, sex, national origin and religion in any programs which receive state funds. This year the state legislature created an exemption allowing discrimination on the basis of religion if the agency's objections are based on its own sincere religious beliefs. Based on the new exemption, the state-funded Child Welfare agency denied the Petition of a Jehovah's Witness to adopt a child because Jehovah's Witnesses do not honor the Sunday Sabbath. Analyze the constitutional issues the Jehovah's Witness can raise. How is the court likely to rule on them and why?

B. A city enacted an ordinance requiring warnings on all advertisements and labels for any beverage sold in the city containing added sugar, specifically requiring a warning that the product contributes to obesity, diabetes, and tooth decay. Two beverage distributors sued the City for violation of their rights under the First Amendment. Analyze the constitutional issues. How is the court likely to rule on them and why?

C. Each county in the State of Columbia selects its own method of voting. A wealthy county on the coast provides only electronic voting machines in each precinct and votes are machine counted. An inland county in which 30% of the population is at or below the poverty level provides only written ballots in each precinct and votes are hand counted. What constitutional issues can a voter from the inland county raise, if any? How is the court likely to rule on them and why?

D. A federal regulation requires pre-approval by a supervisor before any writing by a federal employee can be published or publicly disclosed. Analyze the constitutional issues the employees can raise. How is the court likely to rule on them and why?

1)

Part I.

FOS -First amendment: freedom of speech:

rule

The first amendment provides that congress shall make now law abridging the freedom of speech. when determing whether or not this protection has been violated, courts generally look to whther or not the form of speech is protected. If the speech is protected, then the highest level of scrutiny is involved (strict scrutiny). Under the **strict scruitney** test for freedom of speech, the government has the burden of showing that its regulation is necessary to serve a compelling government interest and that the regulation is narrowly tailored to achieve that interest.

rule

Unprotected speech: Courts have determined that the government has a per se compelling interest in prohibiting certain types of speech, now commonly referred to as unprotected speech. Those are: speech that incites imminent lawless action, fighting words, obscenity, defamation and many forms of commercial speech.

Fossil

Jamal will argue that his song is protected under the first amendment and freedom speech because it does not meet the following requirments.

Fragement rule

Incitment - imminent lawless action: Incitement is when a person ^{intentionally directs} provokes another to ^{speech to} unlawful behavior. It is unprotected speech. whether speech can be regulated as incitement is determined by the Brandenburg test:

Brandenberg test: Under brandenberg, speech can be regulated if ALL of the following are present

1. there is a risk of imminent harm
2. the likelihood of producing illegal action ~~that~~
3. the courts will look to the intent to cause the imminent illegality.

Jamal uploaded his rap song titled "fuck the police" on the Henry Jones rap page. The rap song included a title of "fuck the police", graphic lyrics, and a statement about members of the city being affiliated with the KKK. Since the song was uploaded through a public forum and it was on the internet and not in person, Jamal will argue that there was no Imminent threat of harm to any of the city's members. This may be a valid argument since the slurs were not in person and the other party is not a captive listener. Therefore, lacking the imminent portion of prong one of the Brandenburg test. Jamal posted his song through Facebook and the internet is not a regulated forum (see below) this makes it less invasive as listening to the words in person. This makes the likelihood of producing illegal action very slim to none (prong 2). Lastly, the courts will look at prong 3, the intent to cause the imminent illegality. Here, Jamal has no criminal record and the song is playing on the internet. These are both important factors because gangsters and criminals don't really listen to rappers that they can't relate to. Since Jamal has no criminal record he most likely does not have a good street reputation with the actual criminals and gangsters. Also, Jamal will argue that parties are free to hit pause or not visit his rap page to listen to the song. The Mayor, police chief, and two police officers will argue that they have to patrol the city and have to hear the song while people are driving in their cars. They may also argue that they are exposed to the song regardless when they conduct search warrants, or go into restaurants or stores. The court will most likely find that Jamal's rap does not meet constitutional muster to convict him of Terrorist threats, disturbing the peace, and intimidating witnesses because the rap does not include any Incitement or provokes a person to commit unlawful behavior.

Good Analysis & Conclusion

Fighting words; fighting words are words directed at another person which are likely to provoke a violent response against the speaker and inflict immediate emotional harm. They are unprotected. The focus is on how the crowd reacts and not on the actual words. Briefly, Jamal will also argue that his song is protected under the first amendment and freedom speech because his song does not include fighting words and is only an expression of free speech. Here, the court will look to whether or not the words in Jamal's songs provoke a violent response against the Mayor, police chief, and two police officer and whether or not it also inflicts immediate emotional harm. Since the title itself suggests that all listeners disregard the police, the police force will argue that the song is encourage people to not listen to them and commit unlawful behavior. The mayor will argue that this causes immediate emotional harm for him because it causes haveck in his city.

(However, both the mayor and Police force are public figures (see below) they should be used to people not always being on their side. Especially police officers, they make a living on people not following every law. Jamal will argue that this is not in any way directed at them personally but just a general upset. Jamal did however name the police officers and the mayor is very well known. Its important to note that here, there is no mention of actual violence that occured because of the song. None of the named people got hurt and no one started running around the street trying to hurt them after they listened to the song. The courts will most likely hold that the song is a form of free speech and not fighting words because there is no direct harm that occured from it. the court will put most of its analysis on how the listener reacts and not on the actual words.

Profanity and indecent speech; profanity and indecent speech are still protected but at a lower standard. Profanity is okay in public settings since there are no privacy invasions, they are also okay on facebook because the other party is not a captive listener. They are okay on any parts of the internet because they are not invasive and are usually proceded by warnings (PG 13 etc.) In fact, the internet is not regulated in general. The Mayor, police chief, and two police officer will argue that the song literally says fuck the police

and therefore it is profanity. Jamal will argue that although its says the word fuck, his song and the title are still protected since he uploaded it on a public platform. The court will most likely hold that the Profanity is okay since its in a public settings and there are no privacy invasions. *Is Facebook public?*

Whether the government can regulate conduct depends on whether the forum in which the conduct occurs is a designated, public, nonpublic, or limited public forum.

Is Facebook Public Forum or not? (a hot issue)

OK **PUBLIC FORUM:** a public forum is where speech has traditionally been permitted, such as a public park. Here there must be a compelling interest with no less restrictive means. the government may regulate certain conduct in public forums provided

*Why?
Explain
(content-based)*

1. the regulation is content neutral.
2. is narrowly tailored to serve a significant government interest
3. there are alternative channels of communication left open.

The Song was uploaded on a public forum. it's important to note this because the conduct is being punished and regulated.

*Analyze it
This is an issue = only 1 case in lower courts
have held that Twitter to be public forum
(open question)*

Part II. Tort Lawsuit:

Defamation: in Ny times v. Sullivan the court established that you must look at the character of the plaintiff to know whether or not they are a public or private figure. If the plaintiff is a public official or running for public office then clear and convincing evidence of falsity and actual malice is required. if the plaintiff is a private figure than just

*GOOD
FISH
SENT*

negligence is involved. Here we have a mayor, police chief and two police officers. Jamal will argue that Each one of these plaintiffs is a public figure. When they took their job they knew that their main task was to protect the public. With such job, there comes many unfortunate side effects. for one, you lose your privacy. Secondly, you cannot please everyone in these positions. There will always be a citizen that hates the mayor or cops because they have had a negative confrontation or simply do not follow their same beliefs. The cops and mayor will argue that they are not a public figure and have a right to privacy. (see below)

Invasion of privacy: the right to privacy is a fundamental right. this includes the right to avoid the disclosure of personal matters and the right to make important decisions. Here the Mayor and police enforcements will argue that Jamal is invading their privacy and **freedom of association** by letting everyone know they practice the KKK ritual.

However, the courts will most likely find that the since they are public figures (see above) ^{NOT UNDER FREEDOM OF PRIVACY} The clear and convincing evidence of (falsity) and actual malice is not met. Since the police officers did have a a ritual with a replica of the KKK cross being burned, there is no clear and convincing evidence that they are not members. Although it was a private party, the court will find that since they are public figures the ritual somehow got out and a reasonable person would think since they did burn the KKK cross than they are bound to be confused as a KKK member.

IED: intentional infliction of emotional distress - in Snyder, there was intentional and reckless IED by behaving in an extreme and outrageous way. Hustler held recovery for IIED has to show clear and convincing evidence of ^{not needed} (falsity) and actual malice (see above). Under Snyder there is no liability for speech that is otherwise protected by the first amendment. Jamal will argue that he did not behave in an extreme and outrageous way. The plaintiffs will argue that although it was just a song, Jamal knew they weren't actual members and caused them a lot of harm. The court will hold that The IIED claim will

good use of facts + inferences

also fail to meet constitutional muster because it does not meet the malice prong and the D was not behaving in an extreme or outrageous way, he was just exercising his freedom of speech. *in a Public Forum? (Always)*

In conclusion, the first amendment limits government liability to impose tort liability for speech. In matters of private parties, the limit depends on who the plaintiff is. In public figures, there is little or not protection for torts such as the ones described. The court will most likely dismiss the tort claims. *Good Action Street*

Other:

public disclosure of private facts: publication of private facts that is not a legitimate public concern and would be offensive to the reasonable person. no liability if information was lawfully obtained and truthfully reported.

*Good job! You describe the cases well,
and analyze well using the facts.
Analyze whether the forum is public or private:
This is a case with Facebook, Twitter, etc
+ regulating internet is generally more restricted.*

END OF EXAM

2)

2A. 1st Amendment Freedom of Religion

The 1st Amendment provides that Congress shall make no law respecting an establishment of religion (Establishment Clause) or preventing the free exercise thereof (Free Exercise Clause).

Establishment Clause (EC)

Under the given facts, the Jehovah's witness can raise an EC violation in response to the government's conduct. The EC compels the government to maintain a position of neutrality toward religion. Under the EC, a governmental regulation will not be upheld unless it meets the Lemon Test. The Lemon Test requires that three elements be met: 1) the government's regulation has a secular purpose; 2) the regulation neither advances nor inhibits religion; and 3) it does not result in excessive entanglement of government and religion. Here, the Jehovah's witness will claim that the regulation is not secular as it specifically discriminates against those who consider themselves Jehovah's witnesses. Moreover, it could be argued that the government's denial advances their interest in their own religious practices which clearly violates prong 2 of the Lemon Test. Lastly, an excessive entanglement of government and religion is present as the exemption created by the state legislature interfere's with a person's right to adopt based on their religion in connection with a state-funded program. Given the reasoning *supra*, it is safe to conclude that the government will fail the Lemon Test.

(maybe)
good
Analysis
What about accommodating the Agency's religious views?

Free Exercise Clause (FEC)

The FEC ensures that a person cannot be punished for his or her religious beliefs. A person is not required to believe in the existence of a supreme being for the FEC to take effect. Under the FEC, a violation occurs if a governmental regulation requires behavior that a religion prohibits or prohibits behavior that a religion requires. Here, the Jehovah's witness will argue that the government's denial of his or her petition to adopt is a violation of the FEC. He or she will argue that they have the right to freely exercise their religious beliefs and not be penalized as a result. A regulation under the FEC can be analyzed under two different tests: 1) the Smith test; and 2) the Sherbert test.

Traditionally, the Sherbert test applied Strict Scrutiny in relation to a FEC violation. However, once the court ruled in Smith, a regulation was found to be valid if it was generally applicable and did not specially target a particular religion. Here, the state legislature's regulation violates Smith as it clearly discriminates against those who do not hold the same religious beliefs as the government-funded agency and the regulation is not generally applicable.

2B. Commercial Speech- Central Hudson Test

If the government attempts to regulate speech which is lawful and not misleading (truthful), then the Central Hudson Test must be met; unlawful activity need not meet the requirements of the Central Hudson Test. Under the test, the government must prove that the regulation serves an important government interest, advances the interest, and is narrowly tailored to do so (does not need to be the least restrictive means). Here, the speech involved is lawful and not misleading as it pertains to labels on beverages containing sugar, therefore the government must meet the Central Hudson Test. The government will argue that their regulation is geared toward ensuring the health of citizens, which is certainly an important interest. They will further argue that the regulation advances the interest as it warns consumers that added sugar contributes to

various health issues. It is likely that the ordinance requiring warnings on advertisements and labels will be deemed valid as the government meets the Central Hudson Test.

18 But: Believe notice at Pregnancy Clinic struck down as uncon compelled speech. Discuss

2C. Fundamental Right to Vote

The right to vote is an integral part of a democratic society. A voter from the inland county can raise various issues in response to the voting mechanisms established by the State of Columbia. One of the first arguments raised could involve the idea of "one person one vote." This philosophy entails that one person's vote should carry as much weight as another person's. More specifically, equal representation of votes should exist. Here, the inlander could argue that the difference in the demographics of the wealthy county on the coast and the the poverty-stricken inland county could result in an inaccurate measure of votes. Furthermore, the inlander could make an argument under Bush v. Gore, in response to the methods that the two counties use to count their votes. The wealthy county provides electronic machines, while the inland county votes are hand-counted. The inland counter voter could argue that a standardized method of counting votes should be used throughout the entire State of Columbia in order to ensure accuracy.

How?
(explain)

20 Good point (state what constitutional issue is raised: at-vote + Equal Protection)

2D. Prior Restraint

A prior restraint is a court order or administrative system which prevents speech from occurring. Prior restraints are not favored in our democratic society and courts would rather allow speech to occur and then punish it if it is deemed unprotected. A prior restraint, such as the pre-approval by a supervisor in the case at bar, must have clear criteria and procedural safeguards. Here, the employee will claim that their 1st

amendment right to freedom of speech is violated by the prior restraint. Moreover, he or she will claim that the requirements for approval are not clear and the restraint is overbroad. The regulation requires pre-approval for any writing by a federal employee. What is considered a writing under the regulation? Is a writing a letter, memo, poem, note, or social media post? The employee should not have the burden of guessing what constitutes a writing before he or she can exercise their right to free speech. Even more, procedural safeguards are not in place. If the employee's writing is not approved, then he or she is unable to publish it or publicly disclose it, which basically leaves them the option to keep the writing to themselves. A court would likely find that the prior restraint is unconstitutional as it is overbroad and does not provide procedural safeguards.

good
Analysis

19
Also analyze public employee speech: Pickering balancing test,
Garcetti - within job duties
unprotected

END OF EXAM