

First Amendment and the Ethics of Law (EPE 306)

YALE UNIVERSITY - ETHICS, POLITICS, AND ECONOMICS – YSS 2021

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COURSE DESCRIPTION:

This course will address the First Amendment and freedom of speech, focusing on the ethical implications of restrictions on free speech, as well as the exercise of free speech and contemporary issues involving free speech. Course topics and discussions will include the “fighting words” doctrine, hate speech, true threats, content regulated speech, freedom of speech and the internet, and the so-called “right to be forgotten”.

By the end of the course, students will be able to recognize the role free speech plays in society, including its negative and positive impacts on various segments of society. Students will also have an understanding of the competing interests arising from the First Amendment’s right to free speech, and will be able to analyze how these competing interests are weighed and measured in the United States as compared with other countries.

Class preparation is essential to an understanding of the course objectives. Students should be prepared for engaging class discussions, inclusive of all points of view. The University’s policy prohibiting plagiarism shall be enforced; students are expected to work alone on assignments, unless otherwise instructed. Most media and reading assignments are linked below, or available on-line. Required written work consists of daily reading responses, a mid-term examination/paper, and the final exam.

This course will be taught online for the 2021 Yale Summer Session.

COURSE REQUIREMENTS AND GRADING:

Participation in class and timely completion of written work are required. Participation in class will consist of 20% of the final grade. Daily reading responses are due at the start of each class; the total reading responses consist of 20% of the final grade. The mid-term exam/paper will consist of 25% of the final grade. The final exam will consist of 35% of the final grade. Students are expected to review all “Pre-recorded Material” on the syllabus, and be prepared to participate in class discussions regarding same. “Readings” on the syllabus will be specially assigned to individual students, or groups of students, by announcement prior to each class. Students are expected to be prepared to facilitate class discussion on readings which have been specially assigned. With the exception of an emergency, students must seek permission to be absent from class prior to the scheduled class in which they plan to be absent. Unexcused absences from class will result in a decrease in the final grade by one full letter grade.

CLASS 1 (JULY 13): INTRODUCTION: discussion of course schedule/syllabus, grading, etc.; ethical and legal considerations regarding free speech.

Reading Response #1 due at the start of class 1 (page limit: 2 pages or 1200 words):

- 1. Do colleges/universities have an ethical obligation to prohibit offensive speakers from speaking on campus? Why/why not?*
- 2. What, if any, is our ethical obligation to restrain from exercising our free speech rights in public?*

Pre-recorded Material:

1. Video: Big Think: “Law vs Justice: What is our Duty in Society?” (approximately 30 minutes – view through “Grandstanding” segment)

<https://bigthink.com/videos/law-vs-justice-what-is-our-duty-in-society>

2. “*Free Speech on College Campuses*” Video – Prof. Geoffrey R. Stone, Ethics Institute at Dartmouth College, 9/25/17 (1 hour)

<https://youtu.be/Vt3zIoUGujI?t=414>

3. “From Protest to Resistance” Documentary, 6/13 (1 hour) – available through the library

4. Columbia University 1968 protest (8 min.)

<https://www.youtube.com/watch?v=0vApATxcur0>

5. Noam Chomsky interview, 12/19/19 (11 min.)

<https://www.youtube.com/watch?v=VjoAmkonH50&feature=youtu.be>

READINGS:

Dea, “Sometimes Refraining from Speech is Good”, University Affairs, 6/7/19

<https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/sometimes-refraining-from-speech-is-good/>

Flanders, “*Are Universities Schools? The Case for Continuity in the Regulation of Student Speech*”, New York University Law Review, Vol. 93:101 (2018)

https://www.nyulawreview.org/wp-content/uploads/2018/10/Flanders-pub_0.pdf

“*Report of the Committee on Freedom of Expression at Yale*” (Woodward Report), December 23, 1974

<https://yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>

Niraj Chokshi, “[What College Students Really Think About Free Speech](#)”, *New York Times* (3/12/18)

Post, Robert C., “[There Is No 1st Amendment Right to Speak on a College Campus.](#)” Vox.com, 31 Dec. 2017

Alexander Tsesis, “[Balancing Free Speech](#)”, 96 *Boston University Law Rev.* 1 (2016)

Marceau & Chen, “*Free Speech and Democracy in the Video Age*”, *Columbia Law Review*, Vol. 116, No. 4 (May 2016)

<https://columbialawreview.org/content/free-speech-and-democracy-in-the-video-age/>

CLASS 2 (JULY 15): HISTORY OF THE FIRST AMENDMENT: Why do we have the First Amendment protection of free speech?

Reading Response #2 due at the start of class 2 (page limit: 2 pages or 1200 words):

Why is free speech protected under the First Amendment?

PRE-recorded Material:

1. History of First Amendment from Izzit.org YouTube channel (20 min.)

<https://www.youtube.com/watch?v=YezjmAZBB3E>

2. “Shouting Fire: Stories from the Edge of Free Speech”, HBO Documentary (*Vimeo*, 2012) (1hour, 15 min.)

<https://vimeo.com/38265857>

3. The Ethics Centre, “IQ2 Debates: Political Correctness Failed Itself”, 2/22/17 (1 hour)

<https://ethics.org.au/ethics-explainer-freedom-of-speech/>

READING:

Abrams, Floyd, “*The Soul of the First Amendment*”, Yale University Press, 2017

CLASS 3 (JULY 20): THE “FIGHTING WORDS” DOCTRINE AND “HATE SPEECH”: influence of history and public discourse on whether speech is protected, or likely to incite violence.

****Mid-term examination/paper distributed prior to class 3; due at the beginning of class #4. Maximum page limit - 4 pages (2400 words).*

Reading Response #3 due at the start of class 3 (page limit: 2 pages or 1200 words):

What is the difference, if any, between speech which is likely to incite or produce imminent lawless action, and fighting words?

Pre-recorded Material:

1. CSpan Landmark Supreme Court Cases, *Brandenburg v. Ohio*, 4/16/18, Katie Fallow & Nadine Strossen (1.5 hours)

<https://www.c-span.org/video/?440874-1/supreme-court-landmark-case-brandenburg-v-ohio>

2. News clips of flag burning incidents, from FreedomNewsTV (7 min.):
<https://www.youtube.com/watch?v=HE-KUvF7SZ0>

And this one from “The Sun” (3 min.)
<https://www.youtube.com/watch?v=W4PayzLR9BM>

3. Video on protests from Vox.com (5 min.):
<https://www.youtube.com/watch?v=srnA3cNTsXQ>

BLM protest video from Vanity Fair (9 min):
<https://www.youtube.com/watch?v=gS2MG2k9BIM>

4. Associated Press Video on the revival of the KKK (3 min.):
https://www.youtube.com/watch?v=Y_dKhkvVBfg

5. Katia Campbell TEDTalk (13 min.)
https://www.ted.com/talks/katia_campbell_the_freedom_of_hate_speech_a_call_for_civil_dialogue/up-next

READINGS:

[Cantwell v. Connecticut](https://en.wikipedia.org/wiki/Cantwell_v._Connecticut), 60 S.Ct. 900 (1940)

Bradenburg v. Ohio, 395 U.S. 444 (1969) (speech which incites or is likely to produce imminent lawless action not protected)

Chaplinsky v. New Hampshire, 62 S.Ct. 766 (1942) (fighting words)

State v. Baccala, 326 Conn. 232 (2017) (*Chaplinsky* discussed)

State v. Liebenguth, 181 Conn. App. 37 (2018), reversed by Connecticut Supreme Court on 8/27/2020. (“N” word; “Remember Ferguson”)

The Volokh Conspiracy, “Fighting Words in the Connecticut Supreme Court” (8/27/20)

<https://reason.com/volokh/2020/08/27/fighting-words-in-the-connecticut-supreme-court/>

State v. Krijger, 313 Conn. 34 (2014) (breach of peace conviction reversed)

State v. Symkiewicz, 237 Conn. 613 (1996) (verbal statements unaccompanied by physical violence are violent and threatening when they amount to “fighting words that portend physical violence”)

State v. Parnoff, 329 Conn. 386 (2018) (defendant’s statements to water utility personnel on defendant’s property for maintenance purpose did not constitute fighting words) -

<https://cases.justia.com/connecticut/supreme-court/2018-sc19588.pdf?ts=1530533022>

CLASSES 4 (JULY 22): TRUE THREATS: what constitutes a true threat?

*****MID-term examination/paper due at the beginning of class #4 (maximum page limit – 4 pages/2400 words).**

Reading Response #4 due at the start of class (page limit: 2 pages or 1200 words):

When someone speaks or writes something that could reasonably be interpreted as a threat to another, what must the speaker intend by their expression in order that the expression be considered a true threat? Explain.

Guest Speaker: *Dean Rodney Smolla, Dean of University of Delaware Law School (argued *Virginia v. Black*)

Pre-recorded Material:

1. Federalist Society Podcast, “Free Speech and Criminal Intent”, 9/13/19 (1 hour)

<https://fedsoc.org/events/free-speech-and-criminal-intent>

2. *Virginia v. Black* – United States Supreme Court argument (1 hour). Please click here and choose “oral argument”:

<https://www.oyez.org/cases/2002/01-1107>

READINGS:

Virginia v. Black, 538 U.S. 343 (2003)

State v. Taupier, 330 Conn. 149 (2018), 139 S.Ct. 1188 (pet. cert. denied 2019) (threat against judge; analysis of required intent) -

<https://www.jud.ct.gov/external/supapp/Cases/AROcr/CR330/330CR72.pdf>

Elonis v. U.S., 135 S.Ct. 2001 (2015) (offensive speech)

Benjamin Means, “Criminal Speech and the First Amendment”, 86 *Marquette Law Review* 501 (2002).

Jessica Ferranti, “True-threat Doctrine and Mental State at the Time of Speech”, Journal of the American Academy of Psychiatry & the Law, June 2016, 44(2), pp. 138-44 – available on line.

Harvard Law Review: *Commonwealth v. Knox* [190 A.3d 1146 (Pa. 2018) (USSC pet. denied 4/15/19)], 132 Harv.L.Rev. 1558 (2019).

<https://harvardlawreview.org/2019/03/commonwealth-v-knox/>

CLASSES 5 (JULY 27) & 6 (JULY 29): TRUTH AND THE FIRST AMENDMENT: Does the truth matter? Who is protected? Who should be protected? What is the “truth”?

Reading Response #5 due at the start of class #5; reading response #6 due at the start of class #6 (page limit: 2 pages or 1200 words):

1. Is it ethical to lie when one is speaking in public? Why/why not?

2. Why must public officials and public figures prove actual malice in defamation actions?

PRE-RECORDED MATERIAL:

1. “*Nobody Speak: Trials of the Free Press*” Documentary (1/24/17) (1.5 hours), available on Netflix

2. ABC REPORT ON ALVAREZ (3 MIN):

[HTTPS://WWW.YOUTUBE.COM/WATCH?V=YPGUZ0J24Wo](https://www.youtube.com/watch?v=YPGUZ0J24Wo)

3. *FEDERALIST SOCIETY GUIDE ON NYT VS SULLIVAN* (4 MIN):

[HTTPS://WWW.YOUTUBE.COM/WATCH?V=QEZ1mFTTN8s](https://www.youtube.com/watch?v=QEZ1mFTTN8s)

4. *NYTIMES V. SULLIVAN* – USSC ARGUMENT – AUDIO (1 HOUR)

[HTTPS://WWW.OYEZ.ORG/CASES/1963/39](https://www.oyez.org/cases/1963/39)

READINGS:

Turner v. Wells, 879 F.3d 1254 (11th Cir. 2018) (“true facts”) -

<https://law.justia.com/cases/federal/appellate-courts/ca11/16-15692/16-15692-2018-01-18.html>

<http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-us-v-alvarez> - *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012) (prosecution under Stolen Valor Act violated free speech), but see

<https://law.justia.com/cases/federal/appellate-courts/ca11/15-14220/15-14220-2018-05-17.html> - *Prison Legal News v. Florida Department of Correction*, 890 F.3d 954 (2018) (free speech not violated by DOC’s impoundment of prison newspaper).

Jane E. Kirtley, “Getting to the Truth: Fake News, Libel Laws, and ‘Enemies of the American People’”, American Bar Association -

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/getting-to-the-truth/

FREDERICK SCHAUER, “FREE SPEECH, THE SEARCH FOR TRUTH, AND THE PROBLEM OF THE COLLECTIVE KNOWLEDGE”, 70 SMU L.REV. 231 (2017)

[HTTPS://SCHOLAR.SMU.EDU/CGI/VIEWCONTENT.CGI?ARTICLE=4682&CONTEXT=SMULR](https://scholar.smu.edu/cgi/viewcontent.cgi?article=4682&context=smulr)

CLASSES 7 (AUGUST 3) & 8 (AUGUST 5): REASONABLE TIME, PLACE & MANNER AND OTHER RESTRICTIONS ON SPEECH: Balancing public/governmental interests against individual right to freedom of speech.

Reading Response for class #7 due at the start of class 7 (page limit: 2 pages or 1200 words):

Is it ethical for an owner of a bake shop to refuse to design a wedding cake for a same-sex couple because same-sex marriage offends the bake shop owner’s genuinely held religious beliefs?

Reading Response for class #8 due at the start of class 8 (page limit: 2 pages or 1200 words):

1. Why did the USSC decide as it did in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*?

2. What ethical obligation does a private business owner have to insure that their business practices are not discriminatory?

PRE-RECORDED MATERIAL:

1. *THE NATION* VIDEO: “THE NEW CULTURE WARS: HOW THE RIGHT STIFLES FREE SPEECH THROUGH ART CENSORSHIP”, 5/24/11 (45 MIN.)

[HTTPS://WWW.YOUTUBE.COM/WATCH?V=I5YQPIGBFX4](https://www.youtube.com/watch?v=i5YQPIGBFX4)

2. UNITED STATES SUPREME COURT ORAL ARGUMENT (AUDIO), *MASTERPIECE CAKESHOP V. COLORADO CIVIL RIGHTS COMMISSION*, 12/5/17 (1.5 HOURS)

[HTTPS://WWW.YOUTUBE.COM/WATCH?V=JOYVEFOOObS](https://www.youtube.com/watch?v=jOyVEFOOObS)

READINGS:

“Understanding the First Amendment Limitations on Government Regulation of Artwork”, ABA (1/2/17) -

https://www.americanbar.org/groups/state_local_government/publications/state_local_law_news/2016-17/winter/understanding_first_amendment_limitations_government_regulation_artwork/

McCullen v. Oakley, 134 S.Ct. 2518 (2014) (buffer zone on public walkway outside abortion clinic was not narrowly tailored reasonable time, place and manner restriction, violated first amendment)

<https://harvardlawreview.org/2014/11/mccullen-v-coakley/>

Erwin Chemerinsky, “Not a Masterpiece: the Supreme Court’s Decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*”, discussion of *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S.Ct. 1719 (2018) (unresolved question of whether or not businesses may discriminate based on first amendment freedom of speech)

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/

Minnesota Voters Alliance v. Mansky, 138 S.Ct. 1876 (2018) (statute prohibiting wearing of “political” clothing to polling place on election day was facially invalid and violated first amendment)

<https://harvardlawreview.org/2018/11/minnesota-voters-alliance-v-mansky/>

National Institute of Family & Life Advocates v. Becerra, 138 S.Ct. 2361 (2018) (commercial speech; abortion-related disclosure requirement did not violate first amendment even though required disclosures were in the interest of opposing abortions, while disclosures providing additional access to abortions were not required; for synopsis of case, see Global Freedom of Expression at Columbia University, available on line) <https://harvardlawreview.org/2018/11/national-institute-of-family-life-advocates-v-becerra/>

Packingham v. North Carolina, 137 S.Ct. 1730 (2017) (state statute prohibiting registered sex offender from accessing social media website violated first amendment) <https://harvardlawreview.org/2017/11/packingham-v-north-carolina/>

New York Times v. United States, 403 U.S. 713 (1971) (Prior restraint on publication of study of Vietnam War violated freedom of speech; vague argument re national security insufficient to overcome First Amendment protection; government had not shown publication would cause an inevitable direct, and immediate event likely to imperil American forces; no clear and present danger.)

Animal League Defense Fund v. Reynolds, 878 F.3d 1184 (2018) (Idaho statute criminalizing entry into agricultural production facility by misrepresentation violated First Amendment) - <https://www.leagle.com/decision/infco20180104114>

CLASS 9 (AUGUST 10): CONTENT-RELATED REGULATION OF SPEECH BY THE GOVERNMENT

READING RESPONSE #9 DUE AT THE START OF CLASS 9 (page limit: 2 pages or 1200 words):

WAS THE CITIZENS UNITED CASE WRONGLY DECIDED? WHY/WHY NOT?

PRE-RECORDED MATERIAL:

1. LOUIS THEROUX, “AMERICA’S MOST HATED FAMILY IN CRISIS”, 4/3/11 (1 HOUR), AVAILABLE ON ITUNES FOR \$2.99

<HTTPS://ITUNES.APPLE.COM/AU/TV-SEASON/LOUIS-THEROUX-AMERICAS-MOST-HATED-FAMILY-IN-CRISIS>ID429903993>

2. “*WAS CITIZENS UNITED WRONGLY DECIDED?*”, NATIONAL CONSTITUTION CENTER DEBATE, 5/22/15 (1.5 HOURS)

<HTTPS://WWW.YOUTUBE.COM/WATCH?V=VHJ5LAAKH8O>

READINGS:

Snyder v. Phelps, 131 S.Ct. 1207 (2011) (Westboro Baptist Church anti-gay protesters entitled to First Amendment protection re tort claim)

March v. Mills, 867 F.3d 46 (1st Cir. 2017) (Maine Civil Rights Act barring noise that can be heard within building does not violate First Amendment) -
<https://cases.justia.com/federal/appellate-courts/ca1/16-1771/16-1771-2017-08-08.pdf?ts=1502218807>

Matal v. Tam, 137 S.Ct. 1744 (2017) (violation of free speech for government to refuse to issue trademark to band called “Slants” because the name violated a provision of Lanham Act prohibiting registration of trademarks that may “disparage” persons, institutions, beliefs, or national symbols)

Iancu v. Brunetti, 139 S.Ct. 2294 (2019) (“shocking/scandalous” prohibition to trademark registration violates free speech; post-*Matal*) -
https://www.supremecourt.gov/opinions/18pdf/18-302_e29g.pdf

Texas v. Johnson, 109 S.Ct. 2533 (1989) (flag burning)

Fuller, P. Brooks; Garrett Wagner, Kyla P.; and Mazandarani, Farnosh (2020), “Porn Wars: Serious Value, Social Harm, and the Burdens of Modern Obscenity Doctrine”, *American University Journal of Gender, Social Policy & the Law*, Vol. 28: Iss. 2, Article1.

<https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1779&context=jgspl>

Considering the impact of *Citizens United v. FEC*, 558 U.S. 310 (2010): “*Citizens United* at Work: How the Landmark Decision Legalized Political Coercion in the Workplace”, Harv.L.Rev., Vol. 128, No. 2 (Dec. 2014)

<https://harvardlawreview.org/2014/12/citizens-united-at-work/>

CLASS 10 (AUGUST 12): FIRST AMENDMENT AND THE INTERNET/SOCIAL MEDIA

*****Final Examination distributed prior to last class; maximum page limit – 8 pages (4800 words). *Due date and time of final examination to be announced.**

Reading response #10 due at the start of class 10 (page limit: 2 pages or 1200 words):

Should on-line speech be regulated by the United States government? Why/why not?

PRE-RECORDED MATERIAL:

1. “THE SOCIAL DILEMMA” DOCUMENTARY – 1/26/20 (1.5 HOURS), AVAILABLE ON NETFLIX
2. “THE U.S. SHOULD ADOPT THE RIGHT TO BE FORGOTTEN ONLINE”, INTELLIGENCE SQUARED DEBATES, 8/11/17 (1.5 HOURS)

[HTTPS://WWW.INTELLIGENCESQUAREDUS.ORG/DEBATES/US-SHOULD-ADOPT-RIGHT-BE-FORGOTTEN-ONLINE](https://www.intelligencesquaredus.org/debates/us-should-adopt-right-be-forgotten-online)

READINGS:

BBC NEWS, “YOUTUBE ‘NOT A PUBLIC FORUM’ WITH GUARANTEED FREE SPEECH”
(2/27/20)

[HTTPS://WWW.BBC.COM/NEWS/TECHNOLOGY-51658341](https://www.bbc.com/news/technology-51658341)

KATE KLONICK, “THE NEW GOVERNORS: THE PEOPLE, RULES AND PROCESS GOVERNING ON LINE SPEECH”, 131 HARV.L.REV. 1598 (6/7/19)

[HTTPS://HARVARDLAWREVIEW.ORG/2018/04/THE-NEW-GOVERNORS-THE-PEOPLE-RULES-AND-PROCESSES-GOVERNING-ONLINE-SPEECH/](https://harvardlawreview.org/2018/04/the-new-governors-the-people-rules-and-processes-governing-online-speech/)

Seralathan, “*Making the Time Fit the Crime: Clearly Defining Online Harassment Crimes and Providing Incentives for Investigating Online Threats in the Digital Age*”, Brooklyn Journal of International Law, Vol. 42:1 (2016)
<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1663&context=bjil>

Facebook’s Anti-Discrimination Policy: do hate groups have a First Amendment right to access to social media? <https://techcrunch.com/2018/04/24/facebook-content-rules/>

Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (plaintiff sought injunction to remove from internet portions of YouTube video which resulted in death threats against plaintiff; injunctive relief denied as it implicated free speech of video-hosting website, and was not grounded in copyright interest of plaintiff)

Floyd Abrams, [“When 2 + 2 Might Equal 5”](#), *New York Times* (5/7/18)

Adam Liptak, [“How Free Speech was Weaponized by Conservatives”](#), *New York Times* (7/1/18)

Alina Tugend, [“Colleges Grapple with Where – or Whether – to Draw the Line on Free Speech”](#), *New York Times* (6/5/18)