

First Amendment and the Ethics of Law (EPE 306)
First Amendment, Freedom of Speech, and the Internet

YALE UNIVERSITY - ETHICS, POLITICS, AND ECONOMICS – SUMMER 2024

Karen A. Goodrow
Telephone: 860.304.1300

Office Hours: by arrangement
E-mail: karen.goodrow@yale.edu

COURSE DESCRIPTION:

This course will address the First Amendment and freedom of speech, and the internet, 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 gain knowledge and understanding of the complex issues surrounding speech on the internet and the ethical implications of speech moderation controlled by private big tech companies. Students will also gain 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.

Completion of syllabus assignments and class preparation are 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 reading assignments are linked below, or available on-line. Required written work consists of daily one-page reading responses, a mid-term examination/paper, and the final exam.

Students are responsible for obtaining the following books which are part of the syllabus assignments:

1. Abrams, Floyd: *“The Soul of the First Amendment”*, Yale University Press, 2017
2. Bollinger, Lee C. and Stone, Geoffrey R., *“Social Media, Freedom of Speech and the Future of our Democracy”*, Oxford University Press, 2022

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 read the assignments prior to each class, review pre-recorded sessions, and to participate in class discussions. 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: HISTORY OF THE FIRST AMENDMENT: WHAT DOES FREEDOM OF SPEECH PROTECT?

Reading Response #1 due at the start of class 1:

Why does the First Amendment protect freedom of speech?

Pre-recorded Material:

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

2. “What Does the First Amendment Protect?” Floyd Abrams interview, 2/17/2022 (1.5 hours)

<https://www.youtube.com/watch?v=6X3tUEwLVxE&t=2701s>

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

<https://vimeo.com/38265857>

READINGS:

Abrams, Floyd, “*The Soul of the First Amendment*”

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/>

For reference only: “*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>

CLASS 2: SPEECH ON THE INTERNET: IS IT TIME TO RECONSIDER FIRST AMENDMENT PROTECTION OF SPEECH?

Reading Response #2 due at the start of class 2:

1. Should we rethink the First Amendment’s protection of freedom of speech considering the impact of the internet and social media on freedom of speech?

2. Why were Section 230 Reforms implemented?

PRE-recorded Material:

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

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

READING:

Bollinger and Stone: Part One and Part Two (Chapters 1 through 7)

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

Reading Response #3 due at the start of class 3:

1. 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.

2. What, if any, ethical obligation do we have to insure that our speech and writings do not cause harm or offense to others?

Pre-recorded Material:

1. C-Span 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>

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

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

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

READINGS:

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/>

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/>

CLASS 4: Speech on Public Platforms and Content Moderation: Balancing free speech rights with protection of society.

Reading Response #4 due at the start of class:

Is the use of algorithms to moderate speech on public platforms ethical?

*****Mid-term examination/paper distributed prior to class 4; due at the beginning of class #5.**

Pre-recorded Material:

“*THE SOCIAL DILEMMA*” DOCUMENTARY – 1/26/20 (1.5 HOURS), AVAILABLE ON NETFLIX

READINGS:

Bollinger and Stone, Part Three (Chapters 8 through 13)

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

*****MIDTERM examination/paper due at the beginning of class #5.**

Reading Response #5 due at the start of class #5:

Why did the USSC decide in U.S. v. Alvarez that lying was protected speech? Is it ethical to lie?

Reading Response #6 due at the start of class #6:

Should social media platforms be held liable for lies posted on their platforms when such lies result in real harm to real people?

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. “*Fake: Searching For Truth In The Age Of Misinformation*” Documentary, 2/14/2020 (1 hour):

<https://www.youtube.com/watch?v=PMv4Mbfd9HA>

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).

[*New York Times Co. v. Sullivan*](#), 84 S.Ct. 710 (1964) (false statements/public officials)

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 & 8: 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:

1. Why did the USSC decide in McCullen v. Oakley that the abortion statute at issue violated the free speech clause of the First Amendment?

2. Should convicted child sexual offenders have access to internet social media sites which are utilized by children? Explain.

Reading Response for class #8 due at the start of class 8:

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: CONTENT-RELATED REGULATION OF SPEECH BY THE GOVERNMENT

READING RESPONSE #9 DUE AT THE START OF CLASS 9:

DO YOU AGREE WITH THE DECISIONS IN MATA V. TAM AND IANCU V. BRUNETTI? 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](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](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)

Brewer v. City of Albuquerque, 18 F.4th 1205 (U.S. 10th Cir. 2021)

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, Article 1.

<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: POSSIBLE REFORMS FOR SPEECH ON THE INTERNET

******Final Examination distributed prior to last class.***

Reading response #10 due at the start of class 10:

Should government regulate on-line speech? Why/why not?

PRE-RECORDED MATERIAL:

1. “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:

Bollinger & Stone, Part Four (Chapters 14 through 18)

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/)