First Amendment Syllabus
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There seems to be a wide enough discrepancy in the coverage of the First Amendment in the various sections of Constitutional Law that I am not going to assume any prior knowledge. If you are familiar with a case or a topic, please add what you know to the discussion. I don’t give out brownie points for class participation, so you shouldn’t be scorned by your classmates.

The casebook is Steven H. Shiffrin (of Cornell Law School) and Jesse H. Choper (Earl Warren Professor of Public Law and former Dean at the Boult Hall School of Law, University of California, Berkeley), The First Amendment (4th ed. 2006) (S&C) and its 2007 supplement (Supp.). I may add reading either through handouts or on line. I have included some comments to the reading assignments to stimulate your thinking before class, and have the entire first section of the course, on the topic of “unprotected speech.” We will basically go through the table of contents, skipping only the chapter on religion, which Professor Leslie Griffin covers brilliantly in a separate course. I will try to get more of the details of the syllabus out, but I hesitate to get too far advance or to get into too much future detail because I may want to make changes, either because I think a topic needs more or less coverage or because of new developments.

Throughout the course we will again and again have to ask why we do or do not protect speech and the press and whether we should take a different road in a particular situation. The philosophical and jurisprudential issues are discussed in the opening pages, but they keep coming back. Every day you should think hard about why we have freedom of expression (a catch-all phrase that does not appear in the Constitution) and what its costs and benefits are.

I. “Unprotected” Speech (And why did I put quotation marks around “unprotected”?)

A. Incitement


B. Libel and Invasions of Privacy


Παγε 1 οφ 3
Illinois is thought by many observers to be a dead letter, but it hasn’t been overruled. Read the Frankfurter and Black opinions carefully, particularly about how we should approach the Illinois law, which surely has its heart in the right place. Does Beauharnais involve the speaker’s freedom, even if he’s a bigot, or the critical underlying issue of seditious libel and the right to criticize government? Or both? The central case of New York Times v. Sullivan, another one of Justice Brennan’s powerhouse opinions, remains critical today.

Thursday, January 24, 2008: Private Individuals and Public Interest. S&C 68-95. At what point does the public’s right to know or to criticize outweigh a person’s right to be let alone?

C. Obscenity, Fighting Words, Hate Speech and Jes’ Talkin’ Dirty

Tuesday, January 29, 2008: Obscenity, per se. S&C 95-115. As I’ve said in class, between 1957 (Roth) and 1973 (Paris Adult and Miller) obscenity cases were about the biggest category on the Supreme Court’s docket and it had a makeshift theater in the basement of the Supreme Court Building so that the justices could decide for themselves whether the work in question was “obscene.” The Court uses “obscenity” to mean works that can be banned and “pornography” to mean dirty literature generally, whether or not it is bannable. It expended a huge amount of thinking on the subject, much of it by Justice Brennan, who started out upholding the concept, though with a liberal slant (Roth) but gradually became an enemy of the concept of banning dirty literature (his dissents in Paris Adult and Miller). Of course, in the meantime we had gone from the fifties through the sixties into the seventies. Note 5 on page 115 speaks of the practical impact of Miller, but fails to mention VCRs, DVDs and the Internet, which the last time I looked, had 151,000,000 sites under the word “porn.” Why should the government be able to punish you for writing what it calls obscene? Why shouldn’t you be able to read or look at whatever you want?

Thursday, January 31, 2008: Fighting Words, Hecklers’ Vetoes and Vulgar Speech. The Not Obviously Related Question of Who Owns Speech? S&C 120-43. Chaplinsky v. New Hampshire, written by one of the Court’s great liberals, is a pretty dumb opinion, considering that recipient of Chaplinsky’s words was the city marshall, who should have been able to withstand the abuse. What is Justice Murphy’s justification for excluding various categories from First Amendment protection? Is the rationale avoidance of retaliation or the feelings of the person being verbally abused? Should Father Terminiello and student Feiner be stopped from talking because the crowd was getting restless? Why? The great case of Cohen v. California is multi-layered. Read it slowly and carefully. What is left of fighting words after Cohen? What about the criticisms of the Harlan opinion?

We then take a side tour of the interplay of copyright and speech. These cases are very important. Shouldn’t President Ford be able to make a buck from his memoirs? But aren’t they of public interest, particularly to the extent that he discussed his pardon of Richard Nixon? The copyright laws have become a major battle ground, and introduce us to a continuing problem: how do concepts of private property and ownership of words and images interact with freedom...
Tuesday, February 5, 2008: Child Pornography and the Concepts of Overbreadth and Vagueness. S&C 115-19, 143-55. Vagueness is primarily connected with due process: if you can’t tell what has been made a crime, how can you act lawfully? Overbreadth is a First Amendment concept that can be applied even when a law is very clear. If it covers the defendant’s acts, but could have been applied to protected speech, the defendant is allowed to raise the rights of those who could have been prosecuted, on the theory that those third parties’ speech might be “chilled” by the risk of prosecution, even though they probably would win in the long run. The modern Court has limited the defense to “substantial overbreadth.” How does New York v. Ferber differ in its rational from obscenity cases like Miller? Why does the majority say that the New York statute is not overbroad? What about the issue of digital or virtual child pornography? In Ashcroft v. Free Speech Coalition why does Justice Kennedy strike down the CGI provisions of the CPPA? There is a post-Ashcroft case pending in the Court right now.

Thursday, February 7, 2008: Sticks and Stones. S&C 155-76. Do words cause injury? Of course they do. How much should that count in deciding what is protected speech? Catherine MacKinnon of Michigan one of the most important feminist writers and teachers. She and the poet Andrea Dworkin wrote the statute on page 155, which was adopted in Indianapolis and declared unconstitutional in American Booksellers Ass’n v. Hudnut, a Seventh Circuit opinion affirmed summarily by the Supreme Court over a dissent by several justices. Go over the statute, the commentary on it, and Judge Easterbrook’s opinion in Hudnut. Compare the Skokie case, Collin v. Smith, bearing in mind that Skokie, Illinois is a heavily Jewish suburb of Chicago, which at the time of the dispute had a large population of survivors of the Nazi Holocaust, and that the American Nazis had deliberately picked as the site of their parade to cause pain. Consider other nations’ attitude toward hate speech. Are we too fastidious in our protection of worthless people who say evil things? We will return to hate speech later in the term.