

Syllabus for First Amendment

Spring, 2019

Monday and Wednesday, 10:30- 11:50 A.M.

Peter Linzer

Course books:

Steven H. Shiffrin, Jesse H. Choper and Frederick Schauer, *The First Amendment* (6th ed., West, 2015) ("Shiffrin")

Peter Linzer and Nicole B. Casarez, *The First Amendment and Beyond—Speech and Press in the Twenty-first Century* (to be published later in 2019 by Carolina Academic Press—available to the class free on line) ("L&C")

Before summarizing what the course will cover, I'd like to make an argument why you should take this course.

A Pitch for the Course

I understand that this course conflicts with BusOrgs, and I can't in good conscience tell you not to take BusOrgs. But if you have already taken it, are taking Bob Ragazzo's section, or plan to take it another time, I strongly urge you to take First Amendment. (I know that it also conflicts with some other good courses.)

At this time of deep political division in the United States, with President Trump attacking reporters and news organizations that don't agree with him, with those speaking out being murdered in other countries and mass murders here being tied to social media, freedom of speech and press is critically important. While First Amendment issues are not likely to be on the Texas bar exam, they often appear on the Multi-state

Professor Nicole Casarez and I are in the process of writing a casebook, called "The First Amendment and Beyond; Speech and Press in the Twenty-first Century" ("L&C") for Carolina Academic Press, a prominent publisher. (Professor Casarez, who has several times been a Visiting Professor here at the UH Law Center, is not teaching this course, though I will invite her in from time to time if her schedule permits. She teaches Communications at St. Thomas University and has a strong background in journalism. She is a UT lawyer, a former Vinson & Elkins associate, and led the successful fight to get Anthony Graves out of prison after twelve years on death row. She is prominently featured in Mr. Graves's book, *Infinite Hope: How Wrongful Conviction, Solitary Confinement and 12 Years on Death Row Failed to Kill My Soul* (2018).

Our casebook is not finished, so I am supplementing it with Shiffrin, Choper & Schauer, *The First Amendment* (6th ed. 2015, West Publishing Co.) ("Shiffrin"), a fine book, but one that focuses on aspects of speech and press somewhat differently than we do. The Shiffrin book is a paperback, a bit overpriced in my view, but, still, it is a paperback, so it's not too outrageous. It also reprints a good deal of useful secondary writing. We will put extensive portions of our casebook on line for you without charge, so your total cost should not be overwhelming.

Many of the basic issue of free speech seem resolved, but with President Trump making two appointments to the Supreme Court and with the seeming increase in violence and hate speech, there is no assurance that existing case law will prevail. Even more, there are important new areas, especially cell phones, the Internet and social media, topics that are covered only cursorily in other casebooks. For examples, the Supreme Court ruled 5-4 in 1973 that hard core pornography (essentially, people engaging in sex) could be made illegal, and that case, *Miller v. California*, is still the law. But if you punch in “porn” to Google or another search engine on your cell phone, you will be connected with over one billion (yes, with a B) sites all over the world, all of which violate what the Supreme Court said could be forbidden, and all of which are available, often for free, in the comfort of your own home. One other example out of many. It is pretty clear that “hate speech” is protected by the First Amendment and for the most part cannot be restricted by government. While many other countries greatly restrict it, our attitude here is that our free speech climate can tolerate it better than, say Europe, which suffered directly under the Nazis. But the recent mass killings and rise of alt-right anti-Semitism and racism through blogs and social media have led to calls for Internet and social media platforms, which as private parties are not covered by the First Amendment, to censor this speech. Should we encourage private censorship or let the bigots rant at will? Is it relevant that several of the killers and attempted bombers were heavily into these blogs and social media sites? (Most of them seem right-wing, but the guy who shot the Republican congressional softball players was a liberal.)

A related problem is the decline of newspapers and other forms of print. Should independent bloggers be treated the same as reporters for established newspapers and radio-tv news programs? Social media has already provided a lot of breaking news, and the Arab Spring of a few years ago was largely precipitated by Facebook and other social media which circumvented government-controlled newspapers and broadcasters in the Middle East. In America, editors and publishers of newspapers have been shielded from government requirements of objectivity, but should the telephone and cable companies that largely control the physical wires, tubes and relays that make up the Internet be treated as publishers, protected by the First Amendment or as common carriers, and subjected to “net neutrality,” either by legislation or FCC decrees? Or should they be able to favor, say, big users like Amazon over small emailers like you and me? Should they be able to limit use of their facilities to points of view that they favor? (Newspapers can do this, and while cable is subject to some amount of regulation by the Federal Communications Commission, both MSNBC and Fox have pretty obvious - and opposite - points of view.)

These are the types of problems that we will cover in the course. If you have any questions, feel free to either email me at PLinzer@uh.edu or call me at (713) 876-5166.

An Outline of the Course

Because we are still working on getting our casebook ready and because Shiffrin is a new edition for me, though I have taught out of a previous edition several times, I don't have the exact pages and dates of every assignment. I do know what I intend to cover and can give you a good approximation.

Monday, January 14 to Wednesday, January 28 (no class on Monday, January 21): The origins of free speech: seditious libel, sedition prosecutions and modern terrorism. The L&C and Shiffrin casebooks both cover the basic cases, though we go into somewhat greater depth. Not only do these early cases give you the doctrine covering sedition and related crimes, they are the foundation of our basic thinking about freedom of speech and press. L&C looks at some cases and personalities often

skipped in First Amendment casebooks. We think they are too important to ignore, even if they can't be examined in detail.

Wednesday, January 30 to Wednesday, February 13: Reputation, Privacy and Government Surveillance. The concept that some topics are "outside" the First Amendment, a concept that has eroded, but is still important, has led to several topics that had been left to government discretion for a long time, now being rethought. The great case of *New York Times v. Sullivan* remains dominant as to defamation, but the explosion of social media has raised many new wrinkles. Privacy as a tort is a slippery concept, but even more important is government surveillance, a subject often viewed as covered by the Fourth Amendment (search and seizure), but increasingly viewable as impinging on freedom of speech and press – if government (or Russian hackers?) may be listening in, are you likely to speak as freely? My co-author, Professor Casarez, has published a major article on the synergy between speech and privacy. There are several laws governing snooping, but they are far from comprehensive and clear. Our colleague Emily Berman is an expert on government surveillance and teaches a fine and valuable course. Professor Casarez and I view the problem more from a First Amendment perspective, which could give different and possibly greater protection to privacy as opposed to the protection from prosecution that the Fourth Amendment primarily provides.

Monday, February 18 to Wednesday, March 6: First Amendment Methodology. There are areas of First Amendment practice that have special focus: prior restraints, overbreadth and vagueness, the distrust of content and viewpoint distinctions in legislation. Here, the concept that some topics are "outside" the First Amendment also comes into play. Over the last 75 years the Court has backed away from many areas previously considered unprotected, but it hasn't totally abandoned the concept of "two tiers of protection."

SPRING BREAK – March 11-17

Monday, March 18 to Wednesday, April 3: Silicon Valley and Contemporary Technology. In 1967 Dean Jerome Barron of George Washington University Law School wrote a landmark article in the Harvard Law Review entitled *Access to the Press—A New First Amendment Right*, arguing that without access to mass media freedom of speech and press were ineffectual, but that most people were unable to on radio and tv get their words into a newspaper. Two years later, in *Red Lion Broadcasting Co. v. FCC*, the Supreme Court, citing Barron, affirmed the Federal Communications Commission's fairness doctrine, which gave a right of reply to those who were personally attacked on radio and television, a decision that was highly criticized as *violating* the First Amendment even as it claimed to advance it. Five years later, however, in 1974, in *Miami Herald v. Tornillo*, the Court held a Florida right to reply law unconstitutional when applied to a newspaper and didn't even mention *Red Lion*. This issue of access and rights of reply has never been resolved, but the Internet has changed everything. Now anyone can put his opinion on line and hundreds of millions of people worldwide subscribe to social media. Just as DVDs and the Internet completely overruled the Court's 1974 obscenity rules, the new technology has provided access but has created serious problems that neither the Court nor Congress has dealt with – and perhaps should not deal with. We are familiar with the allegations that many aspects of hacking – arguably by the Russians, affected the 2016 presidential election, and we have already noted that social media and hate speech have at least some causal connection with violence against minority groups and political opponents. The issues are quite different from traditional constitutional law – the Supreme Court has dipped its toe(s) into cybertechnology without showing tremendous sophistication about it, a

limitation that greatly affects the substantive issues, and other bodies – Congress, the FCC, the states, Silicon Valley and the general public already play an important role. This is the speech issue of today and of the future, one in which you, as the coming generation of lawyers, will play the dominant role. We will look at it as deeply as we can, given most lawyers' lack of technical background.

Monday, April 8 to Wednesday, April 10: Newsgathering and Freedom of the Press. You may have read that on November 15, 2018, a federal district court ordered President Trump to restore the press credentials of CNN's Chief White House Correspondent, Jim Acosta, who has been confrontational with the president. The White House accused him of putting his hands on an intern who was trying to take away his microphone, but a) the tapes showed that he seemed defending himself, and b) Press Secretary Sarah Sanders produced a tape that proved to be doctored. CNN filed suit to get Acosta's credentials back, virtually every news agency (AP, Bloomberg, First Look Media, Fox News, Gannett, NBC, The New York Times, Politico, USA Today, the Washington Post, and others) joined the law suit and are filing an amicus brief in its support. Note that this includes Fox, viewed as the most pro-Trump media body. The story is far from over, and appellate courts may reverse the district court. Do press representatives have special status that you and I lack? Should they be viewed as the surrogates of the general public, since it is through them that we obtain information about public matters? Or are their rights no greater than yours and mine? Is there a difference between "the freedom of speech" and the following words "or of the press?" Where do bloggers fit in? Should they have a right to press credentials as well? There isn't room for everybody in the White House press room.

Monday, April 15 to Wednesday, April 17: Freedom of Association and the Public Forum. These are not closely related, but I will use these two classes to discuss how you have a right to associate with some people and not others and how that squares with civil rights laws. The public forum has for generations meant that you could not be barred from speaking or distributing literature in public streets and parks, but what about airports and state fairs? Should the organizers of Boston's St. Patrick's Day Parade be able to bar gays and lesbians, because the organizers don't want to associate with them, even if they are Irish? What about the Boy Scouts? (Actually, while the Court held that their freedom of association trumped (sic) the rights of the gays, both organizations have abandoned their hostility and now admit gays. Is that a sufficient reason for the courts to stay out?) How does the public forum fit in with the Internet?

Monday, April 22 to Wednesday, April 24: Money and the Political Process. Over the decades courts have held that speakers could not be prevented from obtaining money to carry on their activities. In the famous *Citizens United* case, Justice Scalia for a bare majority held that this meant that the First Amendment barred restrictions on corporations spending large amounts in elections, rejecting the argument that government should be able to equalize political power between those with the money to affect elections and those without. That battle is far from over.

The Makeup Class for Martin Luther King Day: We lose a class on the second Monday in the term, and I'm told that I should make up the lost day by increasing every class by three minutes (3 minutes x the remaining 27 classes = the 90 minutes lost on MLK Day). This, of course, is nonsense. You learn by reading an assignment and discussing it in class. We can't cover a topic for three minutes every day and expect you to put the 27 three minute discussions. I'd like to create a makeup day to discuss the curious rule that those who work for the government and those who get government grants have

fewer speech rights than the rest of us, at least to a degree. (I get paid by the State of Texas. Does that mean that I can't criticize, say, the Governor or the State Attorney General? We'll see. If I disappear one day, the answer may be yes.)

Dealing with stress and worry: We are "asked" by the Provost to post information about psychological help at the University. This is a very valuable asset. Law school, as we all know, can be very troubling and there are people to talk with.

Counseling and Psychological Services (CAPS): CAPS can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5154 during and after business hours for routine appointments or because someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. [http://www.uh.edu/caps/outreach/lets talk. Html](http://www.uh.edu/caps/outreach/lets_talk.html).