

**Advanced Constitutional Law:  
New Issues in Speech and Press Freedom**  
Spring 2019, 2/3, 2/17, 3/2, 3/23, 4/6, 4/20  
5 – 7 PM, WCC Room 5050

**Lecturer Kendra Albert<sup>1</sup>**

WCC 5020

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**Pronouns:** they/them

**Course Description:**

We will examine current issues and underlying challenges in the areas of speech and press freedom.

The course is organized around three “tentpoles”: doctrine, theory/values, and practice. Each day’s reading will aim to tee up issues related to each of those three categories, in addition to exploring a contemporary issue. (Of course, the lines between these three categories are never as clear in practice as they are in theory.) If I’ve done my job correctly, at the end of each session you will have learned some doctrine, explored a theoretical approach or critiqued a normative set of commitments, and discussed how the doctrine and these approaches interact with the practice of First Amendment law.

There are too many issues in press and speech for us to get them all in one semester, and maybe even in an entire career. New and interesting topics will undoubtedly arise during the duration of the class. I deal with this in two ways. First, by leaving the last class blank so that I have the flexibility to pick the topic mid-semester. Second, I ask each student to do a case round on a current case, which allows us to engage with a wider variety of issues than we would otherwise be able to.

**Course Requirements**

*Pre-Class Questions/Comments*

In order to help me get a better sense of where to focus our discussion, I ask students to submit one short question or comment on the readings before class. Please don’t feel like you need to write too much – a paragraph or two is fine.

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<sup>1</sup> Kendra Albert is a clinical instructor at the Cyberlaw Clinic. Their legal practice includes representing and advising clients on matters related to this course, including press access to court documents and crafting internet platform policies. They also worked at the Electronic Frontier Foundation, at Cloudflare, and at Zeitgeist PC prior to joining the Cyberlaw Clinic.

These comments are due by 12 PM on the day of class, and should be submitted via the Canvas discussion page for that particular day of class.

### *Class Discussion*

You will be required to participate in class discussions. Participation is judged based on both quantity and quality. High quality participation builds on and relates to the comments of other students as well as integrating the readings.

### *Case Rounds*

Each student will prepare a 7 minute presentation related to a current case. Presentations will start during the third class. You will need to sign up for a slot on Canvas. Please notify me which case you have chosen at least a week before your presentation slot.

These rounds have a couple of purposes:

- Present the variety of issues that can be considered through the lens of speech and press freedom.
- Require students to read and engage with trial level courts with a subject that can be viewed as purely appellate.
- Prepare students for legal practice by providing an opportunity for students to get feedback on how to briefly present the key issue of a case and reach an objective determination of how it may resolve.

Criteria for a case:

- Can be federal or state. (Federal will likely be easier to find, but if you are interested in a particular state, go for it!)
- Must be decided by a trial level court with a written opinion, and have been appealed to a higher court by one of the parties, but there must not be an appellate court decision yet.
- Must involve some speech or press freedom issue.
- You can choose a case with a live legal issue (something that is not fully resolved) or a case that's been appealed but is relatively open and shut. Each has its merits!

What to do in the presentation:

- Briefly summarize the relevant facts of the case.
- Discuss the trial court's ruling.
- Summarize the issues present on appeal.
- Present your viewpoint on how you expect the appeal to come out.

### **Classroom Policies:**

#### *Laptop and Readings*

You may use laptops and tablets for note-taking or looking up material relevant to the course, though there will periodically (with explicit indication) exercises and other class activities where I prefer no use of laptops. You do not need an accommodation or instructor permission.

That being said, I encourage you to bring hard copies of the readings and refer to them if you are able, as I have found that students (and instructors) tend to engage better without the Internet's siren song. I will endeavor to make readings available through the copy center as far in advance as possible. Optional readings will be posted on Canvas but will not be included in course packs.

### *Attendance*

You must notify me via email before class if you will be absent. If you are not able to notify me before class, please do so as promptly as possible.

I understand that illness and other unforeseen circumstances occur, but every attempt should be made to attend class, especially given the small number of sessions.

### *Office Hours*

My office hours are by appointment – you can make an appointment using my Calendly link (available on Canvas). Every student is required to schedule at least one appointment per semester.

What can you do in office hours?

- Ask questions about the substance of the class. (Questions can be about particular cases or topics, or about how the subject generally fits together.)
- Work through an issue you're confused about by talking through it with me.
- Discuss something we talked about in class further.
- Get advice on a writing project (class-related or not).
- Hear about how clinics work.
- Talk about careers or life in law school. Or frankly, most anything else.

If you know what you want to talk about in advance, it's great to send me a note that explains the general topic, so I can do any necessary prep.

### *Accessibility*

Harvard Law School is dedicated to facilitating equal access for students with disabilities and to cultivating a campus culture that is sensitive and responsive to the needs of students. To request an accommodation for a disability during the course, students should contact Accessibility Services in the Dean of Students Office at [accessibility@law.harvard.edu](mailto:accessibility@law.harvard.edu) or at 617-495-1880, or visit the office in WCC 3019. Additional information, including advice about how to register for accommodations, can be found at [hls.harvard.edu/dept/dos/accessibility](https://hls.harvard.edu/dept/dos/accessibility).

Even outside of the context of accommodations, if there's something I can do to make your learning easier, please let me know.

### *Names and Pronouns*

If you go by a different name or set of pronouns than the one under which you are officially enrolled, please inform me. Likewise, if a classmate (or the instructor) mispronounce your name,

please let them know so they can correct it. Students are expected to respectfully refer to each other by preferred, correctly pronounced names and pronouns during class discussions.<sup>2</sup>

### *Basic Needs and Childcare*

If you face challenges securing your food or housing (which would, of course, affect your performance in the course), I urge you to contact the Dean of Students for support. Furthermore, please notify me if you are comfortable in doing so. This will enable me to provide any resources that I may possess.<sup>3</sup>

I understand that childcare can be difficult to come by for graduate students. Dean of Students may be able to provide additional support and accommodations for you if you are a parent. Newborns are welcome in class. For older children and babies, please discuss with me in advance.

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<sup>2</sup> This name and pronoun policy is adapted from Adrienne Keene's Introduction to Critical Race Theory Syllabus, available at <https://blogs.brown.edu/amst-2220j-s01-2017-fall/syllabus/>.

<sup>3</sup> Basic Needs statement is adapted from Sara Goldrick-Rab, *Basic Needs Security and the Syllabus*, <https://medium.com/@saragoldrickrab/basic-needs-security-and-the-syllabus-d24cc7afe8c9>.

## Class 1, February 3

Topic: What's new and old in speech and the press?

### Objectives:

- Introduce traditional frameworks and new challenges.
- Discuss how changes in “the real world” have shifted the environment for First Amendment rights.
- Reflect upon historical images of First Amendment practice and how they've shifted (or not) over time.

### Readings:

- Speech
  - Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis* (April 2001). Cardozo Law School, Public Law Research Paper No. 41. (Part I, II and IV).
  - Amanda Shanor, *The New Lochner*, Wisc. L. Rev. 133 (2016), skim 133-138, full read pgs. 138-164.
  - Tim Wu, *Is the First Amendment Obsolete?*, Knight First Amendment Emerging Threats Series.
- Press
  - Ronnell Anderson Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66. Ala. L. Rev. 253 (2014).
  - Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 Loyola 102 (2018) (Parts I, II and III).
- First Amendment Practice
  - Mari J. Matsuda, *The Keynote Address: Progressive Civil Liberties*, 3 Temp. Pol. & Civ. Rts. L. Rev. 9 (1993-1994).
  - *ACLU Case Selection Guidelines: Conflicts Between Competing Values or Priorities* (2018) (pgs. 1-7)  
[http://online.wsj.com/public/resources/documents/20180621ACLU.pdf?mod=article\\_inline](http://online.wsj.com/public/resources/documents/20180621ACLU.pdf?mod=article_inline)

## Class 2, February 17

Topic: State action doctrine and commercial content moderation

### Objectives

- Using a sample case, look at how the state action doctrine is applied to First Amendment applications to online platforms.
- Learn about the processes and procedures that have come to define commercial content moderation, as well as section 230, the law that has created that category.
- Examine critiques of the state action doctrine and potential alternatives, with an eye towards the question of whether any of those alternatives feel like they might solve issues related to content moderation on online platforms.

### Readings:

- Prager University Sample Case
  - *Prager Univ. v. Google LLC*, Case No. 17-CV-06064-LH, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018). Pgs. 1-5, 9-17.
- Content Moderation and the New Governors
  - Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018).
  - Sarah T. Roberts, *Behind the Screen: Content Moderation in the Shadows of Social Media*, 151-169 (2019).
- State Action
  - Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503 (1985). Read 503-519, 534-557.
  - Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet*, 52 Harv. C.R.-C.L. L. Rev. 145 (2017). Read 159-164.
- Reflecting on Prager University
  - Listen to oral argument in the Ninth Circuit appeal.  
[https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000016122](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016122)

## Class 3, March 2

Topic: The Espionage Act and the “Unattractive” Litigant

### Learning Goals:

- Look at how First Amendment arguments (including the press clause) relates to prosecutions over leaked materials under the Espionage Act.
- Discuss whether definitional limits on “the press” would assist in giving the press clause additional meaning or definition, and if so, how to define “press.”
- Explore procedural and optical issues related to disputes between litigants, or litigants who are widely disliked. Discuss how stakeholders choose to support them, distinguish themselves, or ignore them.

### Readings:

- The Espionage Act
  - Stephen P. Mulligan & Jennifer K. Elsea, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*, Congressional Research Service (March 7, 2017) <https://fas.org/sgp/crs/secretcy/R41404.pdf>. 1-17, 25-32.
  - 18 U.S.C. §793.
- Julian Assange
  - Julian Assange Superseding Indictment, 5/23/2019.
  - Gabe Rottman, The Assange Indictment Seeks to Punish Pure Publication, Lawfare (May 24, 2019), <https://www.lawfareblog.com/assange-indictment-seeks-punish-pure-publication>.
  - Oscar Rickett, *Julian Assange’s Whistleblowing Doesn’t Make Him Immune to Critique*, Vice News (April 12 2019), [https://www.vice.com/en\\_uk/article/zmpev5/julian-assange-arrest-wikileaks-sexual-assault-allegations](https://www.vice.com/en_uk/article/zmpev5/julian-assange-arrest-wikileaks-sexual-assault-allegations).
- “Unattractive” Litigants
  - Richard Delgado & Jean Stefancic, *Must We Defend Nazis?: Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (2018).
  - Martine Powers, *In defending Milo Yiannopoulos, ACLU gets pushback from some of its own*, The Washington Post: Gridlock (August 10, 2017), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/08/10/in-defending-milo-yiannopoulos-aclu-gets-pushback-from-some-of-its-own/>.
  - Re-read the *ACLU Case Selection Guidelines* from February 3<sup>rd</sup>.

## **Class 4, March 23**

Topic: First Amendment As “Hunting License”?

### Learning Goals:

- Gain a working knowledge of the commercial speech doctrine.
- Look at how the commercial speech doctrine has been used to challenge regulations.
- Explore the edges of the commercial speech doctrine through the lens of privacy legislation, discussing whether the tailoring and fit elements common to First Amendment jurisprudence are appropriate for broader regulatory models.

### Readings:

- Commercial Speech and Deregulatory Potential
  - Daniel E. Troy, Taking Commercial Speech Seriously, *The Federalist Society* (May 1, 1998).
  - Amanda Shanor, *The New Lochner*, *Wisc. L. Rev.* 133 (2016), 165-183.
  - Rebecca Tushnet, *Notes on Commercial Speech & the First Amendment Panel*, <https://tushnet.blogspot.com/2019/06/commercial-speech-first-amendment.html>. (Please don't worry if you don't understand all the case references! The goal is just to expose you to how practitioners are talking about these issues.)
- What About Privacy Law?
  - Neil M. Richards, *Why Data Privacy Law is (Mostly) Constitutional*, (excerpted from *Intellectual Privacy*, 2014).
  - Complaint for Declaratory Judgment and Injunctive Relief, *ACA Connects v. Frey*, D. Maine.
- A Return to Tofurkey
  - *Turtle Island Foods SPC v. Soman*, No. 4:19-cv-00514-KGB, 2019 WL 7546141 (E.D. Ark. Dec. 11, 2019). (You can skim or skip the sections on Pullman abstention. Unless you're taking Federal Courts, in which case you can explain them to me.)

## **Class 5, April 6**

Topic: Public Health and Action-Speech Distinctions

### Learning Goals:

- Explore how courts (and theorists) have justified or defined the speech-action distinction in First Amendment law.
- Look at how that relates to concerns of public health (prior to COVID-19) in the context of HIV transmission laws.



- Use four different speech restrictions/compulsions in the COVID-19 context to test our normative assumptions and potential line drawing methods.

#### Readings:

- Speech/Action Distinctions and Challenges to HIV Transmission Laws
  - *People v. Russell*, 158 Ill.2d 23 (Ill. 1994).
  - Frederick Schauer, *On the Distinction Between Speech and Action*, 65 Emory L.J. 427 (2015). Skim Part I, read the rest fully.
  - *State v. Batista*, 151 Ohio St.3d 584 (Ohio 2017).
- COVID-19 (Not So) Hypotheticals
  - Justice Department Files Its First Enforcement Action Against COVID-19 Fraud, <https://www.justice.gov/opa/pr/justice-department-files-its-first-enforcement-action-against-covid-19-fraud>
  - Public Safety Director Ambrose warns against false reporting of coronavirus in Newark via social media, <https://nextdoor.com/agency-post/nj/newark/newark-police-department/public-safety-director-ambrose-warns-against-false-reporting-of-coronavirus-in-newark-via-social-media-139923492/>
  - Ryan Bort, *Why It's Dangerous for Trump and Fox News to Prescribe Unproven Drugs to Treat Coronavirus*, Rolling Stone (March 24, 2020) <https://www.rollingstone.com/politics/politics-news/trump-fox-news-coronavirus-treatment-advice-972042/>.
  - Phil Mattingly, Lauren Fox, & Jake Tapper, *Rand Paul is first senator to test positive for coronavirus*, CNN Politics (March 23, 2020) <https://www.cnn.com/2020/03/22/politics/rand-paul-coronavirus/index.html>

#### **Class 6, April 20**

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