

## Freedom of Speech, Press, and Association Syllabus-Tentative

Professor/Dean Lidsky  
Spring 2021  
Phone: 572-882-3246

Office: 230 Hulston Hall  
TTh 4-5:15, Room 6  
Email: lidskyl@missouri.edu

On Twitter: @LidskyLidsky (for media law and first amendment law and law school developments)

### **Texts:**

KROTOSZYNSKI, WELLS, LIDSKY & CORBIN, **FIRST AMENDMENT: CASES & THEORY** (Aspen Publishing 3D ED. 2017) & occasional handouts

### **Policies:**

**Statement of Intellectual Pluralism:** The University and this instructor welcome intellectual diversity and respect student rights. I encourage free discussion, inquiry, and expression in this course. Student performance will be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards. Students who have questions concerning the quality of instruction in this class may address concerns to either the Dean of the Law School or the Director of the Office of Student Rights and Responsibilities (<http://osrr.missouri.edu>). All students will have the opportunity to submit an anonymous evaluation of the instructor at the end of this course.

**Academic honesty:** Academic integrity is fundamental to the activities and principles of the School of Law. All members of the law school community must be confident that each person's work has been responsibly and honorably acquired, developed, and presented. Any effort to gain an advantage not given to all students is dishonest whether or not the effort is successful. The law school community regards breaches of the School of Law's Honor Code as extremely serious matters. Sanctions for such a breach may include academic sanctions from the instructor, including failing the course for any violation, to disciplinary sanctions ranging from probation to expulsion. I will follow university procedures on cases of academic dishonesty; in such cases it may be necessary not only to report such dishonesty to the Associate Dean but also to assign a failing grade for the assignment or even the entire course. When in doubt about plagiarism, paraphrasing, quoting, collaboration, or whether something might be seen as a form of cheating, feel free to consult me.

**Statement for ADA - Students with Disabilities:** If you anticipate barriers related to the format or requirements of this course, if you have emergency medical information to share with me, or if you need to make arrangements in case the building must be evacuated, please let me and/or the Associate Dean know as soon as possible. If disability related accommodations are necessary please register with the Office of Disability Services (<http://disabilityservices.missouri.edu>), S5

Memorial Union, 882-4696 and then notify the Associate Dean of the Law school of your eligibility for reasonable accommodation. For other resources for students with disabilities, click on “Disability Resources” on MU homepage.

**Technology in the Classroom:** NOTEBOOK COMPUTERS, PHONES, PAGERS, ETC.: You may use computers and smart phones in class only *for purposes directly related to the class* such as note taking, reading course materials, or accessing the course site. Social networking, reading or sending email messages, surfing the Internet, game playing, or any work unrelated to this class is not permitted and will affect your class participation grade. Similarly, students must silence any cell phones or pagers during class. If you have an extraordinary situation that might require you to answer your cell phone during class, please let me know before class.

**AUDIO OR VIDEO RECORDINGS:** [This is a required notice.] Students may not record classes except in cases of special need with the instructor’s express permission. To foster an environment for learning, the university prohibits redistribution of audio or video recordings of statements or comments from the course to individuals who are not students in the course without the express permission of the instructor and any students who are recorded. In accordance with Executive Order #38, the unauthorized distribution of such materials is a violation of academic standards and may violate copyright laws and/or privacy rights. Students found to have violated this policy are subject to discipline in accordance with the provisions of Section 200.020 of the Collected Rules and Regulations of the University of Missouri. Professor Lidsky is open to having you record the class if you ask permission.

### **Course Goals, Objectives and Expected Learning Outcomes:**

This course explores the theory and doctrine associated with the First Amendment of the U.S. Constitution. It is structured to accomplish the following goals, objectives, and outcomes:

- Increase your understanding of the basic building blocks of free speech theory and doctrine, primarily focusing on Supreme Court cases but also reviewing emerging issues.
- Provide you with the analytical tools to assess the complex free speech issues that arise in various social and political interactions.
- Improve your ability to spot First Amendment issues and analyze them orally and in writing.
- Improve your ability to read and analyze U.S. Supreme Court cases and better understand how legal analysis of constitutional law issues differs from analysis of common law and statutory issues.

### **Grading and Assignments:**

#### **1. Final Exam**

Ninety percent (90%) of your grade in this class will be based on your score on the final exam. The final exam will be an open-book exam administered in the classroom on the scheduled exam date.

## 2. Midterm

Ten percent (10%) of your grade in this class will be based on your score on a midterm. The midterm will be given during a class period and will each consist of 20 multiple-choice questions. The questions will cover topics we discuss in class and will also be designed to guarantee that you are reading the assigned cases. The midterm will account for 10 percent (10 %) of your final exam score.

## 3. Class Attendance and Participation

I will pass around an attendance sheet each day; students who are present should sign their initials next to their names. The attendance sheet will be considered final; if your name is not initialed by the end of class, you will be considered absent. If you are joining class by zoom, you will need to send me an email with the heading “Attendance confirmation for [date].” Students missing more than four (4) classes will be dropped from the course. Signing in any student as present other than yourself is strictly prohibited and is a violation of the Honor Code on the part of all students involved. I will warn students prior to their possible removal from class as a result of their absences. **I expect every student to be prepared to participate in class discussion.** Failure to be prepared when called on and lack of attendance may affect your final grade. I reserve the right to adjust your final grade two (2) points in either direction based upon attendance and class participation. Feel free to let me know in advance if you know you will be missing class. You can email or text or call me at 352-514-4044 (cell).

Recommended Podcast: <https://www.npr.org/podcasts/767992905/unprecedented>

**Course Materials** (I reserve the right to add a “hot topic” if a relevant one arises. ☺):

Date/Class	Topic/Hot Topic	Assignment/Readings
Tues. 1/19/21 #1	<b>The History, Values and Content of the First Amendment</b>	pp. 3-26
Thur. 1/21/21 #2	<i>Hot Topic: Does First Amendment Doctrine Need Reform?</i>  <i>Hot Topic: Social Media Bans and State Action Doctrine</i>	Read: <a href="https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html">https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html</a>  Read: <a href="https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3214&amp;context=historical">https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3214&amp;context=historical</a>
Tues. 1/26/21 #3	<b>The Foundation of Free Speech Law – The Clear and Present Danger Test</b>  The World War I Cases – Evolution of Clear & Present Danger	pp. 27-38

<p>Thur. 1/28/21 #4</p> <p>Tues. 2/2/21 #5</p>	<p>The Red Scare – Deference &amp; the “Association” Problem</p> <p>The Smith Act - Communists and Clear &amp; Present Danger</p> <p><i>Brandenburg</i> – The Modern Formulation and Some Modern Problems</p> <p><i>Hot Topic: Rethinking Incitement in the Current Age</i></p> <p>National Security Rationales Post-<i>Brandenburg</i></p> <p><i>Hot Topic: The Challenge of Deep Fakes</i></p>	<p>pp.39-46</p> <p>pp.47-56</p> <p>pp. 56-59</p> <p>pp. 59-66</p> <p>Read: <a href="https://www.brookings.edu/research/is-seeing-still-believing-the-deepfake-challenge-to-truth-in-politics/">https://www.brookings.edu/research/is-seeing-still-believing-the-deepfake-challenge-to-truth-in-politics/</a></p>
<p>Thur. 2/4/21 #6</p> <p>Tues. 2/9/21 #7</p> <p>Thur. 2/11/21 #8</p>	<p><b>Government Actions That Discriminate Based on Content</b></p> <p><u>Distinguishing Regulations of Low-Value and High-Value Speech</u></p> <p>Threats versus Hyperbole</p> <p><i>Hot Topic: Social Media and True Threats Doctrine</i></p> <p>Fighting Words versus Offensive Speech</p> <p><i>Hot Topic: Race and Fighting Words</i></p> <p>When Can Hostile Audiences Shut Down a Speaker?</p>	<p>pp. 70-81</p> <p>Read: <a href="https://www.abajournal.com/magazine/article/threatening_words_courts_protected_speech">https://www.abajournal.com/magazine/article/threatening_words_courts_protected_speech</a></p> <p>pp. 82-87, 523-32 (from Chapter 10)</p> <p>Read: <a href="https://www.virginialawreview.org/volumes/content/blackness-fighting-words">https://www.virginialawreview.org/volumes/content/blackness-fighting-words</a></p> <p>pp. 88-94</p>

<p>Tues. 2/16/21 #9</p>	<p><i>Hot Topic: An Antidote to Cancel Culture?</i></p> <p>Content Discrimination and High-Value Speech</p> <p><i>Hot Topic: Hate Speech – Where Does it Fit?</i></p>	<p>Read: <a href="https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html">https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html</a></p> <p>pp. 99-118</p> <p>Casebook, pp. 95-99</p>
<p>Thur. 2/18/21 #10</p> <p>Tues. 2/23/21 #11</p> <p>Thurs. 2/25/21 #12</p> <p>Tues. 3/2/21 #13</p>	<p><b>Content-Neutral Regulations of Speech and the Public Forum Doctrine (i.e. Regulation of Speech on Public Property)</b></p> <p>Foundational Cases</p> <p>Content Neutral Time, Place and Manner Restrictions</p> <p>Modes of Regulation in the Public Forum</p> <p><i>Hot Topic: Laws Restricting Protests</i></p> <p>When is Government Property a Public Forum versus a Non-Public Forum and Why Does It Matter?</p> <p><i>Hot Topic: Retaliatory Arrests for First Amendment Conduct?</i></p> <p>Lozman v. City of Riviera Beach,</p> <p><i>Hot Topic: McKesson v. Doe and Liability for Protest Violence</i></p> <p>What is the Difference Between Speech on Government Property and Government Speech?</p> <p><i>Hot Topic: Twitter Blocking</i></p>	<p>pp. 119-25</p> <p>pp. 126-53</p> <p>pp. 153-56</p> <p>Read: <a href="https://time.com/5882735/tennessee-law-protest-voting-rights-felony/">https://time.com/5882735/tennessee-law-protest-voting-rights-felony/</a></p> <p>pp. 157-93</p> <p>Read: <a href="https://www.oyez.org/cases/2017/17-21">https://www.oyez.org/cases/2017/17-21</a></p> <p>Read: <a href="https://www.supremecourt.gov/opinions/20pdf/19-1108_8n5a.pdf">https://www.supremecourt.gov/opinions/20pdf/19-1108_8n5a.pdf</a></p> <p>pp. 621-48 (from Chapter 12)</p>

	<b>Regulation of the Mass Media</b>	
Thurs. 3/4/21 #14	Regulation of the Press/ Newsgathering  <i>Hot Topic: Constitutionality of Texas Drone Photography Law</i>	pp. 359-377  (Materials TBA)
Tues. 3/9/21 #15	Access to Courts  Access to Government Institution	pp. 377-87  pp. 387-392
Thurs. 3/11/21 #16	Prior Restraints  <i>Hot Topic: New Information on the Pentagon Papers Case</i> “Now It Can Be Told: How Neil Sheehan Got the Pentagon Papers:	pp. 393-413  Read <a href="https://www.nytimes.com/2021/01/07/us/pentagon-papers-neil-sheehan.html">https://www.nytimes.com/2021/01/07/us/pentagon-papers-neil-sheehan.html</a>
Tues. 3/16/21 #17	Regulation of Broadcasters	pp. 413-430
Thurs. 3/18/21 #18	Regulation of Cable System Operators plus Internet & New Media	pp. 430-454
Tues. 3/23/21 #19	Mid-Term	
	<b>Tort Law and the First Amendment</b>	
Thurs. 3/25/21 #20	Defamation  <i>Hot Topic: Weaponized Defamation</i>  <i>Hot Topic: Anti-Slapp in Federal Court</i>	pp. 455-82
Tues. 4/6/21 #21	<i>Hop Topic: The Draft of the Restatement (Third) of Torts</i>  <i>Hot Topic: Defamation and Fake News</i>	

	<i>Hot Topic: Should Section 230 Be Amended?</i>	Read: <a href="https://thehill.com/policy/technology/532137-sex-workers-warn-of-unintended-consequences-in-section-230-fight">https://thehill.com/policy/technology/532137-sex-workers-warn-of-unintended-consequences-in-section-230-fight</a>
Thurs. 4/8/21 #22	Intentional Infliction of Emotional Distress	pp. 483-91
Tues. 4/13/21 #23	Privacy	pp. 491-501
Thurs. 4/15/21 #24	<b>REVIEW DAY</b>	
Tues. 4/20/21 #25	<b>The Government as Speaker, Employer, Educator</b> Government Subsidized Speech and Government Speech	pp. 622-650
Thurs. 4/22/21 #26	Speech by Government Employees	pp. 650-673
Tues. 4/27/21 #27	Public Schools and Libraries <i>Hot Topic: Mahoney Areas School Dist. v. B.L.</i> <i>Hot Topic: Norris v. Cape Elizabeth Sch. Dist., No. 19-2167 (1st Cir. Aug. 6, 2020).</i>	pp. 674-709
Thurs. 4/29/21 #28	<b>REVIEW DAY</b>	

My expectations for myself:

1. I will respect each of you. I will respect the diverse points of view and experiences you bring to this class (which is what First Amendment Law is all about!). I will make this a safe place to make mistakes and experiment with new ideas and concepts.

2. I will have high expectations for each of you. I will expect you to be prepared and participate. I will expect you to focus on learning during the time we're together.
3. I will respect your time and the fact that you have invested resources and continue to invest resources to be in my class.
4. I will try to let you know what to expect day by day.
5. I will try to give assessments that test your knowledge and allow you to show me what you have learned.
6. I will grade you as fairly as I possibly can.
7. I will care about each of you and your learning.
8. I will prepare thoroughly for class.
9. I will be passionate about the subject matter of this course, to which I have devoted my career.
10. I will be open to your questions, including those that are broader than the subject matter of this class. If you need a mentor, I will be one.
11. I will be available to you in person for questions and advice as much as I possibly can.