

Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Constitutional Law. Specifically, we’ll be discussing freedom of the press, part of the ever-popular First Amendment to the Constitution. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series. Today, we will be discussing the First Amendment, a big topic in Constitutional Law. Now, before we get started, I do want to say one thing: Due to the frequent changes in Supreme Court legal precedent these days, we want to note that this is being recorded in the summer of 2022, and the law is as it stands now.

Lee Burgess: The First Amendment to the Constitution guarantees that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” There is a lot packed in there, and we would be here a long time if we tried to tackle it all in one go! Instead, we’ll focus today on just one subsection: freedom of the press. What is it? Is the press’ freedom unlimited? If not, what constraints apply and when?

Lee Burgess: Freedom of the press is a basic, fundamental principle in the United States. It guarantees that the government will not hinder the free exercise of media or press communication and expression through print and electronic media or other various means. This idea is sacrosanct in America and is viewed as an essential pillar of a healthy, functioning democracy. But like every right, there are still limitations. We all have a right to free speech, but it is not unfettered. We cannot scream “Fire!” in a crowded theater and look to the First Amendment to protect that speech. So too with freedom of the press, so let’s take a closer look at what rights the press is actually guaranteed and when.

Lee Burgess: First, and this may be a no-brainer, the First Amendment does not protect the press from liability for violating generally applicable laws. The press is not immune from following the law just because they are the press.



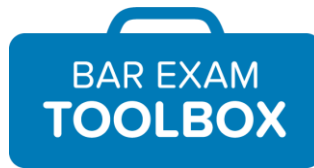
Lee Burgess: With that general principle out of the way, let's turn to the two areas where we've seen the court really chewing on how far the press' freedom extends. The first is disclosure of private facts – when does the press get to disclose otherwise private information? And the second is [defamation](#). When is the press responsible for publishing incorrect and defamatory information?

Lee Burgess: Let's start with the disclosure of private facts. The general rule is that the First Amendment protects the press from liability when, 1) publishing truthful private facts; 2) the publication is regarding a matter of public concern; 3) where information was legally obtained by the publisher; and 4) if illegally obtained info was published, there is no knowledge that the info was obtained illegally. To trim that down a bit, the private facts must be true, a matter of public concern, and either must be legally obtained, or if not, the person disclosing must be an innocent player. That is, they published without knowing the information was illegally obtained. If you're thinking this rule covers a whole lot of information and conduct, you're right. Unless the press is lying, doing something knowingly illegal, or just publishing gossip that is not of public importance, they have no duty to keep private information private.

Lee Burgess: There is a lot of room in this rule for good lawyering. The rule is broad and leaves room for argumentation, especially with respect to the question of whether a matter is of public concern. Let's take a look at a hypothetical to see how a freedom of the press question might play out on an exam. This question is going to guide us through the rest of the rules we discuss in this episode, so hang in there, and rest assured, we'll circle back:

Lee Burgess: "Peter Pastor is a prominent author and lead pastor of a 10,000-member church in Freetown, Freestate. He also has a nationally-syndicated podcast and radio show where he discusses political and cultural issues of the day. His books are about financial planning and management, and his show features a segment where he gives out advice, often about personal finance and planning. Peter Pastor often uses his show to advertise for his church and to seek donations for his ministries. Peter Pastor also brings prominent guests on his show, including local politicians, to discuss issues of morality, politics, and current events.

Lee Burgess: Rita Reporter is a reporter for FreePress, a nationally distributed newspaper. Rita Reporter received an accurate tip that Peter Pastor was funneling money donated to the church through the radio show to his own bank account and to the bank accounts of several guests on his show. To confirm this tip, Rita Reporter decided to sneak into Peter Pastor's home office to review his personal and professional accounting books. Peter Pastor and his wife were home at the time, but were sitting out by their backyard pool and had left their



doors unlocked. Rita walked into the house, but when she saw the couple by the pool, she hurried off the property without reviewing any of the books. Their home security cameras caught her on tape.

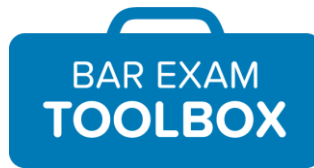
Lee Burgess: Would the First Amendment protect Rita Reporter if the Pastors sued her for trespass? Explain.”

Lee Burgess: Well, what do you think? Does the First Amendment shield a reporter from liability in a civil trespass action for trespassing on private property while investigating a news story on a matter of public concern?

Lee Burgess: Remember the first rule we discussed – there is no First Amendment privilege giving the press immunity from liability arising under generally applicable law, even when in pursuit of a news story, and even if that story is a matter of public concern. To give a little context, in [Cohen v. Cowles Media Co., 501 U.S. 663 \(1991\)](#), the Supreme Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news ..... [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." This is on page 669- 70. Basically, we’re not going to hinder or muzzle the press, but on the other hand, we aren’t going to give them carte blanche to break the law just so they can report on a story. They need to follow the law in pursuit of their story, no matter how important.

Lee Burgess: Here, Rita Reporter’s actions in breaking into the Pastors’ home constituted trespass under generally applicable law that does not single out the press for special treatment. Rita Reporter, like anyone else, is subject to the law prohibiting trespass, even if she is engaged in the journalistic activities of gathering and reporting the news. Thus, the First Amendment is no shield to liability for her, and the Pastors’ can collect damages for her trespass.

Lee Burgess: Let’s get back to Peter Pastor and Rita Reporter: “The next day, Rita Reporter attended a service at Peter Pastor’s mega church. Once the music started, she snuck out of the sanctuary and down the hall toward the church office. On her way, she heard two people coming and darted behind a door. While she hid, she overheard a conversation between two men discussing donations received during a donation drive on the radio show for the church’s new building addition, and debating whether they should continue to funnel 25% to Peter Pastor and 25% to select guests and employees like themselves. They discussed Peter Pastor’s financial troubles and his desire to receive more than 25% of the donations.



Lee Burgess: Peeking around the corner, Rita Reporter recognized one of the men to be Austin Accountant, the accountant for both the church and the radio show. The other man had his back to Rita, but she believed him to be Marty Mayor, Freetown’s mayor who was up for re-election that fall. Rita took a photo of the two men and, when the coast was clear, hurried back to the office.

Lee Burgess: The next day, Rita Reporter wrote a news story that was published along with the photograph in FreePress. The story stated that Peter Pastor was funneling money for himself and other VIPs, and that the two men pictured – Austin Accountant and Marty Mayor, were conspiring with him and in on the scam. The story also reported on the irony of Peter Pastor’s financial troubles, given the part of his profession is to give personal financial advice. By coincidence, the next page of the same edition of FreePress featured a separate story about Marty Mayor and his re-election bid. The article correctly stated that Marty Mayor had spent the entire previous day door-knocking with his campaign team and meeting with many of Freetown’s residents. Rita Reporter honestly believed that the man in the photograph was Marty Mayor, even though most people would have been able to tell from the photograph that this was not the case.

Lee Burgess: Would the First Amendment preclude liability if Peter Pastor sued FreePress for invasion of privacy, claiming that the publication of the news story and the photograph disclosed the truthful but highly offensive fact that he was in financial trouble and was funneling money through his radio show? Explain.”

Lee Burgess: Alright, so we know the First Amendment doesn’t protect Rita Reporter from a lawsuit over her trespassing. But what about her story about Peter Pastor? Does the First Amendment shield a newspaper from liability in an invasion-of-privacy action based on disclosure of private facts in a newspaper story?

Lee Burgess: Let’s review the rule we learned earlier in the episode. The First Amendment will protect FreePress if the private facts they disclosed are true, a matter of public concern, and either legally obtained or published without knowledge that the information was illegally obtained.

Lee Burgess: I think under this standard, FreePress is probably immune from liability for publishing the information it did about Peter Pastor. Why? First, the published information was true! Peter Pastor was funneling money through his radio show, he just didn’t want anyone to know about it. Jumping to the third prong, the information was lawfully obtained. Remember, though Rita Reporter broke into the Pastors’ house, she did not obtain any information there. Her information actually came from a tip and from overhearing a conversation in

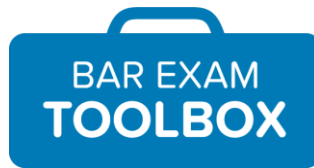


public. Now, I think this would be a more difficult question if Rita had obtained some information legally and other information illegally during her trespass. If you see a question like that on a test, remember that it's your job as a lawyer to think through both sides and determine each side's best arguments. So, make the case!

Lee Burgess: Finally, we need to determine whether the disclosure of private information was a matter of public concern. I would argue that it is. First, Peter Pastor isn't just anyone with financial troubles and misdeeds; he is a public figure who speaks and writes about financial management. He is also a well-known member of the community who occupies a position of authority. In [\*Gertz v. Robert Welch, Inc.\*](#), the Supreme Court has described a public figure for these purposes as someone who assumes "roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. 323 at 345, from 1974. Not only is Peter Pastor famous, he has put himself out there as a financial management expert. Meanwhile, he doesn't manage his own finances well and he is stealing donations from his listeners who believe they are donating to a good cause. So, because the information and photograph are true, newsworthy, and lawfully obtained, FreePress cannot be held liable for invasion of privacy.

Lee Burgess: Okay, there is one more issue I want to address in this question, but we need to learn the applicable rule first. The second major free press-related topic we see in the courts is defamation. As a general rule, the press is afforded heightened protection under the First Amendment for Defamation lawsuits. The level of protection, though, depends on the type of person suing. Generally, to prove defamation, the plaintiff must prove, 1) a false or defamatory statement (a statement that tends to harm the reputation of another); 2) of and concerning the plaintiff, made by the defendant; 3) publication by defendant to a third party; and 4) damages. You can see right away that this rule is dealing with false information, rather than true information like we've discussed so far. This is helpful to flag on a test. If the information disclosed is truthful, apply the rule for disclosure of private facts. If it is not true, you know you need to apply the rules for defamation.

Lee Burgess: Now, like I mentioned, the rules are different for certain types of people. The general rule is applicable to the general public. If the plaintiff is a public official or public figure, however, the standard is higher. In those cases, the plaintiff must also prove the defendant acted with actual malice to be successful. That is, the defendant spoke with either, a) recklessness; or b) knowledge of its falsity. It



is important to note here that for public officials or public figures, proof of negligence is not enough. The defendant must have been at least reckless if not knowing.

Lee Burgess: Now, if the person is a private citizen but they are speaking on a matter of public concern, to be successful, the plaintiff must also prove that the speaker or publisher was negligent. To sum it up, in all defamation suits, the plaintiff must prove the defendant made a false and defamatory statement of or concerning the plaintiff, the defendant published the information to the third party, and there were damages. If the plaintiff is a regular citizen, the inquiry ends there. If they are a public figure, they also have to prove malice. And if they are a private citizen speaking on a matter of public concern, they have to prove negligence.

Lee Burgess: Okay, with that rule under our belts, let's again take a look at the hypo we've been working through throughout this whole episode. This time, Marty Mayor sued FreePress and Rita Reporter for libel on the ground that the news story falsely stated that he was conspiring with Peter Pastor and Austin Accountant. Is FreePress protected by the First Amendment here? What about Rita Reporter?

Lee Burgess: I think this is a close question. As the mayor of Freetown, Marty Mayor is definitely a public official or public figure. And remember, public officials seeking to recover damages in a defamation action (libel or slander) must prove that the defendant acted with actual malice. Do the facts support an argument that Rita Reporter or FreePress knew the information was false? Or, did they demonstrate a reckless disregard of whether it was false or not? Remember, proof of negligent falsehood is insufficient to permit liability for defamation.

Lee Burgess: Here, Marty Mayor can recover only if he proves that either FreePress or Rita Reporter knew that the man Rita Reporter photographed was not Marty Mayor, or that it acted with reckless disregard with regard to that fact. There is no indication that Rita Reporter acted with knowledge of falsity; indeed, we are told that she honestly believed that it was Marty Mayor. There is also no indication FreePress knew the photo was not of Marty Mayor. But it is a much closer question whether FreePress acted with reckless disregard for the truth. While logical or factual consistency is not demanded of a newspaper, the fact that the same edition of the newspaper reported Marty Mayor to be in the church conspiring with Austin Accountant, while the next article reported he was canvassing all day, indicates FreePress very easily could have discovered Rita's report to be untrue. The fact that most people would have recognized the photo was not of Marty Mayor also provides some support for recklessness in



reporting. However, these factors probably lean more toward negligence than recklessness, although it's a close call.

Lee Burgess: And with that, we've made it through the entire question about Rita, Peter, and poor Marty. I hope their wild story helped you see how the First Amendment protections play out in different scenarios and with different players, and that you feel more confident tackling an exam question on freedom of the press!

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you won't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee and Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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[The Brainy Bar Bank: Streamlining Bar Study](#)

[Examples & Explanations for Constitutional Law](#)

[Cohen v. Cowles Media Co., 501 U.S. 663 \(1991\)](#)

[Gertz v. Robert Welch, Inc., 418 U.S. 323 \(1974\)](#)

[Podcast Episode 104: Listen and Learn – Intentional Torts: Defamation](#)

[Podcast Episode 123: Listen and Learn – First Amendment \(Content-Neutral Restrictions\)](#)