August, 2013 Update

Communication Law in America (3rd Edition)

AUTHOR'S NOTE: This Update includes cases through early August, 2013. It is likely the final update for the third edition, in that the fourth edition of the book should be hitting the proverbial newsstands in early 2014.

CHAPTER 1

You may have written it, but you can't defend it

Chapter 1 explains how it is generally the legislatures that create laws. But about half the states also provide for citizen referenda, which means that the public itself can create laws. An example much in the news for several years was California's Proposition 8, which defined marriage so as to exclude same-sex couples. The proposition was struck down, however, by a federal court, on Due Process and Equal Protection grounds, and the state of California refused to appeal that decision. The U. S. Supreme Court ruled that individual citizens, including the original proponents of the referendum, did not have standing to appeal on their own.[1]

You can't vote on *that*, Councilman!

On page 17 brief mention is made of *Caperton v. A.T. Massey Coal Company,*[2] in which the Supreme Court ruled 5-4 that judges should recuse themselves "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." And at the end of its 2010-2011 Term, the justices handed down a unanimous ruling, upholding a Nevada statute that required *legislators* to recuse themselves from voting on matters that may suggest conflicts of interest.[3] At issue was a Sparks, Nevada city councilman who wished to vote in support of a local hotel and casino project, even though his campaign manager stood to benefit from the vote. Justice Scalia's opinion for the Court points to the nation's long history of recusal rules for legislators:

> *Within 15 years of the founding, both the House of Representatives and the Senate adopted recusal rules. The House rule -- to which no one is recorded as having objected, on constitutional or other grounds, was adopted within a week of that chamber's first achieving a quorum. Members of the House would have been subject to*

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[1] *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). In the same term, the Court also denied standing to a group of attorneys with clients in Guantanamo prison, as well as reporter and researchers writing about their cases, in their suit challenging new rules making it easier for the government to intercept their phone and email messages. *Clapper v. Amnesty, International,* 133 S.Ct. 1138 (2013).

[2] 556 U.S. 868 (2009).

[3] *Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).

this recusal rule when they voted to submit the First Amendment for ratification; their failure to note any inconsistency between the two suggests that there was none.

But isn't a legislator's vote an act of expression,[4] protected by the First Amendment? Scalia rejected the argument, framing the act of voting as just that– an action, that accomplishes something rather than just says something:

A legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. . . The act of voting symbolizes nothing. It discloses, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication.

Use of Anti- SLAPP Statute Rejected in Illinois Lawsuit from HS Athletic Coach

Brief mention is made in Chapter 1 (see pages 4-5) of the phenomenon known as Strategic Lawsuits Against Public Participation (SLAPP suits), the goal of which –though they may take many forms , such as libel or invasion of privacy, etc.– is not to win, but rather to silence citizens who are speaking out on important public issues. The coinage comes from a 1992 law review article, and since then over 20 states have passed "anti- SLAPPS" laws to at least make it more difficult for such suits to proceed.[5] A 2012 case from Illinois concerned Dixon, Illinois basketball coach and athletic director Steve Sandholm, swho sued various parties he believed participated in a campaign that defamed him and invaded his privacy by accusing him of psychologically abusing student athletes, and resulted in his being stripped of his duties as basketball coach.[6] Defendants argued that his suit should not go forward because the state's anti-SLAPP law (in Illinois it is called the "Citizen Participation Act") protected their right to "petition, speak freely, associate freely, and otherwise participate in government." (The wording is from the Act itself).

The Illinois Supreme Court made clear that the Act did not constitute automatic immunity against libel or related claims whenever a defendant's speech touches on important public issues, or is designed to produce political change. Defendants can't expect protection from a lawsuit simply by citing the Act. Rather, courts must first consider if the plaintiff's sole motivation is to silence speech on public issues. Here, the unanimous Supreme Corut determined that coach Sandholm's motivation was not to silence the defendants or to prevent them from expressing their opinion about his job performance, that his libel and false light claims were at least plausible, that his was not the "meritless" kind of lawsuit the Citizen Participation Act was designed to squelch. The Court offered no opinion about the merits of his claims, leaving that to a trial court at a later date.

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[4] Justice Alito, in a partial dissent, argues that voting is expression, but still concludes that the state has a compelling interest in regulating that expression.

[5] George W. Pring & Penelope Canan, "Strategic Lawsuits Against Public Participation" ("SLAPPs "): An Introduction for Bench, Bar and Bystanders, 12 *Bridgeport Law Review* 937 (1992).

[6] *Sandholm v. Kuecker*, 962 N.E. 2d 418 (Ill. 2012).

My Bad (ERRATA)

On page 26, the text of the first bullet should explain that the mentioned court decision would be found in Volume 552 (not 321). Many thanks to Stephen M. Busch of Winona State University (in Minnesota) for pointing out the error.

CHAPTER 2

Combat Disease (only if you fight prostitution?)

The First Amendment, we know, protects not only the right to speak, but also a right not to speak. The latter was at issue in a 2013 Supreme Court decision striking down a federal government could not restrict allocation of funding to combat diseases like AIDS and malaria to organizations that first sign a document indicating that they oppose prostitution.[7] As Chief Justice Roberts explained in his majority opinion, some organizations plausibly feared that "a policy explicitly opposing prostitution may alienate certain host governments, and may diminish the effectiveness of some of their programs by making it more difficult to work with prostitutes in the fight against HIV/AIDS."

Sale to Minors of Violent Videos OK'd

Given that the Court had told us in its previous term that the states may not criminalize the sale of videos depicting animal cruelty, it was no surprise that the justices in 2011 struck down California's law forbidding the sale of violent video games to minors.[8] Although the First Amendment was designed primarily to protect political speech, wrote Scalia for the majority, the Court had "long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try." And why should video games be singled out, Scalia wondered. We certainly expose youngsters to highly violent narratives from an early age.

> *Certainly the books we give children to read -- or read to them when they are younger -- contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers till she fell dead on the floor, a sad example of envy and jealousy. Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.*

Addressing the state's argument that interactivity of video games is what makes them especially

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[7] *Agency for International Development v. Alliance for Open Society International*, 133 S.Ct. 2321 (2013).

[8] *Brown v. Entertainment Merchants Association,* 131 S. Ct. 2729 (2011). This was a 7-2 decision, but Justice Scalia's majority opinion was joined by only 4 other justices. Justices Alito and Roberts' concurring opinion suggests that, while the specific statute at issue here may have been unconstitutionally vague, a constitutional statute likely could be crafted. In short, for them the majority failed to take the dangers of video games seriously enough. Justices Breyer and Thomas dissented, the latter continuing to assert the view he had expressed in several cases, that minors have few if any First Amendment rights. Breyer's opinion followed much of the concurring justices' logic, but went a step further, concluding that the California law, even if not perfect, was well crafted enough, and that the state had much good reason to conclude that violent videos and minors are a toxic combination.

dangerous– kids don't just read about killing and maiming, they role play the acts, and become skilled shots in the process– Scalia wrote:

> *California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of* The Adventures of You: Sugarcane Island *in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind... All literature is interactive. The better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.*

And I got *this* medal for. . . prevarication

At least two concepts discussed in Chapter 2, the marketplace of ideas and the truth-seeking value of speech, seem to invite us to consider whether there should be laws against telling lies. And in fact there are, in some situations, as we will see in later chapters. People sue each other over libelous comments (which are by definition untrue), and there are still a few states with criminal libel laws. Misleading advertising can result in hefty fines. And of course there are laws against perjury, and in lying to governmental officials such as police officers.

But in most circumstances we do not permit punishment for telling lies. Thus it was that two conflicting federal appellate rulings on the constitutionality of the Stolen Valor Act virtually ensured a prompt Supreme Court review. The law criminalizes lying about one's military service. More specifically, the law provided punishment up to a year in jail for falsely claiming to have received the Congressional Medal of Honor. The Tenth Circuit Court of Appeals upheld the statute,[9] although the Ninth Circuit had previously struck it down as a violation of the First Amendment.[10]

In July, 2012, the Supreme Court agreed with the Ninth Circuit decision, thus striking down the Stolen Valor Act.[11] Technically there is no majority opinion. Four justices in the plurality found the law an overall violation of the First Amendment, using the traditional "strict scrutiny" standard. Two additional justices also agreed the law should be struck down, but used a more relaxed "intermediate" level of scrutiny, and emphasized that a more narrow statute (for

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[9] *U. S. v. Strandlof*, 667 F. 3d 1146 (10th Cir. 2012).

[10] *U.S. v. Alvarez*, 617 F. 3d 1198, 1200 (9th Cir. 2010), rehearing en banc denied, 638 F.3d 666 (9th Cir. 2011). In the 2010 decision, Judge Smith expressed concern that punishing untruthful speech in this instance, without demanding strict scrutiny to the government's purported interest, makes as much sense as imposing jail time for "lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway."

[11] *U.S. v. Alvarez*, 132 S. Ct. 2537 (2012).

example, one limited to lies designed to bring material gain) might be upheld.[12] And 3 justices dissented, finding that the government's interest in protecting the integrity of the prestige and integrity of the Medal, was sufficient to outweigh First Amendment consideration for what was, after all, a lie.

I ♥ Mom –and the City Can't Stop Me from Telling the World

Chapter 2 includes a discussion of symbolic conduct. The Ninth Circuit Court of Appeals recently held that tattoos- the designs themselves, the process of applying them, and the business itself– are protected by the First Amendment. (The court makes clear that several other federal appellate courts have ruled to the contrary). As Judge Bybee put it, "the principal difference between a tattoo and, for example, a pen-and-ink drawing, is that a tattoo is engrafted onto a person's skin rather than drawn on paper. This distinction has no significance in terms of the constitutional protection afforded the tattoo; a form of speech does not lose First Amendment protection based on the kind of surface it is applied to."[13]

CHAPTER 3

When You're an Aryan, You're an Aryan All the Way?

In 2011, the Tenth Circuit Court of Appeals held that Jerry Lee Bustos' libel suit against the A&E Television Network could not survive the long-held rule that if the gist or sting of an allegedly defamatory statement was true, any slight inaccuracies would not open the defendant to liability. At issue in the case was an episode of *Gangland: Aryan Brotherhood*, which claimed that Bustos was a member of the gang. Though apparently Bustos was not actually a member of the Brotherhood, he had "conspired" with them "in a criminal enterprise," which was deemed "enough to call an end to this litigation as a matter of law."[14]

Are you a rat, or do you just cooperate?

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[12] Perhaps surprisingly, given their use of the more relaxed standard of review, it is the concurring justices' opinion (penned by Justice Breyer, joined by Justice Kagan), that provides the most eloquent language in praise of the occasional lie:

> *False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.*

[13] *Anderson v. City of Hermosa Beach*, 621 F. 3d 1051 (9th Cir. 2010). Judge Bybee recognized that the city has an interest in ensuring that tattoos be applied using sterile procedures, but concluded that the First Amendment would require the hiring of additional inspectors, if need be, rather than shutting down tattoo parlors across the board for lack of resources to inspect them.

[14] *Bustos v. A&E TV Networks*, 646 F.3d 762 (10th Cir. 2011).

The "gist or sting" of truth defense seemed also to be at work in *Sanguedolce v. Wolfe*,[15] in which the Supreme Court of New Hampshire ruled in a state prisoner's defamation suit against a newspaper for falsely claiming he had testified against his robbery accomplice. While admitting that the plaintiff might have had a case if the newspaper alleged that he had committed perjury (perhaps in order to "cut a deal" for leniency from the district attorney), it is not libelous to report, even mistakenly, that one had cooperated with the police. The case thus also turned on the relevant "audience" of allegedly defamatory statements. As the court put it:

> *It may be that some elements in our society would look unkindly upon those who willingly cooperate with the authorities in apprehending or convicting a criminal. Prisoners, in particular, may harbor these sentiments. The prevailing view among law-abiding citizens, however, is that such conduct reflects good moral character, respect for the rule of law, and a willingness to place the interests of truth, justice, and the social order above one's own self interest or petty loyalties*.

But the Feds Told Us These Were the Guys!

The fair report privilege will surely be one of the defenses argued by the *New York Post*, if a libel suit brought against them stemming from an article they ran a few days after the Boston Marathon bombing comes to court.[16] Two young men initially identified by law enforcement as "persons of interest" but who had sought out the police and had their names quickly cleared, soon saw their photo on the cover of the paper, along with the headline, "Bag Men: Feds Seek This Duo Pictured at Boston Marathon." The photo used by the paper had been circulated by law enforcement, and while the FBI may no longer have been seeking the pair, we expect such false starts in these kinds of sensational and rapidly-developing stories. (Early reports about the Oklahoma City bombing back in 1995 suggested that Middle Eastern terrorists were involved).

Is that more Art than Science?

The Second Circuit Court of Appeals has held that debates in scholarly venues about controversial scientific issues are inherently matters of opinion (thus not subject to defamation, false advertising, or similar actions). The court recognized that this conclusion may seem counter-intuitive. After all, isn't science supposed to be about data and facts? But "conclusions of empirical research are tentative and subject to revision," Judge Lynch wrote for a 3-judge panel, "and courts are ill-equipped to undertake to referee such controversies." At issue in *ONY, Inc. v. Cornerstone Therapeutics*[17] were comparative claims made in a scholarly journal article by one of two competing manufacturers of products designed to improve lung functions of premature infants.

Robin Williams not Liable for Product Disparagement

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[15] 62 A.3d 810 (N.H. 2013).

[16] Christine Haughney, "*New York Post* Faces Suit Over Boston Bomb Article," *New York Times*, June 7, 2013, B4.

[17] 720 F.3d 490 (2nd Cir. 2013).

First, I should admit that this is an "oldie but goodie," added now and likely to the next edition of the book in large part because students may enjoy the visuals. Comedian Robin Williams, in one of his HBO comedy specials, did a short bit about how there are red wines and white wines, but no "black wines." He suggested that "Reggie" might be an appropriate name for such a wine. Actually we may never know Williams' intended spelling– this was not written discourse after all. And so the distributor of ***Rege*** Wines sued for libel and other claims. A state court in California rejected the plaintiff's case. While admitting that it is possible to conceive of a libelous comedy routine, Williams' suggestions as to what a Black wine's characteristics might be could not be taken seriously here as a claim about any particular wine on the market. You can see the relevan.t clip from Williams' routine here.[18]

A Placeholder by Another Name?

Los Angeles real estate agents Scott and Melinda Tamkin must have wondered if they had upset their client, Sarah Goldberg, a TV writer. Goldberg's initial draft of a ***CSI: Crime Scene*** episode focusing on a mortgage broker who was to be investigated for killing his wife (a real estate agent) used the Tamkins' as the characters' names, and they sued for libel.

In the episode, the "Scott" character was depicted as "a slick, hard-drinking extensive bondage/porn watching man," with "Melinda's" murder apparently resulting from some kinky sex. But a state appellate court in California threw out the suit,[19] in part because the unsavory characters' surname had been changed to "Tucker" in the final version of the script.

Here is a compilation of the relevant scenes from the CSI episode.

CHAPTER 4

No Actual Malice in Anti-Candidate Flier

Unsuccessful Maine senatorial candidate Jim Schatz was miffed at a Republican-backed political flier claiming that he voted for the following while serving as a local official in the town of Blue Hill, Maine: (a) to withhold funding for the annual Fourth of July fireworks, and (b) to donate the funds saved to a "political organization." He sued for libel. **In early 2012 the First Circuit Court of Appeals held that no actual malice could be found in the flier's development.**[20] First, the facts alleged in the flier came straight from the pages of reputable newspapers**. Second, Schatz's allegation that he was being accused of criminal wrongdoing stretched the facts way too far. The flier merely claimed, correctly, that funds had been donated to a "political organization." It did not claim that the group was his re-election committee.** You can one side of the flier here . (The other side was much less text-filled, saying only that, "thanks to Jim Schatz," there would be "No rockets red glare" and "No bombs bursting in air."

Jury Awards Iowa State Senator $231K Libel Damages

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[18] *Polyrgram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543 (Court of Appeal 1985).

[19] *Tamkin v. CBS Broadcasting*, 193 Cal. App. 4th 133 (2011).

[20] *Schatz v. Republican State Leadership Committee*, 669 F.3d 50 (1st Cir. 2012).

In April, 2012, a jury in Sioux City, Iowa found that the Iowa Democratic Party and its candidate had defamed state senator Rick Bertrand, who had been running against Rick Mullin for the U.S. Senate.[21] The ad claimed that Bertrand's pharmaceutical company had "put profits ahead of children's health." Bertrand established to the jury's satisfaction that the firm for which he had worked never even dealt with the specific drug alluded to in the ad.

Bertrand clearly was considered a public official at trial, which means that the jury found actual malice in the advertisement. But such judgments are very rarely upheld on appeal, so this will be one to watch. CLICK HERE to see the ad. Note you may want to view it a few times and to PAUSE a few times to get a sense of what the newspaper headlines and articles are telling us.

CHAPTER 5

Dissemination of Self-Inflicted Shooting Video not Privacy Act Invasion

In January, 2012, the D. C. Circuit Court of Appeals held that Drug Enforcement Administration special agent Lee Paige could not maintain a privacy invasion claim (here, under the federal Privacy Act rather than as a tort) against his employer.[22] A few years earlier, Paige had lectured to a group of parents and children at a community center in Orlando, Florida. An incident from the talk, reminiscent of the hapless Deputy Barney Fife from the 1960s Andy Griffith show, found Paige, in the course of explaining how folks in jobs such as his need to handle their weapons with respect and care, somehow managed to shoot himself in the thigh.

Apparently, the Paige knew that the event was being videotaped, and the video was made available to the DEA in its investigation of the shooting. And somehow from there the video found its way into YouTube fame. The appellate court held that the Privacy Act was not applicable to this situation, in that the videotape was not an agency "record" within the meaning of the Act, and because Paige failed to prove that the public release of the film was intentional, as also required under the law.

Click HERE to see the video.

No Emotional Distress in This Act

While we are on the topic of Privacy Act cases, mention should be made of *FAA v. Cooper*,[23] a suit against the agency by an airline pilot claiming that the agency had inappropriately shared with other federal agencies the fact that he was HIV-positive. The Privacy Act demands that plaintiffs demonstrate "actual damage" to obtain a judgment against an executive agency found to have inappropriately shared confidential information. Here the Supreme Court, in a 5-3 decision, finds that emotional or mental harm is not what Congress had in mind by the phrase. Cooper's suit could thus not continue.

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[21] "A Victory for Truthful Campaign Ads [editorial]," *Waterloo-Cedar Falls Courier*, April 17, 2012.

[22] *Paige v. Drug Enforcement Administration,* 665 F. 3d 1355 (D.C. Cir. 2012).

[23] *FAA v. Cooper*, 132 S. Ct. 1441 (2012).

Benoit Family Gets $125K in Compensatory Damages from *Hustler*

Brief mention is made on page 159 about how the Eleventh Circuit Court of Appeals, in 2009, allowed Chris Benoit's surviving family members to sue Larry Flynt Publications for invasion of privacy (a Right of Publicity claim). Since then, a jury awarded a $20 million award, reduced by the trial judge to $250K, and in 2012 reduced by the appellate court to $125K (compensatory damages only).[24]

Taping Cops Performing their Duty not "Eavesdropping"

Later on in this Update (under Chapter 7– access to government information) mention is made of the Simon Glik case, in which the First Circuit Court of Appeals ruled that the First Amendment includes citizens' right to film police officers performing their duties, as long as such filming does not obstruct the officers' movement.

Here we make separate mention of another, more recent case also involving citizens filming cops, but because the question posed in the case is whether such filming constitutes a violation of the Illinois Eavesdropping Act, it seemed sensible to include the discussion here, in our updating of the privacy chapter.

The Act in question makes clear that Illinois is a "two party" wiretapping state– both participants to a conversation must consent before either can audiotape it. And the law also makes clear it matters not if the conversation is truly private, or being conducted out in public where many others can hear. The law, as written, applies to conversations involving private citizens and those involving public officials.

And this is what prompted the ACLU of Illinois to sue– having received complaints over the years about alleged police misconduct, the organization decided to institute a "police accountability" program, through which it would tape police performing their duty in public settings. Would their videographers be subject to the Eavesdropping Act, thus potentially opening them up to 15 years imprisonment?

The 7th Circuit Court of Appeals, in *ACLU v. Alvarez,*[25] held that the Act, if applied to taping of police officer performing their duties in public, would be a clear violation of the First Amendment. The court thus did not need to strike down the statute in toto, but still was able to give the ACLU license to proceed with its plans.

No Privacy in Which Physicians Prescribe Which Drugs

Most of us know that pharmacies have the ability to gather data on which physicians in the area are prescribing which drugs. Few us of probably knew that pharmacies providing this data (without any *patient*-identifying information) to businesses that in turn provide them to drug manufacturers is a key component of the "Big Pharma" marketing plan. The state of Vermont decided it found the whole thing a bit unseemly– violating physicians' privacy, and giving pharmaceutical companies' sales representatives too much ammunition as plan their physician-office visits– and passed a law prohibiting the reporting of any physician-identified drug

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[24] See *Toffolini v. LFP Publishing Group* [slip copy], 2012 WL 1503931 (11th Cir.). According to West Law, the decision is not scheduled to be published in the *Federal Reporter*.

[25] 679 F.3d 583 (7th Cir. 2012).

prescribing information for marketing purposes. The Supreme Court, in a 6-3 ruling, struck down the Vermont law as an unconstitutional restriction on commercial speech. Physicians who don't want to meet with drug company representatives can always exercise that option; they don't need the state to limit such marketers' access to information. Morever, that the Vermont law only covered dissemination of information *for marketing purposes* rendered it a very poorly tailored way to protect physician privacy.[26]

No Right to Privacy against Admittedly Weird Interaction with *Cops*

The 11th Circuit in 2011 held that Ms. Arlene Spilfogel failed in both of her privacy claims against the producers of the *COPS* program.[27] Concerning her allegation that Fox Broadcasting had crossed over the line of intrusion, the court pointed out that the right, at least in Florida, did not extend to interactions with the police on public streets. Where Spilfogel also alleged that the *COPS* episode amounted to public disclosure of true but embarrassing facts, the court found that the facts depicted in the episode were not truly "private,"in that the plaintiff herself had revealed them directly to the police, by her behavior and by her direct assertions.

Click HERE to see Spilfogel's interaction with the Florida police officer.

Y'all Come Back Now (and pay me damages), You Hear?

Actress Donna Douglas is probably most closely associated with her role as Elly May Clampett, the "critter"-loving tomboy from the 1960s TV series, *The Beverly Hillbillies*. In 2011 she filed a lawsuit against Mattel for marketing a Barbie Doll modeled after Ms. Clampett. She had never been asked for nor granted permission to use her likeness, her suit alleges. Mattel claims that she has no rights to the character–that the company has contracted with "the appropriate channels." We await the defendant's likely Motion to Dismiss. Click here to see the doll.

CHAPTER 6

Your Marriage or Your Memory Disk?

One of the more complicated issues in copyright law is how to adjudicate question #3 of the Fair Use doctrine– "how much was taken?" Often the only sensible answer is another question– "compared to what?"

And so it was that a 3-judge panel of the Ninth Circuit split on whether a Spanish language tabloid (TV Notas) was in violation of copyright law when it published five photos from the secret wedding of Latin American celebrities Noelia Lorenzo Monge and Jorge Reynoso. The majority pointed to the fact that the newspaper had published all of the photos depicting the secret wedding that had been made available to them. Partly on these grounds, the paper's Fair Use defense was rejected.[28] But a dissenting judge emphasized that the camera

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[26] *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

[27] *Spilfogel v. Fox Broadcasting Company*, 433 Fed. Appx. 724 (11th Cir. 2011).

[28] *Monge v. Maya Magazines*, 688 F.3d 1164 (9th Cir. 2012).

memory disk on which the handful of photos were to be found, and which the newspaper purchased as one item from a local photographer, boasted hundreds of other pictures of the couple (though from other times and situations). Surely 5 out of 400 is not a huge taking, eh?

And since everyone loves a lover, CLICK HERE to see one of the wedding pictures that resulted in the lawsuit.

The Soul of a Trademark

Samuel David Moore (half of musical duo, Sam and Dave), upset at what he took to be an unauthorized depiction of his life in the 2008 MGM film, *Soul Men*, sued unsuccessfully for trademark infringement.[29] He had never acted like a trademark holder, the court held– he had never registered a mark like "Soul Men." Moreover, there were numerous differences between Moore's life and the lives of the two entertainers in the film. One such difference, apparent from this opening scene from the film, is that the fictional soul men were depicted as having gotten their start as back-up vocalists to another singer, whereas Sam & Dave were always a complete duo.

Trademark Dispute Involving Bourbon Packaging

Maker's Mark bourbon boasts a highly recognizable red wax seal. Whether that seal can be protected as a trademark is a dispute before the Sixth Circuit Court of Appeals. The makers of Casa Cuervo Reserva tequila and other products also insists on its right to use the same decorative label. We will monitor the court's deliberations. View View a short (silent) video of the dipping of the bottles.

Faulkner Estate Suit Against Woody Allen Dismissed

In one of the stranger high-profile copyright suits in recent years, the William Faulkner estate has sued Sony Pictures and Woody Allen because Owen Wilson's character in *Midnight in Paris* utters a mere two sentences from Faulkner's novel, *Requiem for a Nun*. A federal district court quickly dismissed the suit. Judge Michael Mills offered a lengthy explication of the narratives of the two works and how each used the small number of words at issue, and held that the Allen film's use of the quote was clearly a fair use. [30]

Graduation (with a twist)

This chapter includes discussion of a couple of lawsuits involving "appropriation artist" Jeff Koons. Another well-known appropriation artist, Richard Prince, was sued by photographer Patrick Cariou over some of Prince's paintings and collages that were clearly based on some of Cariou's photos. Cariou had lived in Jamaica for several years and produced a book of his photos from there called *Yes, Rasta*. A federal appellate court found that about 30 of Prince's pieces in a show he produced for a couple of galleries were related to Cariou photos, but in the majority of these, Prince had added enough of himself to have produced truly original works.

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[29] *Moore v. Weinstein Company*, 2012 WL 1884758 (M.D. Tenn.)

[30] *Faulkner Literary Rights, LLC, v. Sony Pictures Classics Inc.*, ___ F.Supp.2d ___(N.D. Miss. 2013).

But with respect to a handful of images, the court was not so sure if the source material and the finished work were very different. Among these was an untitled Cariou photo that was used by Prince to create the piece he calls "Graduation." Here, the defendant "did little more than paint blue [shapes] over the subject's eyes and mouth, and paste a picture of a guitar over the subject's body." But even those dissimilarities might be enough for Prince to escape liability.[31]

All that Baggage Gave Me a Hangover

As we already know, unauthorized uses of copyrighted works in films are permitted if they are "incidental" or "fortuitous." In ***Vuitton v. Warner Brothers Entertainment***,[32] we see very much the same principle applied to trademark law. The manufacturer of the high-end luggage sued producers of ***The Hangover, Part II*** because of a couple of short appearances of what is erroneously referred to by one of the actors as a "Lewis Vuitton." In fact the piece of luggage used in the film was a "knock-off" manufactured by a lesser company

The only way for plaintiff to prevail, ruled a federal district judge, was if it could persuade a jury that Warner Brothers had some kind of financial stake in duping viewers into believing that the bag was a true Vuitton, and that the luggage company had sponsored its use in the film. Viewing this as a bit of a stretch, Judge Carter dismissed the suit.

Click here to see the relevant scenes from the film.

Chicken or Kale?

Vermont artist Bo Muller-Moore is having a trademark conflict with the Chick-fil-a fast food chain. Moore has been creating and distributing t-shirts inviting folks to "Eat More Kale" (a take-off on the chain's slogan, "Eat Mor Chikin"). The chicken franchise sent Muller-Moore a cease and desist letter in the fall of 2011.[33] See more about the controversy at the artist's own website– www.eatmorekale.com

Holden Caufield Lives On . . . Some Places

Mention is made in chapter 6 (see page 200) of J.D. Salinger's suit against author Fredrick Colting, seeking to enjoin publication of *60 Years Later: Coming Through the Rye*. Under a settlement reached with Salinger's estate, the book cannot be published in the US, but can be in a handful of other countries.

CHAPTER 7

Glomar Guidance Needed

Agencies receiving FOIA requests that they really don't want to honor might issue a "Glomar"

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[31] *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013).

[32] 868 F. Supp. 2d 172 (S.D.N.Y. 2012).

[33] Jess Bidgood, "Chicken Chain Says Stop, But T-Shirt Maker Balks," *New York Times*, December 5, 2011, A12.

response, arguing that even to indicate whether they have such records would jeopardize some strong state's interest. The Supreme Court has never had anything to say about the use of such responses, but a couple of conflicting federal appellate decisions in recent years might increase the chances of a definitive decision in the not-too-distant future. In *Wilner v. NSA*,[34] the Second Circuit Court of Appeals held that the NSA could refuse to say whether it has been intercepting messages to and from attorneys' detainee-clients, even though the executive branch had generally affirmed the existence of records. But the D.C. Circuit Court of Appeals more recently held that the CIA could not invoke Glomar to avoid revealing whether it itself had been conducting drone operations, in that several government spokespersons had already publicly acknowledged the use of drones.[35]

FOIA, First v. Sixth Issues Join in Manning trial

In the largest leak of classified documents since the Pentagon Papers case (see p. 44), the Wikileaks website has made hundreds of thousands of previously secret government documents public, giving the world access to data about the wars in Iraq and Afghanistan, as well as hundreds of State Department diplomatic cables (the kinds of documents the revelation of which forced government agents to hastily apologize among each other when their lies and/or failure to keep others' lies under wraps became known). U.S. Army Private First Class Bradley Manning, imprisoned by the military since 2010 on suspicion of leaking the government documents to Wikileaks, was the subject of what is called an "article 32" hearing, resulting in his being held over for a full court-martial. His 2013 full court-martial resulted in conviction on most counts.

Media outlets have expressed much frustration over the military court's almost complete secrecy during the article 32 proceeding against Manning. Claiming national security interests, the court has made virtually no documents publicly available.

Must I *live* here?

In a handful of states– Alabama, Arkansas, New Hampshire, New Jersey, Tennessee, and Virginia– open records laws make clear that applications for disclosure of such records will only be honored for citizens of that state. In 2013 the Supreme Court upheld the Virginia law.[36]

Constitutional Right to Videotape Police

In 2011 the First Circuit Court of Appeals held that Mr. Simon Glik was within his constitutional rights to film police officers conducting an arrest (using what he felt was unnecessary force) on the Boston Common. Initially the police had arrested Glik for disruption of the peace and for what they took to be violation of the state's wiretapping law, but these charges were quickly dropped. When Glik countersued with a First Amendment claim, the court held squarely in his favor, finding that the case law was so clear in this regard that the police had no right to qualified

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[34] 592 F.3d 60 (2nd Cir. 2009).

[35] *ACLU v CIA*, 710 F.3d 422 (D.C. Cir. 2013).

[36] *McBurney v. Young*, 133 S.Ct. 1709 (2013).

immunity. The American Civil Liberties Union handled the Glik case.

A further update on Glik's countersuit: in early 2012, he received a $170K settlement payment from the city of Boston.

Here you can see a brief excerpt from the ACLU's view of the case.

Tenth Circuit– Mug Shots Private Enough for an FOIA Exemption

In 2012, the Court of Appeals for the 10th Circuit held that the Department of Justice had appropriately withheld from the Tulsa World "mug shots" taken of a handful of criminal suspects.[37] The withholding had been based on Exemption 7 (c) of the FOIA, which covers law enforcement records the release of which would constitute an unwarranted invasion of privacy. While the court admitted that the appellate case law is mixed concerning whether the release of such photos would invade the suspects' privacy (which suggests a future Supreme Court decision on the matter is possible), it found eloquent support for its own conclusion from a federal district in another circuit:

> *Mug shots in general are notorious for their visual association of the person with criminal activity. Whether because of the unpleasant circumstances of the event or because of the equipment used, mug shots generally disclose unflattering facial expressions. They include front and profile shots, a backdrop with lines showing height, and, arguably most humiliating of all, a sign under the accused's face with a unique Marshals Service criminal identification number.*[38]

Public to Ever See Images of Osama bin Laden's Death?

When the Obama Administration announced in 2011 that bin Laden was dead, there was much speculation as to whether any of the photos and videos confirming the killing would be made public. Ultimately the Administration decided against such openness, fearing it would only further inflame radical Muslims. The non-profit group Judicial Watch brought an FOIA suit against the CIA for release of the visual images. The case found the CIA arguing that both Exemption 1 (classified information) and Exemption 3 ("bowing down to other laws," here the National Security Act) required that the images not be made public. The CIA prevailed, as Judge James Boasberg decided not to compel the Administration to disclose the photos. Boasberg chose instead to defer to the expertise of the CIA and the Pentagon to determine if release would damage national security interests. In 2013 the D.C. Circuit Court of Appeals upheld Boasberg's decision. [39]

No more "High 2" FOIA Exemptions

The distinction between Low 2 and High 2 FOIA Exemptions is discussed on pages 254-255. In a far-reaching decision, the Supreme Court in 2011 rejected altogether the High 2 category,

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[37] *World Publishing Company v.United States Department of Justice*, 672 F.3d 825 (10th Cir. 2012).

[38] Quoting from *Times Picayune Publishing Corporation v. U.S. Department of Justice,* 37 F.Supp.2d 472, 477 (E.D.La.1999).

[39] *Judicial Watch v. U.S. Dept of Defense* 715 F.3d 937 (D.C. 2013).

which had developed in the last 30 years by a number of federal appellate courts, but had never been explicitly embraced by the High Court.

"Low 2" exemptions follow the wording of the statutory exemption itself, restricted to documents "related solely to the internal personnel rules and practices of an agency." At issue in *Milner v. Department of the Navy*[40] was a request by a resident of the Puget Sound area in the Pacific Northwest for maps and data related to how safely the Navy stores explosives on the Indian Island naval base near his home. A federal district court granted summary judgment to the Navy, and the Ninth Circuit Court of Appeals affirmed.

The lower courts had applied a "High 2" interpretation of exemption 2, "records whose disclosure would risk circumvention of the law." Specifically, the Navy feared that revelation of these sensitive documents could "point out the best targets for those bent on wreaking havoc -- for example, a terrorist who wished to hit the most damaging target."

Writing for the majority, Justice Kagan allowed that the government's interest is more than reasonable, but concluded that stretching the statutory language of Exemption 2 beyond all reason was not the best way to satisfy that interest. (The Navy could have invoked Exemption 1 for classified documents, for example).

Kagan's linguistic analysis of the statutory language and her critique of the government's preferred interpretation of that language is worth quoting, as she focused on the exemption's "12 simple words, 'related solely to the internal personnel rules and practices of an agency:'"

> *An agency's "personnel rules and practices" are its rules and practices dealing with employee relations or human resources [such as] matters relating to pay, pensions, vacations, hours of work, lunch hours, parking. All the rules and practices referenced in Exemption 2 share a critical feature: They concern the conditions of employment in federal agencies -- such matters as hiring and firing, work rules and discipline, compensation and benefits. Exemption 2, as we have construed it, does not reach the information at issue here. These data and maps calculate and visually portray the magnitude of hypothetical detonations. By no stretch of imagination do they relate to "personnel rules and practices," as that term is most naturally understood. They concern the physical rules governing explosives, not the workplace rules governing sailors; they address the handling of dangerous materials, not the treatment of employees. The Navy therefore may not use Exemption 2, interpreted in accord with its plain meaning to cover human resources matters, to prevent disclosure of the requested maps and data.*

No Privacy for Corporations

On page 261 brief mention is made of a Third Circuit decision in which a trade association seeking release of data about AT&T's admitted overcharging of the government encountered a novel obstacle– the phone company's right to "privacy" under Exemption 7 of the FOIA. I suppose my whimsical musing in that discussion as to whether a corporation's "feelings" could also be hurt was my coy way of suggesting that the decision might not stand up on appeal. And indeed the Supreme Court did in 2011 overturn it.

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[40] 131 S. Ct. 1259 (2011).

The Third Circuit had relied on the fact that another federal statute, the Administrative Procedure Act, includes corporations (as well as partnerships and associations) within its definition of "persons." Thus should not the FOIA's use of the adjective, "personal," refer back most naturally to this statutorily accepted definition of the noun?

Not so fast, concluded Chief Justice Roberts for a unanimous Court:

> *Adjectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own. The noun "crab" refers variously to a crustacean and a type of apple, while the related adjective "crabbed" can refer to handwriting that is "difficult to read; "corny" can mean "using familiar and stereotyped formulas believed to appeal to the unsophisticated," which has little to do with "corn;" and while "crank" is "a part of an axis bent at right angles," "cranky" can mean "given to fretful fussiness." In ordinary usage, a noun and its adjective form may have meanings as disparate as any two unrelated words.*
>
> *"Personal" ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities. This is not to say that corporations do not have correspondence, influence, or tragedies of their own, only that we do not use the word "personal" to describe them. Certainly, if the chief executive officer of a corporation approached the chief financial officer and said, "I have something personal to tell you," we would not assume the CEO was about to discuss company business. Responding to a request for information, an individual might say, "that's personal." A company spokesman, when asked for information about the company, would not. In fact, we often use the word "personal" to mean precisely the opposite of business-related.*[41]

ACLU Unsuccessful in Obtaining Guantanamo and Interrogation Data

Chapter 7 opens with a discussion of *ACLU v. DOD*, involving documents describing the Department of Defense's interrogation policies at Guantanamo. In 2011 the D. C. Circuit Court of Appeals held, in a related case of the same name, that the CIA properly withheld portions of documents describing how it dealt with 14 "suspected terrorist leaders and operatives," who had apparently been interrogated in third-party countries before their eventual transfer to Guantanamo. The FOIA's Exemptions 1 (national security) and 3 (deferring to another statute, here the National Security Act) were invoked. It mattered not to the court that much of the material sought had already leaked out, in that official government acknowledgment of any such information could itself pose national security problems.[42]

In another ACLU action, the 2nd Circuit Court of Appeals ruled in 2012 that the government (CIA, Department of Justice, etc.) was justified in refusing plaintiff's request for specific information about the "enhanced interrogation technique" known as waterboarding. The ACLU argued that waterboarding cannot be the kind of intelligence gathering technique that the National Security Act (under Exemption 3) would permit be withheld, since it has been

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[41] *Federal Communications Commission v. AT&T*, 131 S. Ct. 1177, 1181-1182 (2011).

[42] *ACLU v. DOD,* 628 F.3d 612 (D.C. Cir. 2011).

condemned and declared illegal by the Obama administration. But the technique's legality was not the issue, the court held. At issue was whether releasing the information (and photographic evidence) sought would make it difficult for CIA agents to do their jobs, and Judge Wesley accepted – after the court did its own in camera review of relevant documents– the government's assertions in this regard.[43]

Criminal Sanctions OK for Violating State Open Meetings Act

On page 268, brief mention is made of *Rangra v. Brown*, in which a panel of the Fifth Circuit Court of Appeals hinted that holding city council members criminally responsible for exchanging emails that might constitute an unauthorized meeting could violate the First Amendment. That decision was vacated, however, when the court agreed to rehear the case *en banc*. Since the entire court then found the immediate dispute moot (the appellants were ***ex-***council members by the time oral arguments were scheduled), it was left to a lower court, in a separate dispute involving current city council members, to opine on the constitutionality of the criminal provisions.

In 2011 U. S. District Judge Robert Junell held that the sharp teeth in the Texas Open Meeting Act (TOMA)– transgressors could be fined up to $500 and imprisoned for up to 6 months-- did not violate the First Amendment.[44] As Judge Junell put it, "Texas public officials are not in danger of having their ideas or viewpoints driven from the marketplace by TOMA. Instead, their election to public office allows them a bullhorn for their ideas. Plaintiffs are merely asked to limit their group discussions about these ideas to forums in which the public may participate."

The next year, the Arkansas Supreme Court similarly rejected an argument that state's open meetings provisions of its FOIA violated public officials' First Amendment rights.[45] The court's opinion does not offer any stirring quotes in support of disclosure; rather the justices suggest that the controversy, if one, would be better addressed by the state legislature.

Cops Names and Addresses to Remain Secret

The Ohio Supreme Court held that the state's public records law does not give a newspaper the right to learn names and addresses of police officers involved in a gang-related shooting. The state's argument that those officers would be subject to likely retribution from the gang was sufficient to outweigh the plaintiff's interests.[46]

Bargain CD's

It has often struck me that readers of the text who do not have the resources of a major media outlet supporting them take even the most liberal of FOIA cases with a grain of salt– "great, I

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[43] *ACLU v. DOJ*, 681 F.3d 61 (2nd Cir. 2012).

[44] *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W. D. Tex. 2011).

[45] *McCutchen v. City of Fort Smith*, ___ S.W. 3d ___ (Ark. 2012).

[46] *State ex rel. Cincinnati Enquirer v. Craig*, 969 N.E.2d 243 (Ohio 2012).

have a right to the documents, but how will I be able to afford the agency's fees?" Well, if you live in Ohio and are in pursuit of records which the state has already digitized and which are covered by the state's Public Records Act, you are in luck. The state's supreme court ruled in 2012 that agencies may charge requesters no more that the actual costs of making a copy of the relevant CD (generally holding over 100,000 documents), which the court hastened to add means no more than one dollar. Compare this with the system the court struck down, in which requesters could be charged as much as $2 per page.[47]

I voted Nay, but Don't Tell Anyone?

In *Cardinale v. City of Atlanta*[48] the Georgia Supreme Court tells us that the state's Open Meetings Act requires more detailed description of formal votes than agencies may have thought was demanded of them. Apparently the Atlanta City Council was holding its annual retreat, which was considered an open meeting covered by the Act. And at one point they were to vote on a rules change that would affect how the Council deals with the "public comment" sections of their own meetings. The vote was conducted by a simple show of hands (rather than with a more formal roll-call vote in which members would be called, one by one, by name, with their Yays, Nays, or Abstentions being clearly documented) resulting in a 7-8 count against the proposed change. The actual minutes of the meeting, however, reported somewhat obliquely that "after an extensive discussion it was determined that the membership was not in support of amending the existing law." "Not in support of" could mean a 7-8 vote, of course, but it could also mean 0-15.

Plaintiff Matthew Cardinale argued that the minutes should reflect not only the correct vote tally, but also should match each of the council members with their votes. Although the wording of the Open Meetings Act could be read so as to demand that only minutes of formal roll-calls include such painstaking reports, the state supreme court found this would not be in keeping with the overall pro-disclosure philosophy undergirding of the Act.

CHAPTER 8

Tweeters in the Courtroom?

We know that just about every state permits cameras at least in appellate courts, and many permit them in trial courts as well. We also know that the First Amendment does not require that judges permit TV reporters to bring their equipment into the courtroom (see pages 301-302). More recently judges and state legislators have had to decide whether to allow reporters to use laptops or other mobile devices, even to "live blog" or Tweet from the courtroom. A recent article in the online Huffington Post tells us that different jurisdictions and individual judges have made opposite decisions on the matter.[49] In Massachusetts, the supreme court's "Rule 1:19 was recently changed so as to explicitly permit reporters to use laptops and similar mobile devices,

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[47] *Data Trace Information Services v. Cuyahoga County Fiscal Officer*, 963 N.E. 2d 1288 (Ohio 2012).

[48] 722 S.E. 2d 732 (Ga. 2012).

[49] Michael Tarm, "Courtroom Tweet Ban?" *Huffington Post*, April 16, 2012.

with the change to be effective as of July 1, 2012. More recently, Utah and Kansas courts have opened some courts to tweeters and bloggers.[50]

Oh, and about the old-fashioned issue of camera in the courtroom, Illinois and Utah Illinois have become the most recent states (2012 and 2013, respectively) to permit TV coverage of trial courts.[51]

Jury Questionnaires Opened in Chandra Levy Case

The death of 24-year-old federal intern Chandra Levy led to much media coverage, resulting in the defeat of Representative Gary Condit in the 2002 election, after he was linked romantically with Levy. But Condit was cleared of the death. Instead, a 2010 conviction for murder was obtained against an immigrant from El Salvador.

The case is brought to mind now because in 2012 the *Washington Post* won a ruling from the D. C. Court of Appeals (this is an District of Columbia court, not the U.S. Court of Appeals for the D.C. Circuit) that just as there is a presumptive press right to attend voir dire hearings, so too is there a right to obtain written juror questionnaires used in the voir dire process.[52] The trial judge had argued that privacy rights of jurors were at issue here, but the appellate court reminded him that Chief Justice Burger's opinion in the *Press-Enterprise I* decision (see pp. 292-293 of the textbook) makes clear that trial judges cannot simply assert such a broad interest for all jurors. Rather, individual jurors would have to seek private sessions with the judge and attorneys if specific questions during voir dire made them uncomfortable.

While the Supreme Court has never issued a ruling on the precise issue of First Amendment accessibility to juror questionnaires, the appellate court here makes clear that lower courts that have dealt with the matter have unanimously concluded that potential jurors' responses to the written questions should be as open as would be oral responses to judge and attorney questions in voir dire hearings.

Affidavits Supporting Applications for Search Warrants Presumptively Open

Chapter 8 includes a brief section (pp. 298-301) reminding us that courts have had to deal with not only what kinds of judicial proceedings are presumptively open, but which kinds of judicial documents as well. The Supreme Court has never told us whether affidavits filed with a magistrate asking for a search warrant (at this early stage in an investigation, almost always sealed) can be opened once the overall investigation is complete. In 2011 the Ninth Circuit (finding support for its ruling in earlier decisions from the Second, Fourth and Seventh Circuits) held that there is a common law right to access to the affidavits.[53] At issue were documents associated with an investigation, no longer pursued by the government, against Montana resident

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[50] Lilly Chapa, "Journalists Now Allowed to Tweet, Live Blog from Utah Courtrooms," *Reporters Committee for Freedom of the Press*, November 20, 2012.

[51] Rob Tricchinelli, "Update: Cameras in the Courtroom," *The News Media and the Law*, Spring, 2013, 27.

[52] *In Re Access to Jury Questionnaires,* 37 A. 3d 89 (D.C. Court of Appeals 2012). The case was thus sent back to the trial court; judge with instructions, in essence, to take the *Post's* First Amendment rights more seriously.

[53] *U. S. v. Custer Battlefield Museum*, 658 F.3d 1188 (9th Cir. 2011).

Christopher Kortlander for "fraudulently misrepresenting the provenance of historical artifacts" sold by him at the Custer Battlefield Museum.

Proposition 8 Videos To be Released

Mention is made on page 303 (footnote #81) of *Hollingsworth v. Perry,* in which the Supreme Court denied a request to broadcast or stream live the federal trial challenging California's Proposition 8, which had defined marriage to be uniquely between one man and one woman (thus invalidating same-sex marriages). In 2011, however, the U.S. District Court for the Northern District of California ruled that the video from the 2010 trial must be released to the public.[54]

Right to Attend *Civil* Trials?

In a strange case civil case involving a conflict among family members who jointly had managed the Bear County Resort in South Dakota, the state's supreme court held in 2011 that there is a First Amendment right to attend *civil* trials.(Although several federal circuits have already ruled in favor of such openness, sometimes dating back decades, the United States Supreme Court's lengthy openness doctrine dealt only with a right to attend *criminal* proceedings.)[55]

CHAPTER 9

Risen Subpoena Upheld

Brief mention is made in the very beginning of Chapter 9 of the Obama Administration's decision to renew a subpoena for the testimony of *New York Times* reporter and author James Risen. In 2013 a federal appellate court told James Risen that he has no privilege to avoid testifying in the trial of the former CIA agent charged with leaking classified files to Risen about the agency's covert operations to sabotage Iran's nuclear program. Risen, the majority found, was in a position similar to that of Paul Branzburg himself (of *Branzburg v. Hayes* fame), in that he "has direct information," in fact "the only first-hand account," of a serious crime. The crime, of course, was not production of illegal drugs, but the CIA agent's alleged violation of the Espionage Act.[56] The violation would be giving the documents to Risen. Thus, the media have understandably expressed outrage over the court's decision, in that it would seem to say that reporters must *always* identify sources who have given them documents illegally.

Ken Burns a Reporter

In this chapter we have seen that individuals who are gathering information are not always considered "reporters" who enjoy protection of state shield laws. The city of New York argued that filmmaker Ken Burns should be seen as an advocate rather than a reporter, and that it should have access to his outtakes from his documentary about the "Central Park Five" who had been

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[54] *Perry v. Schwarzenegger*, 39 Media L. Rep. 2391 (N. D. Cal. 2011).

[55] *Rapid City Journal v. Delaney*, 804 N.W. 2d 388 (S. Dakota 2011).

[56] *U.S. v. Sterling*, ___ F.3d ___ (4th Cir. 2013).

wrongly convicted of rape and imprisoned for many years. (The city was defending itself against a civil action by the "Five."). But a federal judge held that Burns was acting as a reporter, simply gathering information for dissemination to the public. It mattered not that in the film that emerged from his research might seem to the city to be rather one-sided.[57]

CHAPTER 10

Mount Laurel and Willingboro Disagree

This chapter makes brief mention of the 1977 Supreme Court decision, *Linmark Associates v. Township of Willingboro,*[58] where the justices struck down a local ordinance from a New Jersey town forbidding the posting of For Sale signs in front of homes. One of the reasons for the decision was that For Sale signs reach a unique audience– folks who might not necessarily be in the market for a home, and thus not regularly reading the real estate pages from their local newspaper. Interestingly, a federal appellate court has now rejected this argument in a case involving another New Jersey town, where the town had passed a law pretty much getting rid of commercial billboards on highways. The company unsuccessfully challenging the law had argued that billboards also reach audiences that no other medium can reach adequately– folks traveling in and through the township on the interstate highway.[59]

Yes, We Don't Offer Abortions

The first of the "Central Hudson" test questions asks whether the regulation at issue in a particular case is aimed at deceptive advertising. In recent years courts have had to decide if those pro-life "pregnancy counseling" centers seen in many cities are engaged in deceptive marketing when they fail to tell a client from the outset that their goal is to make sure she does not get an abortion. Here is how a federal appellate court described a Baltimore ordinance as it would apply to a local counseling center:

> *The Center has sincerely held moral, ideological, political, and religious beliefs that abortion and at least some forms of birth control are profoundly wrong and thus are not to be chosen. The Ordinance requires the Center to state that it does not provide or make referral for abortion or birth-control services. The conflict between the Center's beliefs and the mandated disclosure is thus plain: where the Center wishes to guide women toward alternatives to abortion and birth control, the Ordinance requires it to indicate at the outset that those services are readily available, just not at the Center*

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[57] *In re McCray, Richardson, Santana, Wise and Salaam Litigation*, ___ F.Supp.2d ___ (S.D.N.Y. 2013).

[58] 431 U.S. 85 (1977).

[59] *Interstate Outdoor Advertising v. Zoning Board of the Township of Mount Laurel*, 706 F.3d 527 (3rd Cir. 2013).

itself.[60]

The court did not make a definitive ruling, opting instead to send the case back to a lower court for more fact finding. The court also pointed out that the city had considered and rejected a complementary statute which would have required groups that perform abortions but do not refer for adoption to make *this* limitation known to their clients at the outset.

FDA Reined in on Cigarette Warnings?

In 2011 the FDA published rules implementing Congressional goals set out in the Family Smoking Prevention and Tobacco Control Act. The agency's rules would have packs of cigarettes display rather huge (at least 50% of the surface area, front and back) and highly graphic "arguments" against smoking. In 2012 Judge Richard Leon of the U.S. District Court for DC struck down the rules,[61] for two main reasons. First, the government may have a right to demand the tobacco companies promulgate specific facts about smoking, but these graphic images conveyed emotion, not facts. Second, even if they government had a right to compel big tobacco to make these highly graphic anti-smoking arguments themselves, the 50% minimum area feature of the rule was far too restrictive of First Amendment rights.

It is expected that Judge Leon's decision will be appealed. In the meantime, a bit later in 2012 in another jurisdiction, by a 2-1 vote, the Sixth Circuit Court of Appeals upheld the same FDA regulations, having concluded that the tobacco companies were not even entitled to a "strict scrutiny" level of First Amendment analysis. This court emphasized that the government had reason to believe that tobacco advertising is misleading, especially to youngsters, and has a right to enforce compelled speech by the tobacco companies to minimize the dangers of such deception.[62] It will not be surprising if the Supreme Court has the final word on this issue.

CLICK HERE to see a sample of the graphics the FDA rule would require.

FTC Clamps Down on Athletic Shoe Advertisements

In May, 2012, the FTC announced that Skechers, distributor of Shape Ups and other athletic shoes with unusual sole design to force users to "roll" a bit while walking, was unwarranted in touting alleged health benefits from simply wearing the shoe (e.g., weight loss, and toning one's legs and buttocks). The company would pay a $40 million settlement. In the video here, Robert K. Jennings, lead attorney in a separate class action suit against Skechers, argues in this video provided by his office, that the defendant's deception was not limited to its media advertising, but is also apparent from the wording on the shoe boxes themselves.

This follows on the heels of the Commission's having compelled Reebok to offer $25 million in refunds for deceptive health claims about Easy Tone sneakers. The FTC claimed that there was no reason to believe wearing these sneakers would "tone" us while we walk any better

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[60] *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, ___ F. 3d ___ (4th Cir. 2013) (en banc).

[61] *R.J. Reynolds Tobacco Company v. FDA*, 845 F. Supp. 2d 266 (D.D.C. 2012).

[62] *Discount Tobacco City & Lottery v. U.S.*, 674 F.3d 509 (6th Cir. 2012).

than wearing other shoes, that the walking itself is what does a body good. CLICK HERE to see a sample Reebok ad at issue in the settlement.

I've Got to Crow! (that I am an especially qualified attorney)

As you know from chapter 10 (see pages 344-348) the Supreme Court has found it challenging to set forth a clear rule as to how and when lawyers may advertise their unique or special qualifications. In 2012 the 2nd Circuit Court of Appeal took a swing at the issue, and only partially upheld New York rules governing attorneys' touting their being "certified" by associations accepted by the ABA. Attorney J. Michael Hayes' advertising in various media, and his professional letterhead, indicated that he is a "Board Certified Civil Trial Specialist, which in fact he is. And the state regulations did not forbid such information being included in attorneys' self-descriptions. It did, however, require that the ads would make clear that

1. the association providing this certification was not a government entity,
2. such certification was not an actual requirement to practice law, and
3. the certification "does not necessarily indicate greater competence than other attorneys experienced in this field of law."

The court upheld the first provision, but struck down the second and third requirements. As to the second one, the court thought it was a solution without a problem. Did the state fear that potential clients would presume that the thousands of attorneys with no specific "board certification" was imposters, illegally practicing law?

Provision #3 the court found even more troublesome. While board certification may not be a guarantee of expertise, one cannot become certified as a civil trial specialist without "having been lead counsel in at least 5 trials and having 'actively participated' in at least 100 contested matters involving the taking of testimony, passing an extensive examination, participating in at least 45 hours of [continuing legal education], and devoting at least 30 percent of the lawyer's practice to the specialized field." To force lawyers who jump through such hoops to explicitly state in their ads that it may have all been a sham struck the court as a clear violation of the First Amendment.[63]

FTC's Wrath Against Kevin Trudeau Stands

In 2011 the 7th Circuit court upheld a lower court ruling which in turn upheld several FTC sanctions against "infomercialist" (I never knew this was a word) Kevin Trudeau, whose infomercials associated with his book, "The Weight Loss Cure: The Book 'They' Don't Want You to Know About," had apparently caught the commission's attention. By the second time the case reached the appellate court in 2011, the main issues were the size of the government' fine against Trudeau ($37.6 million), and a $2 million "performance bond" the pitchman would have to provide to the FTC in advance of any additional informercials he might wish to produce related to this specific book title. As to the large fine, the court agreed with the district court that this was a reasonable estimate of the harm caused to Trudeau's customers who bought his book through the 800-number touted on the informercials.

A larger debate surrounded the $2 million performance bond– was this not a violation of Trudeau's future commercial speech? The court ruled it was not, specifically because it was not

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[63] *Hayes v. State of New York Attorney Grievance Panel,* 672 F.3d 158 (2nd Cir. 2012).

a fine. As long as a proposed infomercial would not include additional false claims, the money would be refundable.[64]

Generic Drug Labels Need Do No More than Track Patent-Holder's Labels

In a decision focusing on the complicated legal doctrines governing the marketing of brand-name and generic drugs, the justices in 2011 struck down state tort laws that demanded more of generic drug manufacturers' warning labels than did relevant federal law.[65] At issue was the drug called metoclopramide (the generic version of the brand-name drug, Reglan), used "to speed the movement of food through the digestive system," but which recent data suggests may cause "a severe neurolgical disorder." When patients who experienced the dangerous side effect sued the manufacturer of the generic drug for failure to warn, the defendant pointed to FDA regulations that seemed to prohibit generic drug labels to deviate from the precise wording approved for the original, brand-named version of the drug.

Arizona Funding Scheme to Create "Level Playing Field" Struck Down

The Supreme Court's *Citizens United* decision signaled the majority's likely interest in striking down several kinds of campaign finance regulations (and at least a couple of the Court's own prior decisions). So it was no surprise that in 2011 the Court, in a 5-4 vote, struck down an Arizona law that sought to "level the playing field" between relatively cash-poor candidates taking public funds and very wealthy candidates (perhaps by dint of wealthy donors' support or the candidate's own personal fortune).[66] The law, which triggered additional public funding for candidates whose opponents began to spend at prescribed higher levels, was a violation of the First Amendment in that it burdened the speech of those wealthier candidates. As Chief Justice Roberts put it, under Arizona's plan, "the vigorous exercise of the right to use personal funds to finance campaign speech" leads to "advantages for opponents in the competitive context of electoral politics."

CHAPTER 12

Public Stations may now air Political Ads (and be paid to run them)

In July 2012 the Ninth Circuit Court of Appeals, in a 2-1 ruling, struck down a federal law prohibiting public broadcasting stations from running political ads.[67] The court concluded that the government's claim of potential harm– that public broadcasters would be tempted to change their programming in order to please political candidates who advertise heavily with them–was not backed with substantial evidence. The court especially found such arguments inapplicable to fears about diluting children's programming, in that most viewers of such programs, by design,

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[64] *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011).

[65] *Pliva, Inc v. Mensing*, 131 S. Ct. 2567 (2011).

[66] *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

[67] *Minority Television Project v. FCC*, 676 F.3d 869 (9th Cir. 2012).

are too young to vote anyway. The court invites Congress to "try again" to come up with enough evidence to justify such regulations, but also expressed skepticism, in that non-commercial stations are allowed to run ads by nonprofit groups, which presumably also might pressure station managers to produced programming to their liking.

Captioning for Online Video

In January 2012 the FCC promulgated a report setting forth its plan to require that video programming must be close-captioned when it appears online, if captions had been provided for earlier broadcast of the same programming. An example would be a TV program that is captioned on one of the major broadcast networks having to be captioned also when a service such as Hulu streams it.

In a somewhat related action, a federal district court in California ruled in 2012 that the state's anti-SLAPP rule does not protect CNN from having to comply with state regulations also requiring that online video programming be captioned. The court rejected CNN's assertion that the decision whether or not to caption its online video streams was activity protected by the First Amendment, such that the deaf community organization seeking access to online captioning was interfering with political activity.[68]

FCC Wants to Loosen Cross Media (Broadcast and Print) Ownership Rule

In December, 2011, the FCC proposed that the rules governing when a company may own both a TV station and a newspaper in the same large market be relaxed. The proposal would permit such cross ownership as long as the TV station is not one of the top four stations in the market.[69] The commission gathered public comments, followed by reactions to those comments, and in May, 2012 told the relevant Senate committee that further action is very high on their "to do" list).

FCC Agrees Fox Can't Be Fined for *Past* "Fleeting Expletives"

In 2010 the Second Circuit Court of Appeals (see p. 422, n. 34) decided that fines could not be maintained against Fox TV for award shows in which Cher and Paris Hilton had uttered "fleeting expletives." The FCC's guidelines as applied to such utterances was unconstitutionally vague, the court held.

In the closing days of its 2011-2012 term, the Supreme Court also found that the fines could not stand, but its reasoning was far more restrained. The Court did not reach the First Amendment issues. It did not even go so far as to agree with the appellate court that the FCC's ***current*** policies were vague. Technically the Court held only that the specific defendants in front of it could not be fined, in that the Commission had not, ***at the time of the broadcasts in question***, yet been clear about its intention to punish even fleeting expletives. Although the narrowly structured decision could theoretically result in identical future broadcasts resulting in fines, most observers believe that the FCC will instead either retreat from its stand, or spend yet

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[68] *Greater Los Angeles Agency on Deafness v. CNN*, 862 F. Supp. 2d 1021 (N.D. Cal. 2012).

[69] Cynthia Littleton, "FCC Eyes Reg Loosening," *Daily Variety*, December 27, 2011, p. 2.

more time trying to clarify under what circumstances fleeting expletives can result in sanctions.[70]

Wardrobe Malfunction Case Decided

Page 420 (the caption of the "wardrobe malfunction" photo) finds me predicting that the FCC ruling against CBS stemming from the notorious 2004 Super Bowl halftime would likely be overturned. And so it happened in 2011, when the Third Circuit found the FCC's assertion that even "fleeting" expletives and sexual imagery could be found indecent was arbitrary and capricious when compared to its long history of more lax regulation.[71] The court did not therefore rule on First Amendment grounds, but rather finds the commission in violation of the Administrative Procedure Act (and earlier cases interpreting it) for failure to explain adequately why it felt the need to become a more strict regulator of fleeting material.

More recently, a few days after the Supreme Court's Fox decision in 2012, the justices refused to hear the government's appeal from the Third Circuit ruling.[72] Typically, such "denials of cert" include no written opinions, but in this case Chief Justice Roberts referred to the *Fox* decision, thus suggesting that here too the networks should be careful, in that the FCC was not being precluded from issuing future fines for similar or even identical broadcasts. Justice Ginsburg also attached an opinion to the denial of cert, making clear that she believes the *Fox* decision "affords the Commission an opportunity to reconsider its indecency policy."

Cute Buns, Connie– NYPD Fine Reversed

On the heels of the federal appellate decision striking down FCC's indecency policy as applied to "fleeting expletives"– see the discussion of *Fox TV, Inc. v. FCC* on page 422), the Second Circuit Court of Appeals vacated a $27,500 per station fine against ABC for airing an *NYPD Blue* episode entitled "Nude Awakening."[73] Here is how the court described the relevant scene:

> *Connie McDowell (played by Charlotte Ross), who has recently moved in with Andy Sipowicz, disrobes as she prepares to shower, and her nude buttocks are visible [for 7 seconds]." As McDowell turns toward the shower, the side of her buttocks and the side of one of her breasts are visible. While she faces the shower, the camera pans down, again revealing her nude buttocks. Sipowicz's young son, Theo, enters the bathroom and sees McDowell naked from the front. Theo blocks the audience's view of McDowell's nudity. Each character reacts with embarrassment, and Theo leaves the room and apologizes. McDowell, covering her breasts and pubic area, responds, "It's okay. No problem." According to ABC and the ABC Affiliates, the scene was included to portray the awkwardness between a child and his parent's new romantic partner and their difficulties in adjusting to life together.*

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[70] *FCC v. Fox Television*, 132 S. Ct. 2307 (2012).

[71] *CBS Corporation v. FCC*, 663 F.3d 122 (3rd Cir. 2011).

[72] *FCC v. CBS Corporation*, 132 S.Ct. 2677 (2012).

[73] *ABC v. FCC,* 404 Fed. Appx. 530 (2nd Cir. 2011).

See the scene here.

Don't Sue Me, Sue the Feds

One of the themes of chapter 12 is that de-regulation of the broadcast media has been so intense and so nearly complete in the past thirty years or so that it is easy to imagine a not-too-distant-future edition of this textbook no longer including a separate chapter on broadcast law. That having been said, at least one regulation is still enforced pretty strictly– Section 315, the Equal Time Rule. Indeed, many political pundits have taken on faith that one reason both Donald Trump and Mike Huckabee have decided not to run for President in 2012 is that their highly lucrative media appearances would have to be put on hold during the campaign.

An interesting Section 315 corollary issue presented itself in a 2011 decision from the Third Circuit Court of Appeals. Independent Congressional candidate James Schneller, distraught over having been excluded from a weekly interview program focusing on the campaign to which only the Republican and Democratic candidates had been invited, sued the local NBC affiliate station. But as the court pointed out, Section 315 clearly requires aggrieved parties to first get a ruling from the FCC commissioners before bringing a law suit. The plaintiff's claim that the station had violated his First Amendment rights also were without merit, in that TV stations are private corporations, definitionally incapable of violating the First Amendment.[74]

CHAPTER 13

"Splash Screen" Akin to Scarlet Letter as Punishment for Misleading Website

In a 2011 decision, the Ninth Circuit Court of Appeals scolds the creators of a website called DMV.org, which seemed designed to fool visitors into believing that it was actually a government site. The owners of the site derive income, as per usual, from the number of eyeballs who view accompanying advertisements and especially who patronize those advertisers (e.g., by signing up for sponsored driving schools). The federal district court had demanded that for this company to continue to use their preferred name for the site would mean that they must install an initial "splash screen" that would alert visitors that this is NOT a government site.

The appellate court felt this was a bit too much, punishing the owners of the site even if they were to "clean up their act" in the future.[75]

CLICK HERE to see the proposed and ultimately rejected splash screen.

Third Circuit– Students Can't Be Punished for Most Off-Campus Web Postings

Very brief mention is made in chapter 13 (see p. 442, n. 13) of conflicting case law in the Third Circuit concerning if and when public school administrations can sanction their students for offensive messages created off-campus. Mention was brief in the book because the conflicting

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[74] *Schneller v WCAU Channel 10*, 413 Fed. Appx. 424 (3rd Cir. 2011).

[75] *Trafficschool.com v Edriver, Inc.*, 653 F.3d 820 (9th Cir. 2011).

cases were known to be up on appeal to the full circuit, oral arguments in the two cases having been heard together in June, 2010. A year later, the court has resolved the conflict (at least in this circuit) by making it much harder for schools to punish such off-campus speech.

The cases were remarkably similar, both involving students (a middle school student in one case, high school in the other) who created ersatz MySpace pages in order to ridicule a school administrator. The postings would almost certainly be seen as deeply offensive. Indeed, one of the pages seemed to accuse an administrator of being a serial child molester.

Nonetheless, the court held in each instance that the schools had overstepped their authority under the First Amendment. Judges in the majority seemed to be fashioning a rule to the effect that punishments for off-campus postings would be struck down if the students' messages were not targeted at the school community, and especially when there was insufficient reason to predict that the postings would disrupt the school. Even the outlandish charges in the one case did not reach this level, the majority held, in that the phrasing was so over-the-top that any reasonable reader would recognize the posting as a joke– a vicious and tasteless joke, to be sure, but a joke nonetheless.[76]

[76] *Layshock v. Hermitage School District*, 650 F.3d 205 (3rd Cir. 2011) (en banc); *J.S. v. Blue Mountain School District*, 650 F.3d 915 (3rd Cir. 2011) (en banc).