January, 2015 Update

Communication Law in America (4th Edition)

AUTHOR'S NOTE: This update includes reference to the beginning of 2015. You can expect the next update in summer, soon after the completion of the Supreme Court's term.

ERRATA

●P. 336, n. 16. The citation to *U.S. v. Sterling* is incomplete; it should have been cited as 724 F.3d 482 (4th Cir. 2013), with a later *en banc* request denied at 732 F.3d 292 (4th Cir. 2013), and the Supreme Court having denied review, 134 S.Ct. 2696 (2014).

● p. 365, n. 14– reference to *Housing Opportunities Made Equal v. Cincinnati Enquirer* is wrong reference. The case described is ***Pittsburgh Press Company v. Pennsylvania Human Rights Commission***, 376 A. 2d 263 (Pa.. 1977). The Housing Opportunities case deals also with advertising, but for housing, not employment. Specifically, it considered if a newspaper can be liable for accepting illustrated housing ads where photos are of only or almost only white individuals.

●P. 383, in the "And I can Prove it!" graf, line 11. I hope the Fleischmann's margarine folks will forgive my misspelling on their brand name. Also, since going to press, I was able to make an Ebay purchase of one of the magazine ads the FTC criticized. It is now up on my website, both under "Additional Images" for chapter 10, and in the Power Point slide show for the chapter.

●p. 403, very first line– Colin McEnroe's radio program is aired Monday through Friday, not "weekly."

CHAPTER 1

OK to Pray in Greece, New York

Since it is in this chapter where readers are introduced to the Establishment Clause, it is worth nothing that in early May, 2014, the Supreme Court handed down a much-awaited decision generally permitting official town meetings to be opened with a prayer.[1] This was a 5-4 decision, with Justice Kennedy writing for the majority. Kennedy understood that the plaintiff was upset at how often prayers preceding the business at the town's meetings were sectarian, invoking Jesus's name, but held that the Establishment Clause does not protect against this kind of discomfort, especially since there was no pattern of overt disparagement of other religious faiths, and no one had to actually participate in prayer.

CHAPTER 2

[1] *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

Court Gives Public Employees a Bit More Free Speech Rights

Mention is made in Chapter 2 (see page 75) of *Garcetti v. Ceballos*,[2] in which the Supreme Court held that public employees can be subject to sanctions flowing from their speech, if that speech is in the work setting (not aimed at the larger public) and if it is, as the Court put it, "pursuant to their official duties." At the end of its 2013-2014 Term, the Court narrows that holding a bit.[3]

At issue was the firing of a community college administrator whose research into his unit's financial woes uncovered the existence of what they used to call on *The Sopranos* a "no show" employee, someone on the payroll, but not doing much of anything, and hardly ever showing up for work. The individual, a state legislator, was eventually convicted of fraud, and the administrator was a material witness against her (brought in to the grand jury with a subpoena). When he was later fired, the administrator sued, alleging that his dismissal was in retaliation for his speech.

In upholding Lane's termination, the Eleventh Circuit Court of Appeals "read *Garcetti* far too broadly," Justice Sotomayor wrote for a unanimous Supreme Court. Yes, it is true that Lane learned about the government corruption about which he eventually testified while doing research pursuant to his job duties. But that fact does not make his actual testimony into job-related speech. His testimony was offered as a private citizen, and on a matter of clear public interest.

AZ Town Law Governing Sign Sizes Under Review

In Chapter 2 we learn that "time, place and manner" restrictions are generally permitted, but that those which are or seem to be triggered by the content of speech are much less likely to be upheld as constitutional. In January, 2015, the Supreme Court heard a case from Arizona, where the town of Gilbert had passed a law governing the size of signs. The law would allow a fairly large and permanent sign expressing an "ideology," but signs announcing events (including regularly sponsored church services), would have to be much smaller, and removed right after the "event." At oral argument, the justices seemed amused and bewildered at the notion that the church bringing the suit would be subject to the law's stricter provisions if the sign gave viewers directions to the church building. Expect a decision by late June.[4]

Shocked! SHOCKED! (Political Speech Includes Lies!)

Chapter 2 makes brief mention of the fact that political speech is deemed so very important in our system of freedom of expression, even knowing falsehoods are sometimes explicitly protected (see reference to *U.S. v. Alvarez*, the "Stolen Valor Act" case, on page 29). In 2014 the Supreme Court had occasion to take a first look at a case involving false political campaign

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[2]547 U.S. 410 (2006).

[3]*Lane v. Franks*, 134 S. Ct. 2369 (2014).

[4]The lower court decision, upholding the town statute, is *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057 (9th Cir. 2013).

speech more generally.[5] A pro-life group calling itself the Susan B. Anthony List was having trouble placing ads accusing then-Congressman Steve Driehaus of having voted "for taxpayer-funded abortions" (when he voted for Obamacare). Driehaus filed a complaint with an Ohio state elections commission charged with enforcing a state law prohibiting knowing falsehoods in ads seeking to elect or defeat a candidate for office. The commission decided that there was enough evidence to warrant an investigation, but when Driehaus lots his re-election bid, he decided not to pursue his action any further.

So this is the posture in which the case reaches the Supreme Court: The pro-life group seeks a ruling that the state law is unconstitutional, not only as applied to its own advertising, but on its face, in general. The Court had to decide whether the challenge was mooted by the fact of Driehaus' having dropped his complaint. Writing for a unanimous Court, Justice Thomas concludes that the pro-life plaintiff has suffered a real and likely repeatable harm (the election commission in Ohio handles several dozen allegations of untrue campaign rhetoric each election cycle), and instructs a lower court to adjudicate the matter further. There is a good chance the case will be back in front of the Supreme Court in a few years.

CHAPTER 5

A Right to be Forgotten?

It has often been suggested that one way courts should balance competing interests in Public Disclosure privacy cases is to consider that a revelation that was once newsworthy might not be so forever. This "passage of time" test had been embraced in some early 20th Century decisions, but as was pointed out in chapter 5, the "newsworthiness" defense has made it very difficult for Public Disclosure plaintiffs to prevail.

In Europe, a very different philosophy seems to be embraced. The European Court of Justice held in 2014 that there is a right to "practical obscurity," what the French call "le droit à l-oubli" (a right to be forgotten, a "right to oblivion.").[6] Using this reasoning, the court held that Google and other search engines can be forced to remove damaging but true information about folks on request; as a result Google has had to hire many new employees to begin the process of deleting access to some web sites from its search engine, at least when accessed in Europe.[7]

NY Med Forces Widow to Re-Live Husband's Death

Brief mention is made in this chapter (see pages 182-183) of a case involving automobile accident victim Ruth Shulman's successful suit against a TV program that aired video of her conversations with an attending nurse while she was being placed on a helicopter journey to a hospital. A similar dispute emerged in New York City when an ABC program called "NY Med" showed footage of Mark Chanko's treatment at New York-Presbyterian Hospital. Chanko had been run over by a sanitation truck, and was declared dead at the hospital a few hours later.

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[5] *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

[6] *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD)*. Case C-131/12 (European Grand Chamber, 2014).

[7] Maureen Dowd, "Remember to Forget," *New York Times*, May 21, 2014, A23

Surviving family members sued several entities involved in the incident, including the TV network. In late 2014, a state appellate court dismissed the suit,[8] finding that the pixilated images of Mr. Chanko were not identifiable, and that not breach of confidentiality thus occurred. The case was being appealed as of early 2015.[9]

CHAPTER 7

Reveal Guidelines on How/When to Use Drones to Kill Americans?

In April, 2014, the Second Circuit Court of Appeals ruled on an FOIA request from the New York Times and the ACLU for documents concerning how the administration went about deciding when it was legitimate to use unmanned drones to kill two American citizens operating in Yemen.[10] Writing for the 3-0 judge panel, Judge Jon Newman generally upholds a lower court opinion that the various government agencies involved appropriately withheld the requested documents. He does allow that some of the relevant FOIA exemptions claimed by the CIA and the Office of Legal Counsel might have been waived by formal testimony and public speeches on the topic of drone-conducted warfare by a handful of administration officials. And with respect to some of the documents, Judge Newman requires either disclosure of at least redacted versions to the plaintiffs, or disclosure in camera to the district court a detailed "Vaughn index" of available documents. Interestingly, "redacted" is one of the most frequently appearing words in the Newman text, because the official court's opinion itself manifests dozens of redactions.

A couple of months later, the government released much of the memoranda justifying use of drones to kill targeted Americans overseas, having decided not to appeal the Second Circuit's decision.[11]

CHAPTER 8

Ferguson Grand Juror Wants to Talk

In early 2015, a member of the grand jury from Ferguson, Missouri– the one that refused to indict police officer Darren Wilson in the shooting death of 18-year-old Michael Brown, filed a suit against the county prosecutor, seeking the lifting of a lifetime gag order imposed on the jurors. According to press accounts, the thus far anonymous juror seeks to speak out for "legislative change" governing grand juries, and more specifically to raise questions about the conduct of this particular grand jury, which seemed to the plaintiff to have "a stronger focus on the victim" than

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[8] *Chanko v. ABC*, 122 A.D. 3d 487 (Appel. Div. 1st Dept. 2014).

[9] Charles Ornsetin, "Dying in the E.R., and on TV," *New York Times*, January 4, 2015, A22.

[10] *New York Times v. US Dept of Justice*, 756 F.3d 100 (2nd Cir. 2014).

[11] Charlie Savage, "Court Releases Large Parts of Memo Approving Killing of American in Yemen," *New York Times*, June 24, 2014, A17.

one might expect.[12]

CHAPTER 9

Risen Off the Hook; Not Necessarily Future Reporters

On page 336, we learned that New York Times reporter James Risen had lost a federal appellate decision, and thus had no privilege against being forced to testify at the trial of former CIA agent Jeffrey Sterling. (The Supreme Court had since refused to hear the case). Sterling himself stands accused of revealing classified government information about US attempts to disrupt Iran's nuclear program. But in January, 2015, the Justice Department decided not to seek Risen's testimony at all, perhaps in part because Risen made clear he would rather go to jail than to answer any questions that might lead to revelation of his confidential sources.[13]

CHAPTER 10

No More to Each, But More to All

Toward the end of chapter 10**,** the text offers a brief explanation of how the First Amendment has been applied to campaign finance regulations. The book's preface mentions that a Supreme Court decision was expected soon that would address whether federal limits on how much money we may contribute to individual campaigns and how much we can contribute overall during a campaign season are constitutional. The case was handed down shortly after the text went to press.[14]

The to-an-individual-campaign-limit amounts, referred to as "base limits," were most recently set by Congress at $2,600 per election per candidate. (We could thus actually contribute up to $5,200 to a candidate, one-half for the primary election, and one-half for the general election). The "aggregate limits," the total we may give in an election cycle, had been set at $123,000. Within that total, the relevant statutes provided how much could be given directly to candidates and how much to local and national party committees and political action committees (PACs).

In a 5-4 ruling, the Court upheld the base limits but struck down the aggregate limits. The main plaintiff in the case indicated she had given the maximum contributions allowable to each of 16 candidates, and was prevented from giving to an additional dozen or so candidates of her liking by the aggregate limits. Offering the decision of the Court (there was no majority opinion), Chief Justice Roberts said of the aggregate limits that "the Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."

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[12]Mitch Smith, "Grand Juror in Ferguson Sues to End Silence Rule," *New York Times*, January 6, 2015, A12.

[13]Matt Apuzzo, "Times Reporter Won't Be Called in Trial on Leak," *New York Times*, January 13, 2015, A1.

[14]*McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 (2014).

Would Knowing that my Opponent is a Terrorist . . . ?

"Push polling" is a dirty campaign trick that has become so commonplace to almost not be thought of as dirty anymore. Typically the procedure is that the phone bank for one candidate calls voters in the district, assuming a tone as if one were conducting a scientific poll. The purpose of the call, however, is to spread some negative information, sometimes misinformation, about an opponent. "If you knew that Candidate X had been charged with tax fraud, would that fact make you less likely to vote for him, more likely to vote for him, or would it make no difference?" The state of New Hampshire passed a law prohibiting push polling, but the state's supreme court in 2014 held that the law could not be applied to elections for federal offices, that the Federal Election Campaign Act pre-empted any actions by the individual states.[15]

CHAPTER 11

Limits on Damages for Viewing Child Pornography

Child pornography harms its victims not only because its production is part and parcel of sexual abuse of children. Rather, the harm is perpetuated by the continued existence of the offensive images even after a child "actor" becomes an adult. The relevant federal statutes not only provide for fine and lengthy imprisonment, but also permit victims to sue persons who produced, distributed, or who own images of their abuse as children. At issue in *Paroline v. U.S.*[16] was if and how damages should be assessed to any single viewer of digital images of a child's sexual abuse when those same images have been and will be viewed by thousands of others online. The child victim argued that each possessor of the relevant images should be fully liable for the totality of her damages. In this case, the victim sought over $3 million from one such individual.

Writing for the Court's majority, Justice Kennedy provides an illuminating discourse on the notion of causality in the law, and emerges with a decision sending the case back to a lower court to determine what lessor, but not "token" or "nominal" damages, should be assessed to this individual viewer of the disturbing images.

Wrap it First

A federal appellate court has refused to grant a preliminary injunction against Los Angeles' County's ordinance requiring the "talent" in sexually-explicit films wear condoms whenever engaged in vaginal or anal intercourse. The law imposes only minimal restrictions on freedom of expression, while offering the chance to greatly reduce the spread of venereal disease. (Statistics cited by the court showed that persons working in the X-rated movie industry were over ten times more likely top be infected than was the county's general population). The court adds that if a full trial is held on the First Amendment claims, it is possible that a trial court would discover that it is possible for "special effects" to make it appear as if the protected actors were not actually wearing condoms, thus preserving whatever extra measure of "eroticism" the law

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[15] *New Hampshire Attorney General v. Bass Victory Committee*, ___ A. 3d ___ (N.H. 2014).

[16] 134 Sup. Ct. ____ (2014).

seemed to be infringing.[17]

CHAPTER 12

Supreme Court Puts an End to Aereo

Brief mention is made of *WNET v. Aereo* in both chapter 6 (p 235, n. 45) and chapter 12 (p. 457, n. 59). Aereo is (perhaps we should now say "was") an start-up company whose service was available in only a few cities, including New York. Aimed at the market of folks who have already cut their ties with their cable or satellite TV provider, Aereo offered convenient access to over-the-air broadcasts ("as would any old-fashioned antenna!" you say?), also making it easy for subscribers to arrange for the recording and later playback of programs on their computers or mobile devices. The Second Circuit Court of Appeals had held that Aereo was no more guilty of copyright infringement than would be individual users giving themselves access to free, over-the-air broadcasts with their own individual antennas, because the defendant's business model actually had each individual subscriber assigned a tiny antenna of his or her own at the company's headquarters. But the Supreme Court held that, collectively, the use of all those tiny antennae constituted unauthorized [18]"public performance" of the protected TV programming, in violation of copyright law.

Yelp Contributors' Anonymity Attacked

Have you ever uploaded comments on local businesses to websites like Angie's List or TripAdvisor? You likely know that Yelp is a site that invites customers to comment on all sorts of businesses. A carpet cleaning company in Virginia, rather upset with a few negative comments on Yelp, sued the company to unmask the anonymous contributors, and a state appellate court held in 2014 that Yelp should comply. The case turned in part on the plaintiff's allegation that some of the contributors' narratives suggested they had not actually ever availed themselves of the company's services. That alone would be, if nothing else, a violation of Yelp's "Terms of Service" with its contributors.[19]

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[17] *Vivid Entertainment v. Fielding*, ___ F.3d ___ (9th Cir. 2014).

[18] *ABC v. Aereo*, 134 Sup. Ct. 2498 (2014).

[19] *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc*., 752 S.E. 2d 554 (Va. App. 2014).