

February 2012 Update
Communication Law in America (3rd Edition)

AUTHOR'S NOTE: Yes, I know... the most recent Update was just a few weeks ago, but sometimes, especially when a case described in the Update itself gets overturned, I feel compelled to make changes (to update the update?). Under Chapter 8, I needed to provide an addendum to the "Proposition 8 Videos" item, because of an appellate court ruling.

CHAPTER 1

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.

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

On page 17 brief mention is made of *Caperton v. A.T. Massey Coal Company*,¹ 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.² 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 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,³ 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:

¹129 S. Ct. 2253 (2009).

²*Nevada Commission on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).

³Justice Alito, in a partial dissent, argues that voting is expression, but still concludes that the state has a compelling interest in regulating that expression.

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.

CHAPTER 2

Manning trial nearing end on Wikileaks Case

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). In the winter of 2011-2012 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, often thought of as a hearing preliminary to a full court.⁴

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.⁵ 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

⁴"Bradley Manning's Own Defense Appears to Concede He is No Hero," *Mediaite* (Newstex Web Blogs), January 12, 2012.

⁵*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.

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 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. But in most circumstances we do not permit punishment for telling lies. Thus it was that the Court of Appeals for the Ninth Circuit, in 2011, refused to review *en banc* an earlier decision from a 3-judge panel, striking down the Stolen Valor Act, which had criminalized 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. Writing for a 2-1 majority, 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."⁶

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

⁶*U.S. v. Alvarez*, 617 F. 3d 1198, 1200 (9th Cir. 2010), rehearing *en banc* denied, 638 F.3d 666 (9th Cir. 2011). The Supreme Court has granted review, with a decision expected by summer, 2012. It should be noted that the case law elsewhere has been mixed on the constitutionality of the Stolen Valor Act. Indeed, in late January 2012 a 2-1 ruling from the Tenth Circuit Court of Appeals, in *U.S. v. Strandlof*, found the Act constitutional, in that it punishes only knowingly false statements.

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.”⁷

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.”⁸

Robin Williams not Liable for Product Disparagement

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 relevant clip from Williams’ routine [here](#).⁹

CHAPTER 5

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

⁷ *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.

⁸ *Bustos v. A&E TV Networks*, 646 F.3d 762 (10th Cir. 2011).

⁹ *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543 (Court of Appeal 1985).

are prescribing which drugs. Few of us 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 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. Moreover, that the Vermont law only covered dissemination of information *for marketing purposes* rendered it a very poorly tailored way to protect physician privacy.¹⁰

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.¹¹ 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

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.

¹⁰*Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

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

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 2011.¹² See more about the controversy at the artist’s own website– www.eatmorekale.com

Holden Caulfield 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

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 immunity. The American Civil Liberties Union handled the Glik case. [Here you can see](#) a brief excerpt from the ACLU’s view of the case.

Public to 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. More recently the non-profit group Judicial Watch has brought an FOIA suit against the CIA for release of the visual images. The case, in front of the U.S. District Court for DC, finds the CIA arguing that both Exemption 1 (classified information) and Exemption 3 (“bowing down to other laws,” here the National Security Act) require that the images not be made public.

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, which had developed in the last 30 years by a number of federal appellate courts, but had never

¹²Jess Bidgood, “Chicken Chain Says Stop, But T-Shirt Maker Balks,” *New York Times*, December 5, 2011, A12.

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*¹³ 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.

The Third Circuit had relied on the fact that another federal statute, the Administrative

¹³131 S. Ct. 1259 (2011).

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.¹⁴

Documents on “High Profile” Guantanamo Detainees to Remain Secret

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.¹⁵

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

¹⁴*Federal Communications Commission v. AT&T*, 131 S. Ct. 1177, 1181-1182 (2011).

¹⁵*ACLU v. DOD*, 628 F.3d 612 (D.C. Cir. 2011).

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.¹⁶ 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.”

CHAPTER 8

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.¹⁷ At issue were documents associated with an investigation, no longer pursued by the government, against Montana resident Christopher Kortlander for “fraudulently misrepresenting the provenance of historical artifacts” sold by him at the Custer Battlefield Museum.

Proposition 8 Videos To be Released– NOT!

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.¹⁸ Ah, but in February 2012 the Ninth Circuit Court of Appeals reversed this decision, holding that promises made to some of the litigants that the video of the trial would not be publicly distributed must be honored.

¹⁶ *Asgeirsson v. Abbott*, 773 F. Supp. 2d 684 (W. D. Tex. 2011).

¹⁷ *U. S. v. Custer Battlefield Museum*, 658 F.3d 1188 (9th Cir. 2011).

¹⁸ *Perry v. Schwarzenegger*, 39 Media L. Rep. 2391 (N. D. Cal. 2011).

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.)¹⁹

CHAPTER 10

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's 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 infomercials 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 infomercials.

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 a fine. As long as a proposed infomercial would not include additional false claims, the money would be refundable.²⁰

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.²¹ 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 neurological 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 "Level Playing Field" Struck Down

¹⁹*Rapid City Journal v. Delaney*, 804 N.W. 2d 388 (S. Dakota 2011).

²⁰*FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011).

²¹*Pliva, Inc v. Mensing*, 131 S. Ct. 2567 (2011).

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).²² 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

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.²³ The required time for public comments, followed by reactions to those comments, means that it will be at least late Spring, 2012 before the Commission can take action.

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.²⁴ The court here does 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.

Note also that in early January, 2012, the Supreme Court heard oral arguments in a government appeal from the 2010 Fox case (see page 422, n. 34), in which the 2nd Circuit Court of Appeals had held that the FCC's "we can punish even *fleeting* expletives" assertion an unconstitutionally vague standard. A decision is expected by late June.

Cute Buns, Connie– NYPD Fine Reversed

On the heels of the federal appellate decision striking down FCC's indecency policy as applied to

²²*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

²³Cynthia Littleton, "FCC Eyes Reg Loosening," *Daily Variety*, December 27, 2011, p. 2.

²⁴*CBS Corporation v. FCC*, 663 F.3d 122 (3rd Cir. 2011).

“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.”²⁵ 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.

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.²⁶

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

²⁵*ABC v. FCC*, 404 Fed. Appx. 530 (2nd Cir. 2011).

²⁶*Schneller v WCAU Channel 10*, 413 Fed. Appx. 424 (3rd Cir. 2011).

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.²⁷

[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 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.²⁸



²⁷*Trafficschool.com v Edriver, Inc.*, 653 F.3d 820 (9th Cir. 2011).

²⁸*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).