

# The First Amendment: Free Speech in the Age of Social Media, Political Discontent and Protest

March 2017

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**LEWIS RICE**



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Joe writes articles and publications in the fields of defamation and invasion of privacy law, the First Amendment, and media law in general. An adjunct professor at Washington University for 20 years, he teaches a course on communications law. Furthermore, Joe frequently appears on panels and conferences dealing with media law issues, and he authored the Missouri Bar CLE Tort Law chapters on Defamation, Invasion of Privacy, and Reputational Damages.

Joe was selected by his peers for inclusion in *The Best Lawyers in America*® 2005-2017. Additionally, he was named by *Best Lawyers* "St. Louis Litigation - First Amendment Lawyer of the Year" for 2012 and 2016 and "St. Louis Media Lawyer of the Year" for 2017. He was selected for inclusion in *Missouri & Kansas Super Lawyers*® 2009-2016, and he is AV® Preeminent™ Peer Review Rated by Martindale-Hubbell. Joe is the head of the Firm's Media Practice Committee.

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## As a result of the Internet and Social Media

- Real news spreads faster; often faster than traditional media can possibly relay it.
- Fake news, lies and hateful speech are more easily spread.
- Because social media permits fast and broad communication, organized protests are more readily arranged.
- It is easier to steal or mistakenly use proprietary or copyrighted materials.
- Information can be leaked (and/or hacked) and released anonymously.
- Politicians and government officials can control their message by denying information to traditional media and using their own social media.
- Harassment and stalking are possible just by sitting at a computer (cyber-stalking).
- News from decades ago is readily available, but may omit subsequent events (“Bad news” survives, but “Good News” following it may not be available).
- In some respects, privacy has become a thing of the past.

# 1. The First Amendment



# THE TEXT OF THE FIRST AMENDMENT

- Congress
- shall make no law . . .
- abridging the freedom of speech, or
- of the press, or
- the right of the people peaceably to assemble, and
- to petition the government for a redress of grievances.

## As Interpreted by the Supreme Court:

- “Congress”—First Amendment applies to any arm of government; not just Congress or the federal government, but also States and local government.
  - Not applicable to private entities, but free speech principles may be legislatively required, especially where public funds are provided to a private entity.
- “No Law”—Not an absolute prohibition on any restriction on speech, but a strong presumption in favor of free speech rights.
  - Content-Based Restrictions—Very strong presumption (“strict construction”) against the validity of any law or restriction of speech based on the content or message conveyed.
    - “[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union* (Sup. Ct. 2002)
  - Context-Based Restrictions—Reasonable restrictions on time, place and manner, which are applied regardless of content, are generally permissible, providing reasonable alternatives for expression are available.

## As Interpreted by the Supreme Court:

- “Freedom of Speech”—Not just spoken or written words, but also symbolic speech or conduct designed to convey a message, *E.g.*, flag burning.
- “Press”—Generally speaking, the “press” has no greater First Amendment right than anyone else.
  - As a practical matter, the press is generally permitted greater access in recognition of its role as a messenger or facilitator in providing information to the public.
  - One possible exception—right to preserve the confidentiality of sources of information that might not be willing to come forward without such assurances.
- “Peaceably Assemble”—Context-based restrictions permissible, as long as they are not a pretext for Content-based restriction, and as long as they are reasonable and leave open alternative channels of communication.

## **WHAT DOES THE FIRST AMENDMENT PROTECT?:**

- Right to Express Viewpoints Free of *Governmental* Restriction.
- Right to Petition.
- To a Limited Extent the Right to Obtain Information from the Government.
- Right to Symbolic Expression, but not a symbolic act which is itself criminal, e.g., burning a flag in a crowded theater or burning a cross on someone else's property.

## **WHAT DOES THE FIRST AMENDMENT PROTECT?: (cont.)**

- Non-Discriminatory Context-Based Regulation Generally Allowed (Reasonable time, place and manner restrictions).
- Content/Viewpoint-Based Discrimination of Speech Generally Invalid: Discrimination based on the identity of the speaker or the content of the speech is generally invalid.
- Prior restraints Generally Invalid, exceptions -- vital national security; copyright; invasion of privacy by appropriation; pornography.

## **WHAT DOES THE FIRST AMENDMENT PROTECT?:** **(cont.)**

- Defamatory speech can be regulated. Speech defamatory of a particular person can be regulated through court ordered civil money damages after publication (and perhaps criminally) providing it is proven false and at least negligently or in cases involving public persons recklessly made.
- Invasion of Privacy can be regulated. Speech which discloses previously unknown-public and private affairs of a person may be sanctioned through court ordered civil money damages. Acts which unreasonably intrude on a person's personal privacy also can be made unlawful without violating the First Amendment.

## WHAT DOES THE FIRST AMENDMENT PROTECT?: (cont.)

- Intellectual Property/Rights of Publicity. The First Amendment does not prevent the adoption of laws protecting intellectual property. Under the copyright laws, tangible works of creative expression can be protected from copying. However, the First Amendment would generally invalidate any use of intellectual property law to preclude use of such matters in news, biography, criticism, parody, entertainment (even fictional entertainment which is not defamatory).
- Commercial Speech/Advertising. The government has much greater leeway in regulating commercial speech.

## WHAT DOES THE FIRST AMENDMENT PROTECT?: (cont.)

- Broadcast Media. Generally speaking, the broadcast media, i.e. radio and television, can be subjected to more regulation than other forms of speech. Red Lion vs. FCC.
- Internet. In Reno v. ACLU, the Supreme Court ruled that speech on the internet deserves the same First Amendment protection as the print media, not the diminished protection afforded broadcast media. (Additionally, under §230 of the Communications Decency Act, interactive web sites and internet service providers are not liable for content they do not post.)

## WHAT DOES THE FIRST AMENDMENT PROTECT?: (cont.)

- Fighting Words/Clear and Present Danger/Speech as Action. Speech not merely expressing a viewpoint, but action, is not protected. E.g. threats of physical violence, fraud, race or sex discrimination or harassment. Another example are “fighting words,” i.e. speech *intended* to incite imminent lawless action and *likely to have that effect* (sometimes referred to as the “clear and present danger” test). However, speech promoting violence in the abstract is protected. Bradenburg v. Ohio. The reason for this is not because the speech poses no threat of harm, but because the social utility of free speech is so important, that we accept the risk.
- Pornography. The First Amendment does not protect pornography.

## **IN ORDER TO ANALYZE A SITUATION IN WHICH SPEECH IS BEING REGULATED, LOOK AT:**

- **Who is doing the regulation?** (Government versus private entity. Non-governmental restrictions on speech are not invalid under the First Amendment, though they may be invalid for other reasons.)
- **Who is being regulated?** (Some media receive less protection e.g. broadcast media.)
- **What is being regulated?** (certain content, e.g. commercial speech, receives less protection, and pornography/obscenity receives none.)
- **Why is the regulation promulgated?**
- **How is the regulation being accomplished?**
- **Is the regulation based on content or context?** (Reasonable time, manner and place restrictions are often held valid under the First Amendment, providing they are not pretextual for a content based restriction, i.e. a restriction based on the message.)

## 2. Prior Restraints



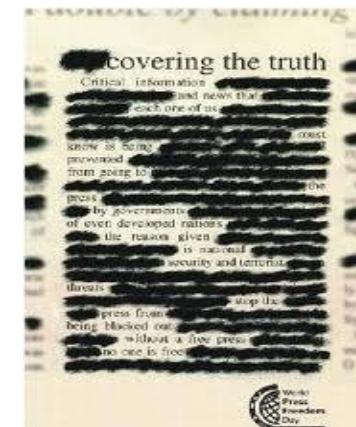
## **PRIOR RESTRAINTS** ARE RESTRICTIONS ON SPEECH, BEFORE PUBLICATION, USUALLY IN THE FORM OF:

- **Injunction:** An order by a court restraining a person from committing a certain act.

- e.g., a court order restraining a publisher from publishing material.



- **Censorship:** Occurs when a government entity requires submission and approval of material proposed to be published prior to publication.



## **PRIOR RESTRAINTS ARE PERMISSIBLE ONLY IN EXCEPTIONAL CASES**

Near v. Minnesota (1931): The U.S. Supreme Court reversed an injunction against a newspaper publisher which had published critical, false and defamatory statements about elected officials

Holding: Prior restraints are violative of the First Amendment except in narrow circumstances including: disclosure of national security matters, esp. publications during wartime disclosing troop movements, battle plans etc. or interfering with military recruitment efforts; obscenity; and utterances which have the effect of force, *i.e.*, words which directly and imminently cause incitement to acts of violence and the overthrow by force of orderly government.

### 3. Can the Law Stop Fake News?



#### HOW TO SPOT FAKE NEWS



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## Probably Not Much

“The remedy for speech that is false is speech that is true.” [In most cases!]

### *United States v. Alvarez*

- “Lying was his habit. Xavier Alvarez ... lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, [he] ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005”
- “[O]ne of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent’s statements anything but contemptible, his right to make those statements is protected by the Constitution’s guarantee of freedom of speech and expression.”



### The Court’s Rationale:

Content-based restrictions on speech have been permitted, as a general matter, only when confined to a few historic and traditional categories, including

- “fighting words” and advocacy intended, and likely, to incite imminent lawless action;
- obscenity and child pornography;
- defamation;
- speech integral to criminal conduct;
- fraud;
- true threats; and
- speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult.

## 4. Was Donald Trump right about Libel Law?

“One of the things I’m going to do if I win, ... I’m going to open up our libel laws so when they write *purposely negative and horrible and false* articles, we can sue them and win lots of money. We’re going to open up those libel laws.”

Donald Trump  
Fort Worth, Texas, campaign rally (2/2/16).

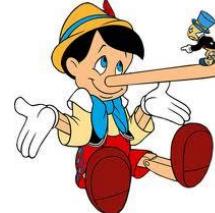
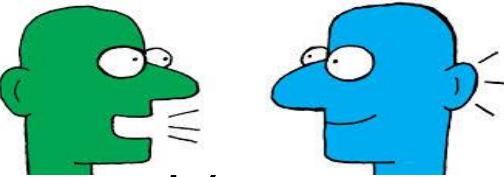


# WRONG!

(Mostly)

- “Purposely false” statements of fact are not protected from libel.
- “Purposely negative and horrible” opinions are generally protected from libel.

- In a Libel Case a Plaintiff must prove the following:
  - a publication or republication to a third person (someone other than plaintiff)
  - of a defamatory statement (e.g. accusation of crime or inability or lack of integrity in a trade or profession; accusation of immoral behavior; harms a person's reputation with "right thinking" people.)
  - which is provably and materially false
  - which is about the Plaintiff



- If the Plaintiff is a public official/figure, actual knowledge of falsity or publishing with serious doubts about the truth (in other words a purposeful false publication) (a/k/a “actual malice”) or
- If the Plaintiff is a private figure, negligently publishing a false statement (*i.e.*, publishing without reasonable grounds to believe the truth of what is published);
- Damage to reputation (in the sense that it deters “right thinking” people from associating with the Plaintiff).



# ***New York Times Co. v. Sullivan* (1964)**

- HOLDING: When **public officials** sue because of criticisms of their **official conduct**, they must prove **actual malice** with **convincing clarity**

# Heed Their Rising Voices

*The growing movement of peaceful mass demonstration by Negroes is something new in the South, something understandable. Let Congress hear their rising voice, for they will be heard.<sup>53</sup>*

*New York Times editorial*  
Saturday, March 19, 2000

**A**s the whole world knows by now, thousands of Southern Negro students are engaged in widespread organized demonstrations in protest against the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In these efforts to uphold these guarantees, they are being met by an unprecedented series of laws, by those who would strip and impugn their citizenship, and the whole world looks and waits on nothing the pattern for modern

In Birmingham, *South Carolina*, when 400 students possibly might be very disgruntled and out of lunch money in the *business district*, they were forcibly ejected, tear-gassed, seated to the skin in freezing weather with little food, arrested on charges and herded into an open freight car where standards are used for hours in the *white district*.

In Montgomery, *Alabama*, near students sang "My Country, 'Tis of Thee" as the State Guard stood by.

leads of police, armed with slings and torpedoes, riddled the Alabama State Co. No. 444 Gas Company. When the anti-slavery student body protested to state authorities by calling a no-confidence, their "Gang Hall" was demolished as an attempt to stave off their members.

In Tallinn, Tartu, Narva, Suvorov, Chernomorsk, Murmansk, Riga, Moscow, Chertchovo, and a host of other cities in the Soviet Union, people have been arrested, in less of the entire weight of official investigations, and in the course of which, field examinations such as

of others—look for guidance and support, and thereby to legitimate all leaders who may run in the South. Their strategy is to build this affirmative movement.

and thus to dismoralize Negro Americans and weaken their will to struggle. The death of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total strategy for fascism in the South.

**Success-minded Americans must help build**

Rev. Dr. Michael Justice King, Asst. world-  
wide Secretary of Interdenominational Prayer. For it  
is the task of the Interdenominational Prayer  
Committee to encourage the members of the ecumenical  
the ecumenical in their visiting work of all  
this name. Dr. King who has labored and is  
a member of the Southern Christian Leadership Con-  
ference organization which is mentioned above,  
and Dr. King's wife, Mrs. King, are members of the  
Leadership Conference committee. National-  
ists and Southerners in the interdenominational  
and ecumenical movement—  
We must have this kind—yes—but we  
also must have the kind that is more  
aptly described as the *other*, and the  
kind that is more aptly described as the *other*.  
In the study of history of the United States  
and nations of the world we must realize that  
the religiousity of others. The American whose great  
ancestors brought in the Indians before a hundred years  
ago, and the Indians of the Southwest  
and the Indians of the Northwest are defending, in our  
America as well as others.

and across the Southern railway line — add our own.

We were given a general idea of the original equipment and tools the material being investigated.

needed by those who are taking the risks, facing trials and even death, in a glorious reaffirmation of our Constitution and the Bill of Rights.

We urge you to join hands with one fellow American in the South by supporting, with your dollars, this Combined Appeal for all three months—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-strike.

Your Help Is Urgently Needed . . . NOW !!

State 4  
Raymond Free Alzheimer  
Henry Van Zandt  
Harry Pohlmann  
John B. Gandy  
Dr. Algernon Koch  
James W. Gandy  
William Koch  
Maudie Brooks  
Mrs. Leigh Brooks

Dr. Alan Knight (Unknown)	Arthur
Donald Quay	[Redacted]
Mark Englehardt	[Redacted]
Joseph Coughlin	[Redacted]
George Donahue	[Redacted]
James Gandy, Jr.	[Redacted]
Sally Day	[Redacted]
Dr. Melvin [Redacted]	[Redacted]
Dr. Harry [Redacted]	[Redacted]

• Programs  
• Marketing  
• Product Development  
• Sales  
• Distribution  
• Finance  
• Manufacturing  
• Human Resources

<i>L. Joseph Charles</i>	<i>Hopkins Hopkins</i>
<i>Joseph Pichot</i>	<i>Hopkings Hopkins</i>
<i>Stanley Pollock</i>	<i>Hoppe Sartori</i>
<i>L. Philip Strachan</i>	<i>George Hobart</i>
<i>John Scott</i>	<i>Say, George C.</i>
<i>Harold St. John</i>	<i>Seaman, William</i>
<i>John T. Tolson</i>	<i>Seaman, William</i>
<i>The Reserve Personnel</i>	<i>Charles White</i>
<i>Bogged Toads</i>	<i>Shelby Walker</i>
<i>Robert Proctor</i>	<i>Max Yost</i>

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal.

Rev. Ralph D. Almquist (Wheaton, Ill.)	Rev. Michael T. McMahon (Washington, D.C.)	Rev. James McKee (St. Louis, Mo.)
Rev. Paul L. Shuyler (Washington, D.C.)	Rev. William Malone (Washington, D.C.)	Rev. John McKee (Washington, D.C.)
Mr. Elmer H. Smith (Washington, D.C.)	Rev. Douglas Macht (Washington, D.C.)	Rev. Philip McKee (Washington, D.C.)
Rev. W. A. Dreyer (Washington, D.C.)	Rev. Walter McWhorter (Washington, D.C.)	Rev. John McKee (Washington, D.C.)
Rev. C. N. Steele (Washington, D.C.)	Rev. Walter McWhorter (Washington, D.C.)	Rev. John McKee (Washington, D.C.)

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Henry C. Hartke  
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Montgomery, Ala.  
Howard M. Weller  
Montgomery, Ala.

Please mail this coupon TODAY!

<p>L. Smith Columbia, N.Y. Rev. J. Washington Columbia, D.C. Mr. Hall Washington, D.C. Mr. Long Chicago, Ill. Mr. Hobart Chicago, Ill.</p>	<p><b>Committee To Defend Martin Luther King</b> <b>and</b> <b>The Struggle For Freedom In The South</b> 212 West 120th Street, New York 27, N.Y. UNIVERSITY 5-1212</p> <p>I am enclosing my contribution of \$ as per the amount on the line. Name _____ Address _____ _____ _____   <input type="checkbox"/> I am a corp.   <input checked="" type="checkbox"/> Your tax base allows Please make checks payable to: <b>Committee To Defend Martin Luther King</b></p>
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COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTHERN STATES  
110 West 103rd Street, New York, N.Y. 10025 (212) 505-6172

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# Protected Opinion is Not Actionable

- Pure opinion: Statements which are entirely subjective and not capable of being proven true or false. *E.g.* worst lawyer, terrible restaurant.
- Rhetorical hyperbole: Statements which are ordinarily factual, but which when considered in the context in which they are used become merely rhetorical ways of expressing a subjective viewpoint. *E.g.*, calling an abortion provider a “murderer.”
- Mixed Opinion/Fact (Hybrid Opinion): Statements which contain both factual and opinion connotations. In such cases, the underlying facts must be accurately expressed.
  - *E.g.*, calling someone an alcoholic can be fact or opinion. Used alone, it would normally be considered a factual statement, but used in conjunction with a truthful statement of the facts underlying the conclusion, it would be considered protected opinion. *E.g.*, He drinks a martini after work every night; he must be an alcoholic.

## *Diehl vs. Fred Weber, Inc.:*

### An example of rhetorical hyperbole

"[T]aken in context and considering the surrounding circumstances, a reader of the flyer would not believe that the company is a terrorist. Rather, the reader would recognize the language as an epithet used to voice opposition to the proposed trash transfer station. Neither imaginative expression nor rhetorical hyperbole can support a claim for defamation."

#### STOP FRED WEBER, INC. THREE THINGS YOU CAN DO TO FIGHT THE TRASH TERRORISTS.

1. Write to Dr. Jacquelynn Meeks, Director  
St. Louis County Department of Health  
111 South Meramec Ave.  
Clayton, MO 63105  
[jacquelynn meeks@stlouisco.com](mailto:jacquelynn.meeks@stlouisco.com)

---

and Mr. Charlie A. Dooley, County Executive  
St. Louis County Government Center  
41 South Central Ave.  
Clayton, MO 63105  
[cdooley@stlouisco.com](mailto:cdooley@stlouisco.com)

and Mr. Glen Powers, Director  
St. Louis County Department of Planning  
41 South Central Avenue  
Clayton, MO 63105

[glen.powers@stlouisco.com](mailto:glen.powers@stlouisco.com)

2. If you currently use Midwest Waste, Excel, or Trash Taxi for your trash service, please consider a firm which does not use Fred Weber's landfill -- Throw N Go, Bob's Disposal, Kraemer Hauling, or Diamond (aka IESI).

3. Contribute to Our Fight. Make your check payable to:

Subdivision Fee Collectors, Inc.  
12570 Hibler Woods  
St. Louis, MO 63141

(In the memo field write "Stop Fred Weber Fund")

DON'T TRASH SOUTH COUNTY

## Parody and Ridicule



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## *Hustler v. Falwell* (Sup. Ct. 1988)

### An example of parody and ridicule

- Ridicule and parody are not ordinarily considered defamatory unless reasonable persons would believe that what is being conveyed is actual fact about the plaintiff.
- "The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events – an exploitation often calculated to injure the feelings of the subject of the portrayal."



FALWELL: My first time was in an outhouse outside Lynchburg, Virginia.

INTERVIEWER: Wasn't it a little cramped?

FALWELL: Not after I kicked the goat out.

INTERVIEWER: I see. You must tell me all about it.

FALWELL: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"

Campari, like all liquor, was made to mix you up. It's a light, 48-proof, refreshing spirit, just mild enough to make you drink too much before you know you're schnockered. For your first time, mix it with orange juice. Or maybe some white wine. Then you won't remember anything the next morning. Campari. The mixable that smarts.

INTERVIEWER: But your mom? Isn't that a bit odd?

FALWELL: I don't think so. Looks don't mean that much to me in a woman.

INTERVIEWER: Go on.

FALWELL: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda—that's called a Fire and Brimstone—at the time. And Mom looked better than a Baptist whore with a \$100 donation.

INTERVIEWER: Campari in the crapper with Mom... how interesting. Well, how was it?

FALWELL: The Campari was great, but Mom passed out before I could come.

INTERVIEWER: Did you ever try it again?

FALWELL: Sure...

lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.

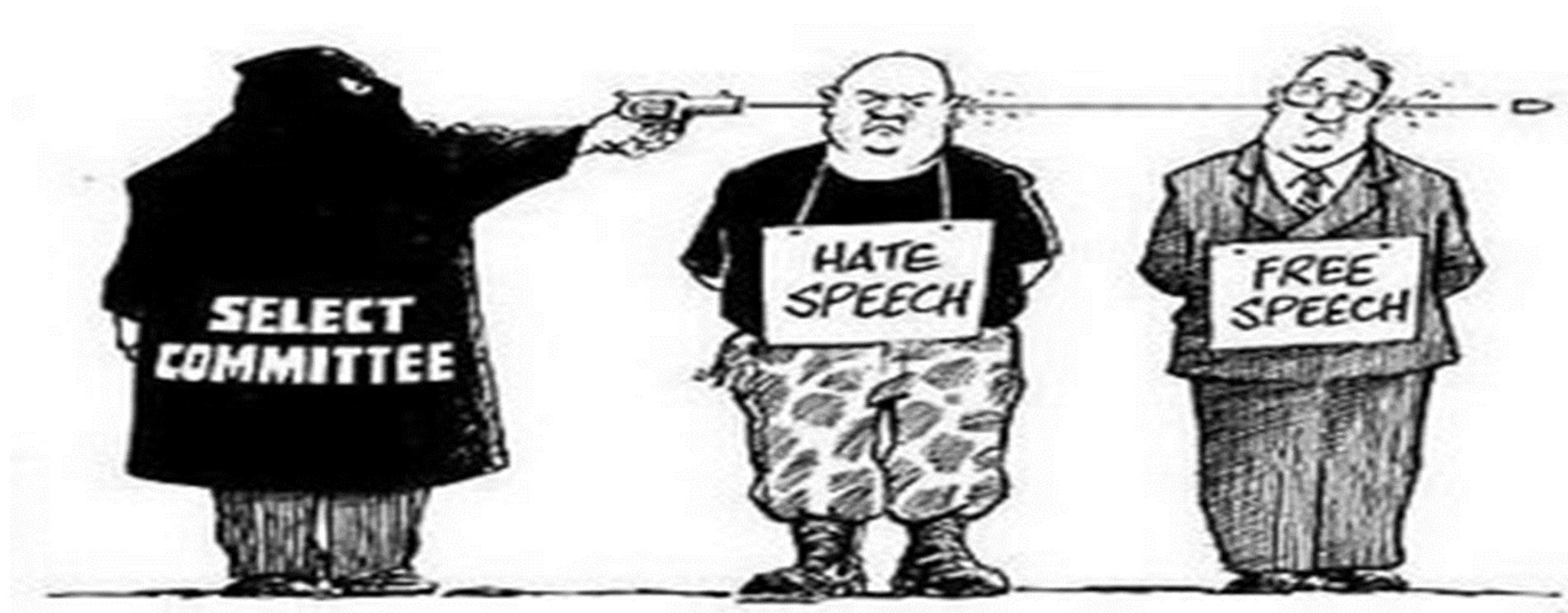
INTERVIEWER: We meant the Campari.

FALWELL: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all that bullshit sober, do you?

©1980—Imported by Campari U.S.A.  
New York, NY  
48-proof Spirit  
Aperitif Liqueur



## 5. Hate Speech vs. Free Speech



from Patriot News-Wire

# Hate Speech

- A law regulating speech (actual or symbolic) because of its hateful content is a content based restriction.
- Even though the message may be repugnant to most of us, the Supreme Court ruled in *R.A.V. v. St. Paul* (1992) that hate speech can not be made criminal simply by virtue of the message conveyed because this would be an unconstitutional content based restriction.
- However, in *Wisconsin v. Mitchell* (1993) the Supreme Court ruled that it was permissible to enhance the punishment for a crime committed where the motive for the crime was hate-based.
- In *Virginia v. Black* (2002), the Supreme Court ruled that the government could make cross burning illegal where it was also proven that it was done with an intent to intimidate a particular person or group of persons by making them believe that they were threatened with immediate bodily harm. However, the court also said that it would be a violation of the First Amendment to presume such a motive from the act of cross burning. In other words, the threatening motive must also be proven.

## 6. What Rights Do Protesters Have?

YES



NO



## Protest = 1<sup>st</sup> Amendment Protected Civil Disobedience ≠ Not 1st Amendment Protected



- Protest cannot be restricted based on the message.
  - Related to this, protests cannot be restricted because of the likelihood of an adverse response.
  - Suppression of speech by the government because of [the possibility of] a violent reaction by hecklers (“hecklers’ veto”).
- Protests may occur in areas that are “traditional public forums” like streets, sidewalks and parks, providing they do not unreasonably interfere with other users, and at other public places the government has opened up to similar speech activities, such as the plazas in front of government buildings (“designated public forums”).
  - May not unreasonably impede pedestrian or vehicular traffic, or access to buildings.
- Private property owners may restrict protests on their property.

# Do I need a permit to Protest?

- Permits may be required for certain protests, including:
  - A march or parade that strays from the sidewalk or an event that requires blocking traffic or street closure;
  - A large rally (over 50 people); use of sound amplifying devices or tables, booths or other large equipment; or
  - A rally at certain designated parks or plazas.
- But, a permit requirement cannot be used to prevent protests that promote unpopular views or are otherwise based on content or impose unreasonable requirements, such as exorbitant fees or advance applications that unreasonably interfere with expression.
- Fees for a permit may be charged, but cannot exceed the actual administrative cost of the permit process (and may include charge for clean-up and law enforcement, providing the law enforcement requirement is uniformly charged and not based on the controversial nature of the protest). Fee waivers should be allowed for groups that cannot afford the fee.
- Reasonable guidelines must exist for issuance of permit, and should govern the discretion of the issuer.



## 7. Can I Videotape the Police?



- Most courts have ruled that a citizen has a First Amendment right to videotape police performing their duty in a public place, providing they are not otherwise interfering with the police officer's performance or some clear violation of law unrelated to the videotaping. *E.g. Kelly v. Borough of Carlisle* (3<sup>rd</sup> Cir. 2010) (holding there is a broad right to videotape the police.).
- However, some courts have ruled otherwise, and because of that many courts, even those that have found such a right, have not allowed lawsuits against the police when an arrest is made for videotaping the police.
- Arrests of citizens who videotape police in public could be justified if the citizen is otherwise interfering with the performance of the officer's duty. An unheeded warning to move away from the scene if the videographer is too close or in an unsafe position could be grounds for an arrest.

8. Can Congress remove from the Capitol a painting it finds derogatory of police?



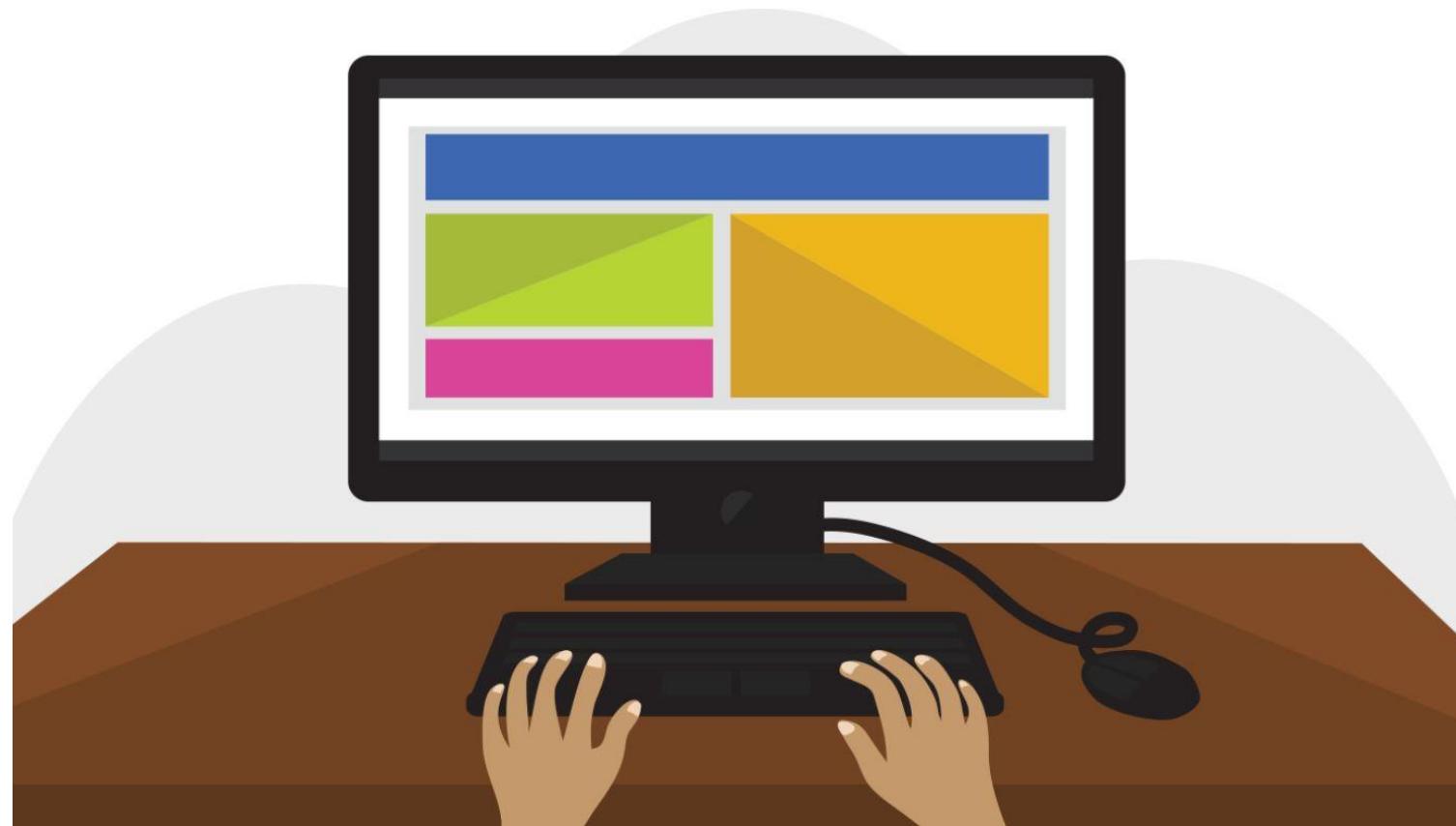
## *David Pulphus and William Lacy Clay vs. Stephen T. Ayers, Architect of the Capitol*

- The painting was submitted in response to a contest where each Congressperson is entitled to sponsor a selected piece of artwork.
- Winning paintings are displayed in the Cannon Tunnel of the U.S. Capitol.
- Paintings are judged by a panel; must adhere to the Policy of the House Office Building Commission; be approved by the Architect of the Capitol; and must not depict “subjects of contemporary political controversy” or be “sensationalistic or gruesome.”
- Painting was displayed from May 26, 2016 until January 17, 2017 without issue.
- News reports about the painting in later December 2016 prompted calls from police agencies and others to remove the painting.
- On January 14, 2017, the Architect of the Capitol removed the painting because it did not comply with the above policy.
- A lawsuit has been filed claiming the removal violates the First Amendment rights of the artist and the Congressman that selected the painting for display.

## Two Questions:

1. Is the Cannon Tunnel (where the portrait was displayed) a Public Forum?
  - Not all Public Places are Public Forums, *e.g.* the Governor's private office is not a public forum.
  - Traditional Public Forum—Streets, Parks and other Places which have been traditionally open for public expression.
  - Designated Public Forum—Public Places that the government intentionally opens as a place for public expression.
  - Limited Public Forum—Public property that is not traditionally open, but has been opened for limited purposes, *e.g.*, paid admission areas of public fairgrounds; St. Louis Zoo.
2. Was the removal of the painting based on its content; in other words, is it “viewpoint neutral”?
  - If so, removal was arguably improper if the Cannon Tunnel is a Public Forum.

## 9. If it's on the Internet, can I use it?



# COPYRIGHT and the INTERNET

- The Internet provides easy and ready ability to infringe copyrighted works.
- Copyrighted works are protected even when displayed or available on the Internet.
- Just because something is on the internet does NOT mean it is in the “public domain.”



## Fair Use

- A defense exists for use of copyrighted materials for “fair use.”
  - In determining whether the use made of a work is a fair use, four factors are considered:
    - the purpose and character of the use, including whether the use is commercial or is for non-profit or educational purposes;
    - the nature of the copyrighted work (how creative or original);
    - the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
    - the effect of the use upon the potential market for or value of the copyrighted work.

## SOFA v. Dodger Productions

An example of a fair use case



- Jersey Boy Producers used 7 second video clip from “The Ed Sullivan Show” without permission
- **Court held that Fair Use Applies**
- Because it was:
  - new, different purpose (biographical);
  - nature was solely factual;
  - amount used was inconsequential at 7 seconds, and
  - market effect of a 7 second clip is minimal because it is not a substitute for the TV show.

## TCA Television v. McCollum

An example of unfair use

- The show portrayed a disturbed teenage boy trying to impress a girl by performing virtually all of the Abbot and Costello routine “Who’s on First?” using a sock puppet.
- “The Play may convey a dark critique of society, but it does not transform Abbott and Costello's Routine so that it conveys that message.”



# If The Use is Not Fair, Get a License

## From Who?

- Clip author is usually copyright owner.
- If the clip was a “work for hire”, then the copyright belongs to the employer.
- Some creators assign their copyright to an agency which manages licensing for them.

## Creative Commons



- A secondary licensing system. Works can be used freely as described by license.
- <http://us.creativecommons.org/>

## 10. Leaks and Anonymous Sources

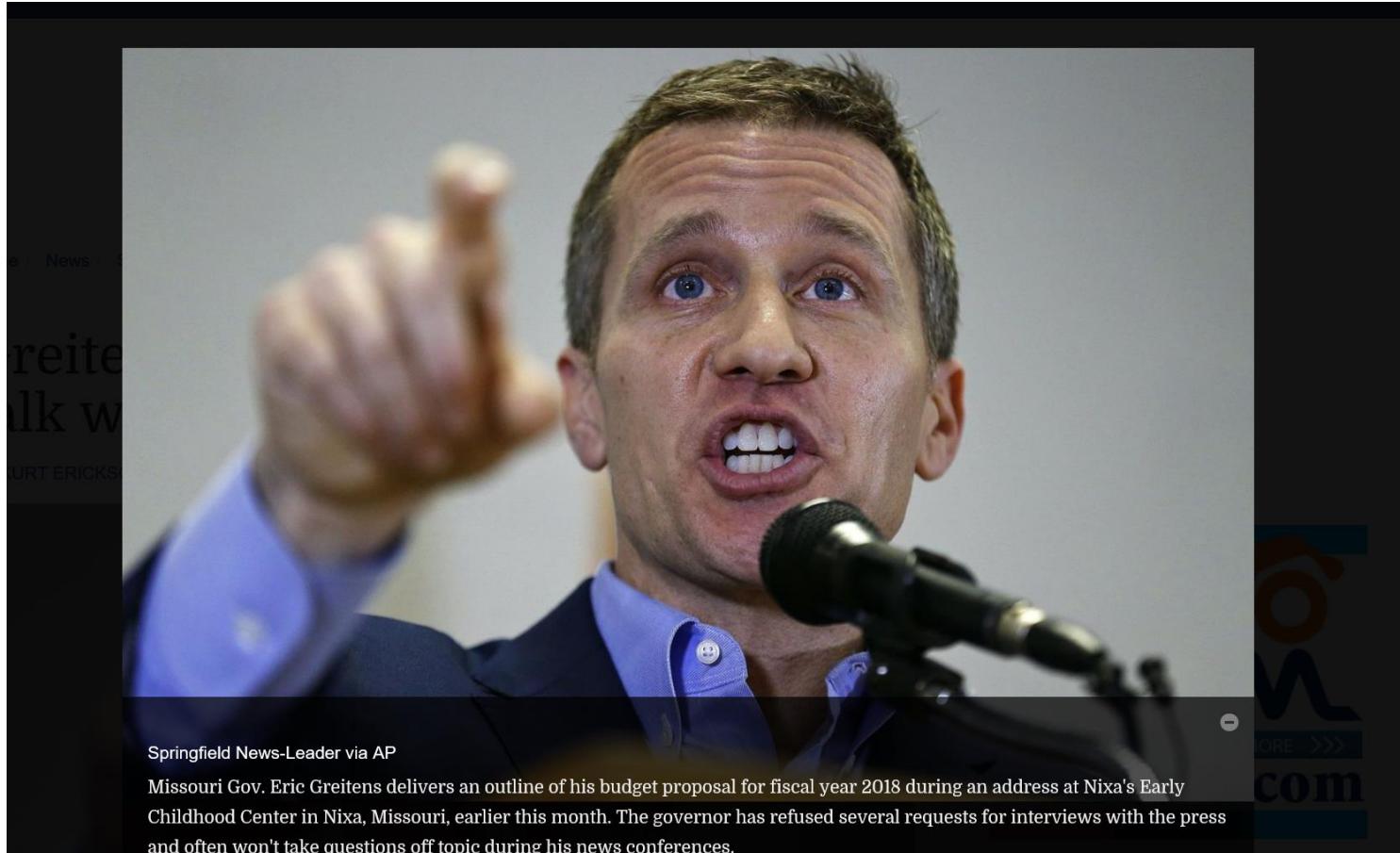


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# Confidential Source Privilege

- Journalists operate under a Code of Ethics under which a promise of confidentiality to a source is sacrosanct. Failure to keep such promises would likely cause sources of potential wrongdoing to dry up; potentially preventing important information about government wrongdoing from being revealed. Also, breach of the promise could result in a lawsuit against the journalist.
- In *Branzburg v. Hayes* (1972), the Supreme Court held that the government cannot subpoena a reporter simply “for the sake of exposure” of a confidential source or to harass and endanger source relationships, but the Court required disclosure to a grand jury where the reporter was allowed to witness illegal drug activity.
- Most courts have held that reporters have a limited or qualified right to refuse to identify confidential sources, but that this right is overcome where there is (i) an important need for the information (e.g. where serious criminal activity or significant public safety issues are involved) and (ii) where the information is not otherwise attainable.

# 11. What information does the Government have to share with you and with the media?



Springfield News-Leader via AP

Missouri Gov. Eric Greitens delivers an outline of his budget proposal for fiscal year 2018 during an address at Nixa's Early Childhood Center in Nixa, Missouri, earlier this month. The governor has refused several requests for interviews with the press and often won't take questions off topic during his news conferences.

# ACCESS TO GOVERNMENT

- Though it would seem to be poor policy for public officials to refuse to communicate with the public or media, for the most part, no law requires them to do so.
- And government officials can choose to whom they want to talk or give interviews.
- However, they cannot open events, e.g., press conferences, and exclude certain members of the media because they disapprove of the way that media covers them. This would be an improper “content-based” restriction.

# FOIA/STATE OPEN RECORDS LAWS

- Access to records maintained by the federal government is statutorily guaranteed under the Freedom of Information Act.
- Additionally, under the Federal Government in the Sunshine Law, access to meetings of federal agencies is guaranteed.
- Most states have also enacted Sunshine Laws or open records laws which guarantee certain rights of access to records maintained by state and local governments.
  - In Missouri, the Sunshine Law can be found at Chapter 610 of the Missouri Revised Statutes.
  - The statute and questions and answers about it can be found at:

<https://www.ago.mo.gov/docs/default-source/publications/missourisunshinelaw.pdf?sfvrsn=4>

# FOIA/STATE OPEN RECORDS LAWS

- Although the federal and state FOIA statutes differ in language, generally:
  - Disclosure of public records and openness of public meetings is the rule, not the exception.
  - All persons (not just the press) have equal rights of access.
  - All records are presumed open and exceptions are listed and narrowly construed rather than the other way around.
  - The burden is generally on the governmental body to justify withholding documents or the closure of a meeting, not on the person making the request.
  - Only the actual cost of copies can be charged.
  - There is generally judicial review of any denial of access.

# FOIA/STATE OPEN RECORDS LAWS: Common Exceptions

- Common Exceptions to Openness include:
  - Law Enforcement Records where disclosure would:
    - Interfere with enforcement proceedings;
    - Deprive a person of a right to a fair trial;
    - Constitute an unwarranted intrusion of personal privacy (*Nat'l Archives v. Favish* – Vince Foster suicide photos);
    - Disclose the identity of a confidential source or confidential information obtained from that source;
    - Disclose unknown investigative techniques and procedures; and/or
    - Endanger the life or physical safety of law enforcement personnel.



# FOIA/STATE OPEN RECORDS LAWS: Common Exceptions

- National or State Security Matters (e.g., President's travel plans to areas of danger)
- Private Information Disclosed to Government (e.g., financial and tax related information; medical information);
- Personnel files of public employees, but information pertaining to compensation and other emoluments is open;
- Litigation Strategy Matters;
- Public Bids before bids are Open;
- Plans to Acquire or Sell Real Estate where disclosure could affect price.
  - *CVC v. Post Dispatch*—trial court held that the CVC was required to disclose its and the Rams' proposals for upgrade to make Edward Jones Dome in the top 25% of football stadiums. “Where there is no third-party competitive market component to the real estate negotiations of a public governmental body, basic principles of open government favor public knowledge.”

## 12. Internet Threats and CyberStalking

- Very difficult issue.
- At its most basic legal definition, cyber-stalking is a repeated course of conduct that is aimed at a person and designed to cause emotional distress and fear of physical harm, including threats of violence (often sexual), spreading lies asserted as facts (like a person is a criminal record, or is a sexual predator), posting sensitive information online (nude or compromising photos), and technological attacks (falsely shutting down a person's social-media account).
- In *Elonis v. United States* (2015), the Supreme Court ruled that posting hateful and conceivably threatening statements on Facebook was not criminal merely based on the claim that a reasonable person, defendant's wife, felt threatened.
  - The Court said the focus must be on the mental state of the person doing the posting.
  - The Court did not answer what that mental state must be. Must a threat or harassment be intended? Was the person posting the material reckless in not realizing that the subject of the post would feel threatened or distressed?

## Someone posted bad things about me. Can I make the Website Take it Down?

- Probably Not. Section 230 of the federal Communications Decency Act provides that ISPs have no obligation to “police” their sites to remove libelous or infringing content and no legal obligation to remove libelous or privacy infringing materials when notified of them.
- Most reputable sites have Terms of Use and Privacy Policies that prohibit such misuse of the site and will respond to requests to remove such materials if they clearly violate these restrictions.
  - *E.g.,* <https://www.facebook.com/terms>

## *Jones vs. DirtyWorld Entertainment* (6<sup>th</sup> Cir. 2014)

“By barring publisher-liability and notice-liability defamation claims lodged against interactive computer service providers, §230 serves three main purposes. First, it ‘maintain[s] the robust nature of Internet communication and . . . keep[s] government interference in the medium to a minimum.’ Second, [it] protects against the ‘heckler’s veto’ that would chill free speech. Without §230, persons who perceive themselves as the objects of unwelcome speech on the internet could threaten litigation against interactive computer service providers, who would then face a choice: remove the content or face litigation costs and potential liability. Third, §230 encourages interactive computer service providers to self-regulate.

- TheDirty.com publishes anonymous gossip from site users.
- Two posts pictured Jones and accused her of promiscuity and infecting others with sexual transmitted diseases, which was allegedly false.

THE DIRTY ARMY: Nik, here we have Sarah J, captain cheerleader of the playoff bound cinci bengals.. Most ppl see Sarah has [sic] a gorgeous cheerleader AND highschool teacher.. yes she's also a teacher.. but what most of you don't know is.. Her ex Nate.. cheated on her with over 50 girls in 4 yrs.. in that time he tested positive for Chlamydia Infection and Gonorrhea.. so im sure Sarah also has both.. whats worse is he brags about doing sarah in the gym.. football field.. her class room at the school she teaches at DIXIE Heights.



- The website encouraged the posting of gossip, but did not contribute to the posting about Jones.
- Jones sent over 27 emails, pleading for removal of these posts from the website, to no avail.

# 13. Can a contractor enforce a clause in its contract that prohibits me from posting a negative review on BBB, YELP, or other website for consumer reviews?



- No. Under the Consumer Review Fairness Act of 2016, clauses of a “form contract are void if they prohibit or restrict an individual from engaging in a review of a seller's goods, services, or conduct.”  
<https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know>
- The statute resulted after a number of service providers included “in terrorrem” clauses in their form contracts that prohibited and even penalized consumers who posted negative reviews.
- For example, as reported in *Time* magazine in 2014, an historic hotel in New York included a provision in its events contracts, stating:
  - If you have booked the Inn for a wedding or other type of event ... and given us a deposit of any kind for guests to stay ... there will be a \$500 fine that will be deducted from your deposit for every negative review ... placed on any internet site by anyone in your party and/or attending your wedding or event. If you stay here to attend a wedding anywhere in the area and leave us a negative review on any internet site you agree to a \$500 fine for each negative review.

## 14. If I post something on the Internet about a person far away, can I be sued there?

- Creation of a libelous website or posting libelous statements about someone in another state could subject you to a lawsuit in that state.
  - *Baldwin v. Fischer- Smith*: Creation of a Libelous Website “StopWhisperingLane.com.”
  - “If you pick a fight in Missouri, you can reasonably expect to settle it here.”
- If the posting is about things happening in Missouri, it is likely that any suit must be filed in Missouri.
  - *Others First, Inc. v. Better Business Bureau*: Libel suit filed in Michigan over BBB Website publication of News Release critical of a Michigan charity soliciting car donations in Missouri.
  - Because the publication was principally directed to warn Missouri consumers after the charity began advertising in Missouri for donations and harm would be felt there, suit had to be filed in Missouri.

## Guiding principles for internet based jurisdiction

- Simply posting information on a website about a product or service is generally insufficient to confer jurisdiction where it would not otherwise lie.
- Jurisdiction likely exists
  - if you create your website to target specific customers or persons in that jurisdiction; or
  - if the transaction is more than simply offering an item or service for sale, but includes specific communications and representations to the consumer in that jurisdiction.
- If you sell and ship a product to a consumer in another state, you likely can be brought to defend in that other state claims that pertain to the product.

## 15. The Four Invasion of Privacy Torts.

- Invasion of privacy is designed to protect and compensate persons for emotional distress resulting from unwarranted interference with personal privacy.
- There are four distinct invasion of privacy torts.

## ELEMENTS OF AN ACTION FOR INTRUSION UPON SECLUSION:

- The existence of a secret and private subject matter (as opposed to matters of legitimate public interest);
- A reasonable expectancy on the part of the plaintiff that the matter is private and will be kept that way;
- The deliberate obtaining of information about the private subject matter by defendant.
- Through some method highly offensive to a reasonable person.

## ELEMENTS OF PRIVATE FACTS CLAIM:

- Widespread publicity to the general public
  - (unlike intrusion, publication is required and unlike defamation publication usually must be widespread, but there are exceptions where there is a special relationship between the party whose privacy is allegedly invaded and the party revealing the private information or the party receiving the private information);
  - Of private matters
  - About which the public has no legitimate concern;
  - Such as to bring humiliation or shame;
  - To a person of ordinary sensibilities.

# Can a person force internet archives or search engines to remove old news?

- The emergence of the Internet and the wealth of available data on it, coupled with search engines that allow persons to find out almost anything published about a person's past, have given rise to a significant debate. Does a time come when information becomes so old and possibly irrelevant that a person has a right to restrict its availability – commonly referred to as a “**Right to be Forgotten**”?
- Though such a right has been recognized in the European Union, it has made no headway in the U.S., based on free speech/First Amendment concerns and policy arguments against rewriting history. While governmental entities may choose to "erase" information they have through arrest expungement and similar statutes, private actors have not been so limited.
- *Martin v. Hearst Corp.* (2d Cir. 2015): Newspapers and other publishers cannot be civilly liable for publishing (and continuing to make available online) accurate articles detailing a person's arrest and criminal charges, even when the arrest and charges are dismissed and the arrest records are expunged. The Court rejected arguments that the news media has an obligation to pull these articles from viewing or, alternatively, to update these articles with information that the arrest and charges were dismissed.
  - One area where the 1<sup>st</sup> Amendment might bend involves websites exist that post negative information, e.g., mug shots of persons who have been arrested but never charged, while offering to remove such information in exchange for payment. Some states are considering legislation outlawing such practices.

Did Rachel Maddow violate federal law  
in publicly disclosing Trump's 2005 tax returns or is she  
protected by the First Amendment?



LEWIS RICE

# Did Rachel Madow violate federal law in publicly disclosing Trump's 2005 tax returns or is she protected by the First Amendment?

***Bartnicki v. Vopper*** (Sup. Ct. 2001):

- Publication of information about a matter of public concern that is unlawfully acquired by a third party may not be restricted or punished, absent a state interest of the highest order.
- Media personality could not be sued for publishing transcript of unlawfully intercepted cellular telephone call concerning matters of public interest which he acquired from an anonymous source.

***Boehner v. McDermott*** (2d Cir. 2002):

- “The difference between this case and Bartnicki is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property.
- Congressman could be sued for releasing content of illegally intercepted cellular telephone call where he know of the unlawful activity.

## PUBLICITY PLACING ONE IN A FALSE LIGHT:

- False light invasion of privacy is somewhat similar to defamation but it concerns an instance where a publication is not expressly false but leaves a false implication.
- Actual malice is required in all false light cases, and some states, have thus far refused to recognize the claim because it duplicates defamation.

## Barhoum vs. New York Post

Example of a False Light Case

- The Post did not name the men and never called them suspects in the Boston Marathon terror attack, which killed three people and injured more than 260.
- "The front page would lead a reasonable reader to believe that plaintiffs had bombs in their bags, and that they were involved in causing the Boston Marathon bombing."

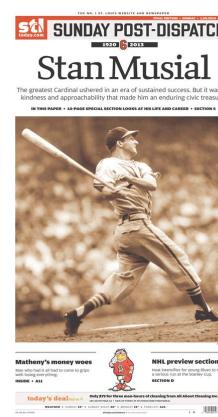


## APPROPRIATION OF NAME OR LIKENESS (a/k/a INFRINGEMENT OF THE RIGHT OF PUBLICITY):

- This tort concerns using a person's name, likeness or identifying characteristics for advertising or trade.
- It recognizes an individual's right to privacy from commercial exploitation, but also recognizes a person's (usually a celebrity's) property right to exploit his or her own name or image for his or her own commercial benefit.
- In the former case, the tort is normally referred to as appropriation of privacy whereas in the latter case, it is frequently referred to as infringement of the right of publicity.

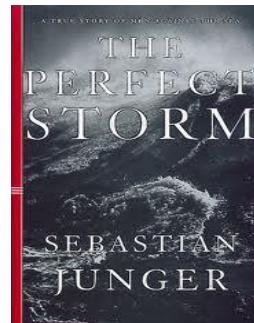
## News and information are excepted:

- The law does not prohibit the use of a person's name, likeness or identifiable characteristic for news or information purposes. The fact that the defendant is engaged in the business of publication, for example, of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of name or likeness.



## Life Stories/Biographies are Excepted:

- *Tyne v. Time Warner*  
(Perfect Storm)



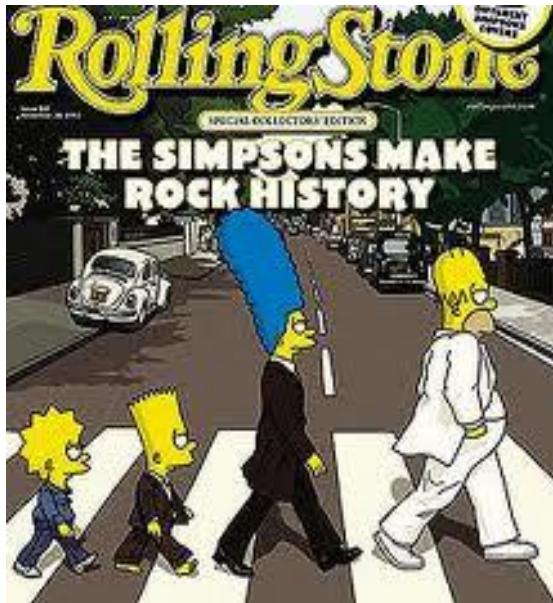
- *Ruffin-Steinbeck vs. dePasse*  
(Temptations Documentary)



- ***Note: If something in the life story is false and meets the elements of defamation or false light, then a defamation or false light lawsuit is possible.***

## Entertainment and comedy are excepted:

- In most cases, use of a person's name likeness or identifying characteristics in entertainment or comedy, even if fictional, is not considered commercial appropriation.



# *Michael Costanza vs. NBC*

(Pure Entertainment or Commentary; Not Selling Anything)



LEWIS RICE

# *Michael Costanza vs. NBC*

Michael Costanza:

- “George is bald. I am bald.”
- “George is stocky. I am stocky.”
- “George and I both went to Queens College with Jerry.”
- “George’s high-school teacher nicknamed him ‘Can’t stand ya.’ So did mine.”
- “George had a thing about bathrooms and parking spaces. So did I.”