

2019 UPDATE

to

CASES AND MATERIALS ON MEDIA LAW

NINTH EDITION

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PREFACE

This supplement covers available relevant materials occurring from publication of the Ninth Edition of the casebook in 2016 through mid-summer of 2019. It aims to keep the casebook current: it updates cases and other materials, adds certain newer court decisions, and includes certain new developments. This 2019 supplement includes most material from the 2017 and 2018 supplements and updates it when applicable.

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Errata and citation updates:

p. 208: On line nine, the word should read “surely” and not “sure.”

p. 234: The citation should read *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142 (Tex. 2014).

p. 272: There should be an apostrophe in the word “plaintiffs” in the third sentence of the second paragraph in the phrase “the strength of the plaintiff’s claim.”

p. 273: The word “or” should be “for” in the second sentence of the first full paragraph describing *Blumenthal v. Drudge*,

p. 284: The citation should read *Grant v. Commer*, 43 Media L. Rep. 2931 (Tenn. Ct. App. 2015).

p. 310: The second period after paragraph three should be deleted.

p. 570: The citation should read *FCC v. AT&T Inc.*, 562 U.S. 397 (2011).

p. 572: The updated citation should read *Gawker Media v. FBI*, 145 F. Supp. 3d 1100 (M.D. Fla. 2015).

p. 588: The updated citation should read *ESPN v. Mich. State Univ.*, 876 N.W.2d 593 (Mich. App. 2015).

CHAPTER I

THE FIRST AMENDMENT AND THE MEDIA

2. The Decline of Old Media and the Rise of the New

p. 23: In 2017, Pew announced that it would report on news media trends via “fact sheets” issued throughout the year instead of offering one annual State of the News Media report. While certain focused reports had been published by summer of 2019—ones that found that many Americans believe that made-up news is a “critical” problem, for example, or that more have shifted from television to online sources to receive local news—the most relevant reports about the state of media as a whole came in 2018. Among them, the assessment that “[n]ewsroom employment [had] dropped nearly a quarter in [fewer] than 10 years, with the greatest decline at newspapers.” Newspapers, Pew reported in a fact sheet, had lost eleven percent in weekday circulation and ten percent on Sunday from just the year before.

But Pew acknowledged that the outlook for traditional media may not be as dire as it might otherwise seem, given the complexities of online readership and online subscriptions:

Taking these complexities into account . . . digital circulation in 2017 was projected to have fallen, with weekday down 9% and Sunday also down 9%. According to the independently produced reports from The New York Times and The Wall Street Journal, however, both companies saw large gains in digital circulation in the past year: 42% for the Times and 26% for the Journal, on top of gains in 2016. If these independently produced figures were included in both 2016 and 2017, weekday digital circulation would have risen by 10%.

This would also change the overall picture for combined print and digital circulation. Including the digital boost driven by these two large, national brands would still result in an overall drop in circulation year-over-year, but a smaller one: Overall weekday circulation would have fallen by 4% in 2017 rather than 11%.

Pew also reported in 2018 that viewership of evening news and morning news programs on networks had declined, by seven percent for evening newscasts and by ten percent in the morning. Network magazine show viewership also declined, by twelve percent from 2016 to 2017. Local news also lost audience numbers by as much as fifteen percent for morning news programming. On the cable side, “the evening news audience declined while the daytime audience remained stable,” Pew reported in 2018, and even so, profits rose 10% for CNN, Fox News, and MSNBC.

News consumption numbers will likely rise in the next year, sparked by the presidential election slated for November of 2020. Relatedly, Pew reported just before the 2018 midterms that a “stark partisan divide” existed in the United States with regard to the media’s watchdog role in politics:

Americans are particularly divided politically on whether or not they think news media criticism keeps political leaders in line – the so-called “watchdog role” of the news media. A vast majority of Democrats (82%) say in the survey conducted earlier this year that they support the news media’s watchdog role, believing that news media criticism keeps political leaders from doing things that shouldn’t be done. On the other hand, the majority of Republicans (58%) think news media criticism gets in the way of political leaders doing their job.

3. New Media, New Issues

p. 25: President Donald Trump’s strong dislike for the media, his repetition of the phrase “fake news,” and his prickly relationship with the press continued into 2019. In 2017, the Washington Post collected polls and suggested that President Trump had “supercharged” America’s distrust of the press and its increasing lack of support for the First Amendment. James Hohmann, “The Daily 202: The corrosion of support for First Amendment principles started before Trump. He’s supercharged it,” Wash. Post, Oct. 23, 2017.

Interestingly, two years later, a 2019 Pew poll suggested that fewer Americans believed that the media itself was behind made-up news and, instead, most blamed political leaders and activist groups for the phenomenon. Even so, most believed that journalism itself must solve the problem:

Even though Americans do not see journalists as a leading contributor of made-up news and information, 53% think they have the greatest responsibility to reduce it – far more than those who say the onus mostly falls on the government (12%) or technology companies (9%).

A somewhat larger percentage of those surveyed (20%) say the public itself bears the most responsibility to reduce it. But another finding suggests the challenges inherent in that effort. Of the 52% of Americans who say they have shared made-up news themselves, a vast majority of them said they didn’t know it was made up when they did so.

Scholars RonNell Andersen Jones and Lisa Grow Sun have argued that President Trump’s anti-media “fake news” rhetoric endangers more than just the media. See Jones, RonNell Andersen and Sun, Lisa Grow, “Enemy Construction and the Press,” 49 *Ariz. St. L. J.* 1301 (2018) (arguing that “[u]ndercutting the watchdog, educator, and proxy functions of the press through enemy construction leaves the administration more capable of delegitimizing other institutions and constructing other enemies — including the judiciary, the intelligence community, immigrants, and members of certain races or religions — because the viability and traction of counter-narrative is so greatly diminished”).

In 2019, Justice Clarence Thomas wrote two dissenting opinions critical of media or, at the very least, its protections. In *McKee v. Cosby*, 139 S. Ct. 675 (2019), Justice Thomas wrote in a dissent from a denial of certiorari that the Court should reconsider the *New York Times v. Sullivan* decision that protects media in defamation cases through the actual malice standard.

“There are sound reasons to question whether either the First or Fourteenth Amendment encompasses an actual-malice standard for public figures,” he wrote, “or otherwise displaces vast swaths of state defamation law.” Therefore, “[i]f the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we.”

A few months later, Justice Thomas attacked media more directly in his dissent in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), a capital murder case in which the Court ruled that the trial court had “committed clear error” in concluding that the prosecution’s peremptory strike of a black prospective juror wasn’t motivated by discrimination. In his dissent, Justice Thomas suggested that the Justices may have heard the murder case mostly because of strong media coverage. If so, he wrote, “the Court’s action only encourages the litigation and relitigation of criminal trials in the media, to the potential detriment of all parties—including defendants.” Such media coverage “discourage[es] reluctant witnesses from testifying and encourage[s] eager witnesses, prosecutors, defense counsel, and even judges to perform for the audience” and reveals information kept from jurors at trial. “The media,” Justice Thomas suggested, “often seeks ‘to titillate rather than to educate and inform,’” changing to some degree language from *Chandler v. Florida* that suggested that an effect of allowing journalists to decide which cases to cover “*may* be to titillate rather than to educate and inform.”

Meantime, court-based challenges against aspects of President Trump’s communication style continued.

First, a federal trial court judge ruled in 2018 that the president cannot block certain readers of his Twitter account simply because those readers have expressed political views in opposition to the president’s. “The viewpoint-based exclusion of the individual plaintiffs [blocked] from that designated public forum is proscribed by the First Amendment and cannot be justified by the President’s personal First Amendment interests,” the judge wrote. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018). The Second Circuit upheld that decision a few months later:

The salient issues in this case arise from the decision of the President to use a relatively new type of social media platform to conduct official business and to interact with the public. We do not consider or decide whether an elected official violates the Constitution by excluding persons from a wholly private social media account. Nor do we consider or decide whether private social media companies are bound by the First Amendment when policing their platforms. We do conclude, however, that the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.

928 F.3d 226 (2d Cir. 2019). The Fourth Circuit had earlier found that the chair of a county board of supervisors had acted unconstitutionally when she banned a poster from a county-related Facebook page: “the interactive component of the Chair’s Facebook Page constituted a public forum, and [she] engaged in unconstitutional viewpoint discrimination when she banned [an

outspoken critic of local schools] from that forum.” *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

There is some precedent in opposition to those appellate decisions. In 2018, a federal judge in Kentucky preliminarily ruled that the Kentucky governor could continue to block certain readers on both his Twitter and Facebook accounts. “He might be wise to listen to constituent views,” the court wrote, “but since a ‘person’s right to speak is not infringed when government simply ignores that person while listening to others,’ the Governor is not required to do so.” *Hargis v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018). As the Sixth Circuit put it in 2019, “[c]ourts have not reached consensus on how First Amendment protections will apply to comments on social media platforms,” citing *Hargis*. *Novak v. City of Parma*, 2019 U.S. App. LEXIS 22398 (6th Cir. July 29, 2019) (Section 1983 lawsuit springing from an arrest for a website that parodied an official police website would continue because of unsettled law regarding such publications).

Second, as noted later in the Chapter Four update, a New York appeals court upheld the trial court’s decision in *Jacobus v. Trump*, 51 N.Y.S.3d 330 (N.Y. Sup. Ct. 2017), that President Trump’s forceful Twitter style did not lend itself to a defamation lawsuit brought by a woman who was the target of some of his tweets, including the suggestion that she was a “hostile” “major loser” with “zero credibility.” 64 N.Y.S.3d 889 (N.Y. App. Div. 2017). “The alleged defamatory statements are too vague, subjective, and lacking in precise meaning (i.e., unable to be proven true or false) to be actionable,” the appeals court wrote, finding also that “[t]he immediate context in which the statements were made would signal to the reasonable reader or listener that they were opinion and not fact.” New York’s high court refused to hear the plaintiff’s appeal. 31 N.Y.S.3d 903 (2018). See also *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018) (Trump’s language at rally—saying “Get ‘em out of here” in response to protestors—was not incitement to riot and was protected by First Amendment).

But, third, a different defamation case against President Trump survived his attorneys’ early motion to dismiss. In *Zervos v. Trump*, 74 N.Y.S.3d 442 (N.Y. Sup. Ct. 2018), the plaintiff had alleged that Trump had behaved inappropriately with her in 2007, grabbing her and kissing her. At a campaign rally, Trump called his accusers liars, so the woman sued him for defamation. President Trump’s attorneys argued that a dismissal or at least a continuance until he left office would be appropriate, but the court refused. “Nothing in the Supremacy Clause of the United States Constitution,” the court wrote, “suggests that the President cannot be called to account before a state court for wrongful conduct that bears no relationship to any federal executive responsibility.” An appeals court later agreed. “Since there is no federal law conflicting with or displacing this defamation action, the Supremacy Clause does not provide a basis for immunizing the President from state court civil damages actions,” the court wrote. “Moreover, in the absence of a federal law limiting state court jurisdiction, state and federal courts have concurrent jurisdiction [and thus] it follows that the trial court properly exercised jurisdiction over defendant and properly denied his motion to dismiss.” *Zervos v. Trump*, 94 N.Y.S.3d 75 (N.Y. App. Div. 2019).

CHAPTER II

FIRST AMENDMENT PRINCIPLES THAT APPLY TO MEDIA GENERALLY

p. 37, after block quote: In 2018, the First Circuit refused to issue a permanent injunction against a defendant’s speech, even though it found the speech itself sufficiently defamatory and likely to continue and even though it had upheld a jury verdict in favor of the plaintiff for defamation. In finding the injunction unconstitutional, the court suggested in part that language that is at one time defamatory may be protected speech on another occasion and, therefore, found the injunction to be “so wide-ranging and devoid of safeguards” that it contravened the First Amendment. *Sindi v. El-Moslimany*, 896 F.3d 1 (1st Cir. 2018).

p. 45, add after final paragraph, also relevant to p. 63-4, as part of n. 3: In 2018, a federal court granted an emergency motion for a temporary restraining order to prevent the internet publication of three-dimensional blueprints for plastic guns. *Washington v. United States Dep’t of State*, 315 F. Supp. 3d 1212 (W.D. Wash. 2018). The balance tipped “sharply” in favor of that outcome, the court wrote, suggesting that “the proliferation of these firearms [could have] many of the negative impacts on a state level that the federal government once feared on the international stage.”

p. 56, after the citations to the law review symposia: The Supreme Court of Nevada cited *Nebraska Press Association* in its 2018 decision overturning an injunction that forbade journalists from reporting on redacted autopsy reports springing from the mass shooting at a country music festival in Las Vegas in 2017. The journalists had requested and had already received the redacted material from the state. “Mandatory Supreme Court precedent teaches,” the court wrote, “that where the press obtains private information from the state—even where the state should have protected the information—damages or criminal punishment may not be imposed absent extraordinary circumstances.” Finding the autopsy reports already in public hands, the court explained additionally that the plaintiffs’ privacy interests had already been harmed and that any subsequent court order could not change that. *Las Vegas Review-Journal v. Eighth Judicial District Court of Nevada*, 412 P.3d 23 (Nev. 2018).

p. 59, note 3: In a case involving claims of misuse of the trademarked term “Comic Con,” the Ninth Circuit overruled what it called “sweeping” suppression orders that prohibited the parties from publishing their views on social media and otherwise prior to and during the trial. “The well-established doctrines on jury selection and the court’s inherent management power provide an alternative, less restrictive means of ensuring a fair trial,” the court wrote in holding that the orders violated the First Amendment as prior restraints on speech. *Dan Farr Prods. v. United States Dist. Court*, 874 F.3d 590 (9th Cir. 2017). See also *WXIA-TV v. State*, 811 S.E.2d 378 (Ga. 2018) (gag order affecting murder case lawyers, the defendant, police, and others was an impermissible prior restraint; “[a] gag order like this one may be constitutionally permissible in exceptional circumstances, but the record here does not reveal circumstances sufficiently exceptional to warrant such a restraint,” given that those supporting the gag order could point only to “significant media interest” and social media interest in the crime).

p. 108, before E.: Two 2018 decisions from federal appellate courts raise related issues. In *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954 (11th Cir. 2018), the court decided that in order to further interests in security and safety, prisons could prevent inmates from receiving the *Prison Legal News* magazine. Prison officials had asserted that advertisements for pen pals and such in the magazine would entice prisoners to violate prison rules. Impoundment of the magazine was not a “silver bullet” that would solve all problems, the court explained, but it found a reasonable relationship between the impoundment and institutional interests. The court rejected New York state’s workaround, one that it explained mandates an attachment to *Prison Legal News* that reminds prisoners not to use the prohibited services. “If New York wants to engage in a fantasy about convicted criminals behaving like model citizens while serving out their sentences,” the court wrote, “it is free to do so, but the Constitution does not require Florida to join New York in la-la land.”

In *Lexington H-L Services. v. Lexington-Fayette Urban County Government*, 879 F.3d 224 (6th Cir. 2018), the court upheld an ordinance preventing driveway delivery of the *Herald-Leader’s* non-subscription publication *The Community News*. The lower court had enjoined the ordinance on First Amendment grounds, but the appeals court vacated that decision. While the court recognized the value of “[d]oor-to-door dissemination of ideas,” it found that the city’s interests in reducing visual blight and reducing litter were sufficiently advanced by the statute. Moreover, the court explained that the ordinance did not censor the publication, but simply prohibited delivery where people were unlikely to receive information anyway.

CHAPTER III

DIFFERENT RULES FOR SOME MEDIA

p. 166, after n. 7: With regard to certain points of access, a federal appellate court held in 2018 that operators of public access television channels in Manhattan must abide by free speech protections, even though the operators work for a corporation, because “[a] public access channel is the electronic version of the public square.” The plaintiffs had argued that they had not been allowed to broadcast their work on the public access channels for three months as punishment after they created a video criticizing the government. They argued that their suspension violated the First Amendment because it was content-based. “Public access channels” or “the video equivalent of the speaker’s soapbox,” the court wrote in reinstating part of the plaintiffs’ claim, “are public forums and . . . subject to First Amendment restrictions.” *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300 (2d Cir. 2018).

p. 173, after n. 3: The Supreme Court’s decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), recognized social media as a “modern public square” that allows citizens to speak and receive information and petition the government for redress of grievances. Indeed, the Court’s decision described social media as ushering in a “revolution in thought.” Social media allows users to “engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’”

At issue in *Packingham* was the constitutionality of a 2008 North Carolina law making it a felony for a registered sex offender “to access a commercial social networking Web site where the sex

offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” The statute applied to about 20,000 people in North Carolina, and the state prosecuted more than 1,000 people, including the petitioner, for violating it by using Facebook. Petitioner appealed his conviction, arguing the statute was unconstitutional. He won in the Court of Appeals, but the North Carolina Supreme Court held that the law was “carefully tailored” to prevent sex offenders from getting information about minors and left open “alternative means” of accessing information, “such as the Paula Deen Network and the website for the local NBC affiliate.”

In an opinion by Justice Kennedy, the Court reversed. The Court held that, “[e]ven making the assumption that the statute is content neutral,” it could not withstand intermediate scrutiny. The Court described the statutory prohibition on accessing social media sites such as Facebook, LinkedIn, and even Amazon as “a prohibition unprecedented in the scope of First Amendment speech it burdens.” The Court’s opinion clearly evinced an understanding of the many uses of social media. In sweeping rhetoric, the Court stated, for example, that “[b]y prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”

The Court’s holding was unanimous (Justice Gorsuch did not participate). However, Justice Alito, Chief Justice Roberts, and Justice Thomas concurred in the judgment only to express dissatisfaction with the “undisciplined dicta” of the majority opinion. As Justice Alito wrote, “[t]he Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.” He worried that the “unnecessary rhetoric” might undermine states attempting to protect minors from sexual predators, but his concurrence nonetheless agreed that the “wide sweep [of the North Carolina statute] precludes access to a large number of websites [such as WebMD and Amazon] that are most unlikely to facilitate the commission of a sex crime against a child.”

Based in part on the decision in *Packingham*, conservative activists in 2019 brought various claims against Google, Facebook, Twitter, and Apple, arguing that “America’s major technology firms have conspired to suppress their political views.” A district court found their overall argument “non-trivial” but dismissed the lawsuit nonetheless. “True,” the court wrote, “in *Packingham*, the Supreme Court recognized that Facebook and Twitter are among the ‘most important places (in a spatial sense) for the exchange of views’ in society.” The *Packingham* decision, however, “did not create a new cause of action against a private entity for an alleged First Amendment violation.” *Freedom Watch, Inc. v. Google, Inc.*, 368 F. Supp. 3d 30 (D.D.C. 2019). An appeal has been filed in the case.

p. 181, add as n.4: In December 2017, the FCC repealed net neutrality and, in June 2018, new rules that the FCC called its “Restoring Internet Freedom Order” went into effect. The FCC described the change as a return to the “successful, bipartisan framework that helped the Internet grow and flourish for two decades prior to 2015.” “This light-touch approach will protect consumers and deliver better, faster, cheaper Internet access and more competition to

consumers.” But, as of June 2019, court-based, legislative, and other challenges to the rule changes remained.

CHAPTER IV

DEFAMATION

A. What is Defamation?

2. Is the Ascribed Meaning Defamatory?

p. 190, as part of “Evaluating the Language”: The Second Circuit held in 2017 that a manufacturer-plaintiff had not proved the falsity of a television news report that had suggested that the manufacturer’s rifle targets were “bombs.” The language was substantially true, the court decided, because the targets were in fact meant to explode. *Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236 (2d Cir. 2017). See also *Edwards v. Detroit News, Inc.*, 910 N.W.2d 394 (Mich. App. 2017), in which the court held that a radio talk show host, whom a newspaper columnist had called a “leader” of the Ku Klux Klan, could not prove his defamation per se claim, given that the talk show host had expressed views in line with those of the KKK.

As the casebook notes, not every false statement or implication is defamatory. In *Virginia Citizens Defense League v. Couric*, 910 F.3d 780 (4th Cir. 2018), the Fourth Circuit affirmed dismissal of a libel suit by a non-profit gun-rights organization based on a documentary film on gun violence narrated by journalist Katie Couric. The documentary had been edited in a misleading way to make it appear that members of the gun-rights group were stumped by one of Couric’s questions about background checks. The court rejected the notion that the misleading editing defamed plaintiffs by portraying them as unfit to be an attorney, a gun store owner, and a gun-rights advocacy organization, respectively. The court also rejected the contention that the interview, as edited, portrayed them as “ignorant or incompetent on the subject to which they have dedicated their organizational mission.”

A case further illustrating that unflattering or even insulting coverage is not necessarily defamatory is *Croce v. New York Times Co.*, 2019 WL 3214077 (6th Cir. July 17, 2019). There, the court found that an Ohio State University professor failed to support his defamation claim against the newspaper after it published an article headlined “Years of Ethics Charges, but Star Cancer Researcher Gets a Pass” and subtitled it “Dr. Carlo Croce was repeatedly cleared by Ohio State University, which reaped millions from his grants. Now, he faces new whistle-blower accusations.” “The article is a standard piece of investigative journalism,” the court wrote, “that presents newsworthy allegations made by others, with appropriate qualifying language.”

p. 190, as part of “Implications”: In *Hosszu v. Barrett*, 46 Media L. Rep. 1073 (9th Cir. 2017), a case in which the court held that an article’s focus—questioning whether an athlete’s performance was “being aided” by performance-enhancing drugs and concluding that “no proof” existed despite the writer’s “suspicions” based upon the athlete’s outstanding performance—did not directly accuse the athlete of using performance-enhancing substances. Olympic swimmer Hosszu’s “discomfort with [the] critical article is understandable, but the First Amendment was not designed

to make anyone comfortable,” the court wrote. “On balance, such discomfiture is a small price to pay for the essential benefits of freedom of speech.”

p. 191: The Texas Supreme Court wrote in 2017 that despite the fact that “[a] free press is essential to a healthy democracy,” a private citizen who had been featured in a magazine article about food stamp misuse titled “The Park Cities Welfare Queen” could proceed on her defamation claim despite the magazine’s argument that an early dismissal was appropriate. The court agreed with the defendant magazine that the article did not directly accuse the plaintiff of obtaining welfare fraudulently, but the court found that the “gist” of the article, including its use of the term “welfare queen,” and its juxtaposition of statements, including that the plaintiff “must have been less than forthcoming” with welfare authorities, could have led a reasonable person to conclude that the plaintiff had acted to defraud welfare officials. *D Magazine Partners v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017).

A New York trial court ruled days before Donald Trump was inaugurated that his Twitter tirade against a political public relations strategist—including tweets that suggested that she had “begged us for a job,” but had been “[t]urned . . . down twice” and “went hostile,” and was a “real dummy,” and a “[m]ajor loser” with “zero credibility”—could not be the basis for the strategist’s defamation claim. “[C]ontext is key,” the judge wrote, agreeing with Trump’s attorneys that an internet culture that was free-wheeling and often included vague hyperbolic statements such as those at issue were insufficient to support a defamation claim: “[A]lthough the intemperate tweets are clearly intended to belittle and demean plaintiff,” the court explained, such tweets could not harm plaintiff’s reputation in an internet age in which “truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck’s back.” *Jacobus v. Trump*, 51 N.Y.S.3d 330 (N.Y. Sup. Ct. 2017). As noted in the Chapter One update, an appeals court upheld that decision and New York’s high court refused to hear the appeal.

For a recent case applying Ohio’s “innocent construction rule” to absolve actor James Woods of liability based on a tweet posed as a question—“So-called #Trump 'Nazi' is a #BernieSanders agitator/operative?”—see *Boulger v. Woods*, 917 F.3d 471 (6th Cir. 2019). The case “boils down to one question,” the court wrote, “does Woods's tweet constitute a false statement of fact?” The court answered no to that question:

Here, the tweet at issue is reasonably susceptible to both a defamatory meaning—that Woods was asserting [that the plaintiff] was the woman giving the Nazi salute—and an innocent meaning—that Woods was merely asking his followers a question. Because Woods's tweet could reasonably be read to have an innocent meaning, under the innocent construction rule the tweet, as a matter of law, is not actionable.

p. 194, after citation to *Milkovich*: More recent decisions involving hyperbole include *Montgomery v. Risen*, 875 F.3d 709 (D.C. Cir. 2017), a case in which the court wrote that journalist James Risen’s use of the words “maestro” to describe the plaintiff software developer and “elaborate and dangerous hoax” to describe the software at issue in a critical book were hyperbolic statements and, therefore, were not defamatory.

p. 199, last paragraph: In 2017, fitness guru Richard Simmons similarly lost his lawsuit against the National Enquirer for reporting that Simmons was transitioning from male to female. Simmons argued that such an allegation was defamation per se. The judge explained that ruling in Simmons favor would validate and legitimize those who find being called transgender a negative, equating such misidentification with errors of sexual orientation, race, and medical condition. *Simmons v. American Media, Inc.*, 2017 Cal. Super. Lexis 7958 (Cal. Super. Ct. September 1, 2017).

In 2018, an appellate court in New York ruled that an imputation of HIV would still qualify as defamation per se. The model-plaintiff's photograph had been used without her permission to illustrate an ad promoting rights for people who are HIV-positive, and the model-plaintiff was not HIV-positive. "This is not to imply that we in any way regard HIV or any other disease to be 'loathsome,' and we disfavor the use of that word," the court wrote. "[W]e prefer a formulation that makes clear that an imputation of a particular disease is actionable as defamation per se not because the disease is objectively shameful, but because a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law and the full embrace of society." *Nolan v. State of N.Y.*, 69 N.Y.S.3d 277 (N.Y. App. Div. 2018).

C. Identification of Plaintiff

p. 201, as part of "Identification by Implication": A California appeals court refused a plaintiff religious singer's action for libel after YouTube removed her pro-life song and replaced it with a notice explaining that the video had violated terms of service, hyperlinked with categories for removal that included "sex and nudity" and "shocking and disgusting." The singer-plaintiff had argued that the notice was per se defamatory, but the court held that such a general list could not reasonably be read as defaming her personally, rejecting the plaintiff's claim that a hyperlink was the modern equivalent of a footnote and therefore directly tied to her. *Bartholomew v. YouTube*, 17 Cal. App. 5th 1217 (2017).

p. 201: *Use of Stock Photographs* A firefighter whose photograph had been taken during a ceremony to honor those who lost their lives in the terrorist attacks on September 11, 2001, had a valid claim for defamation when the defendant newspaper published that stock photograph to illustrate an article titled "Heated Sex Scandal Surrounds Philadelphia Fire Department: It's Bad Stuff." The newspaper argued that the plaintiff had not been defamed in the context of the article, but the Third Circuit ruled that a reasonable person could believe that the article concerned the plaintiff, allowing his defamation and false lights claims to continue. *Cheney v. Daily News.*, 44 Media L. Rep. 2050 (3d Cir. 2016).

p. 201-202, as part of "Group Libel": In a more recent example of group libel, certain University of Virginia fraternity members convinced the Second Circuit to allow their lawsuit against Rolling Stone to proceed on a group libel claim. The trial court had found that the information within the discredited article about an alleged rape on campus describing an upstairs room and the suggestion that such behavior was a part of initiation led by a swimmer did not sufficiently identify the fraternity members. *Elias v. Rolling Stone*, 192 F. Supp. 3d 383

(S.D.N.Y. 2016). The Second Circuit reversed, however, finding that the plaintiffs had plausibly alleged that the article was about them “under a theory of small group defamation.” First, the court found that the fraternity member whose room was accessible from downstairs in the way that the article had described would be identifiable to anyone who knew that room’s location. Second, it found a sufficient link between language in the article and the plaintiff rush chair, who was a swimmer. 872 F.3d 97 (2d Cir. 2017).

New York’s highest court ruled in *Three Amigos SJJ Rest., Inc. v. CBS News Inc.*, 65 N.E.3d 35 (N.Y. 2016), that plaintiff employees and managers of a strip club alleged by a television news station to have been used “in an elaborate scheme to bring Russian and [E]astern European women” to the U.S. to work as dancers, did not have a valid defamation claim. The news report focused on the club itself and not the people affiliated with it, the court explained, and therefore “the challenged statements were not of and concerning plaintiffs” because it did not “mention any employees of the club or of the management and talent agencies that facilitate its daily operations.” The dissenter suggested that the “‘group’ at issue” included only three people who ran the club and that that should be a sufficiently small group for a valid defamation claim.

p. 215: As noted in the Chapter One update, in *McKee v. Cosby*, 139 S. Ct. 675 (2019), the Court denied certiorari in a defamation case brought against comedian, actor and later convicted rapist Bill Cosby. Justice Clarence Thomas concurred in the denial of certiorari but wrote an opinion arguing that the Court should reconsider the constitutionalization of defamation law. Justice Thomas called *New York Times Co. v. Sullivan* and its progeny “policy-driven decisions masquerading as constitutional law.” He invited the Court to examine the original meaning of the First and Fourteenth Amendments, and based upon that understanding, to return the development of the common law of libel to the states.

D. Fault

1. Actual Malice

c. Applying the Actual Malice Standard

p. 219, addition to n. 3: In 2017, a Texas appeals court held that a public figure, Dallas Cowboys football player Robert Jones, had sufficiently alleged actual malice after a news story on TMZ.com accused him of trying to hire a hitman to kill his agent. After TMZ had updated the article to include Jones’ denials, TMZ tweeted “WHOA. Ex-Super Bowl champ Robert Jones allegedly tried to hire a HIT MAN to kill who?” The court, assessing the defendant’s motion to dismiss, found adequate evidence of actual malice: a “dubious source,” a failure to corroborate the information from other sources, and behavior after publication, apparently including TMZ’s tweet. *Warner Bros. Entm’t, Inc. v. Jones*, 538 S.W.3d 781 (Tex. App. 2017).

p. 219, n. 4: The Fifth Circuit, in *Block v. Tanenhaus*, 867 F.3d 585 (5th Cir. 2017), decided that the plaintiff had a viable claim for defamation after *The New York Times* published an article that suggested that he had said that slavery was “not so bad” and equated his libertarian views with racism. The plaintiff had argued that he had used those words in a context outside of chattel

slavery and therefore, the court wrote, “a reasonable jury could determine that the NYT’s decontextualized quotation falsely portrayed him as communicating that chattel slavery itself was not problematic—exactly the opposite of the point he says he was making.” It rejected the newspaper’s defenses, including that the plaintiff’s “pleaded truth would have had the ‘same effect on the mind of the reader,’” citing *Masson*. While the professor was a public figure, the court decided, he had provided sufficient evidence of actual malice to create “a genuine issue of material fact as to whether the NYT altered the meaning of the quotation.”

ii. Procedural Issues

p. 215: The Eleventh Circuit ruled that a plaintiff had failed to show actual malice even though he had argued that the journalists had not verified editorial information and had not contacted him for comment before publishing. The articles at issue, he alleged, accused him of criminal sexual behavior even though the allegations arose in a contentious child custody dispute and even though no criminal charges were ever filed. On that particular record, the court wrote, one involving somewhat confusing findings of fact and procedure in the child custody dispute, “failure to investigate and poor journalistic standards” were insufficient to establish actual malice. Instead, the plaintiff needed to show “that the defendant [had] purposely avoided further investigation with the intent to avoid the truth.” *Klayman v. City Pages*, 650 F. App’x 744 (11th Cir. 2016).

E. The Public-Private Distinction

1. Who Is a Public Official?

p. 239: See also *Horne v. WTVR*, 893 F.3d 201 (4th Cir. 2018), in which the Fourth Circuit held that a director of budget and finance for a county school system was a public official. Such a title, the court decided, suggested significant discretionary government responsibility, including management of the school system’s finances, and invited public interest in the person’s qualifications and performance. See also *Reina v. Lin TV Corp.*, 421 P.3d 860 (N.M. App. 2018) (administrative hearing officer for the City of Albuquerque’s Office of Administrative Hearings was a public official: she had decision-making authority, including the power to assess the city’s proof of ordinance violations, responsibility for land use, zoning, and liquor license hearings, and her decisions were subject to judicial review).

2. Who is a Public Figure?

b. Limited-Purpose Public Figures

p. 245: The Second Circuit affirmed a district court’s ruling that an art authenticator was a limited-purpose public figure. The man had “invited public scrutiny of his forensic methods to authenticate art by (1) participating in several documentaries, including a feature-length film; (2) agreeing to frequent interviews about the validity and usefulness of using fingerprint analysis to

authenticate art; (3) seeking and obtaining fame and clients for himself in the process; and (4) resorting to the press to defend his positions on various controversies relating to his work.” He had also described himself as “a leading authority” in the use of fingerprint analysis. *Biro v. Condé Nast*, 44 Media L. Rep. 1081 (2d Cir. 2015). See also *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106 (D.C. Cir. 2017) (man convicted of two high-profile murders who had “repeatedly turned to the courts, the media, and the public” to argue that his conviction was wrongful was a limited purpose public figure) and *McKee v. Cosby*, 874 F.3d 54 (1st Cir. 2017) (woman who accused actor Bill Cosby of sexual assault was limited purpose public figure because “[b]y purposefully disclosing to the public her own rape accusation against Cosby via an interview with a reporter, McKee “thrust” herself to the ‘forefront’ of this controversy, seeking to ‘influence its outcome’”). The latter case is the one noted above in which Justice Thomas wrote a dissent from a denial of certiorari in which he suggested that *New York Times v. Sullivan* be revisited.

p. 245: *Palin v. New York Times Co.*, 2019 WL 3558545 (2d Cir. Aug. 6, 2019), involved a defamation suit by former vice-presidential candidate Sarah Palin against the New York Times based on the publication of an editorial suggesting that materials published by Palin’s political action committee incited the shooting of Congresswoman Gabrielle Giffords. The PAC materials had crosshairs imposed over congressional districts, but the Times editorial indicated that the materials had imposed crosshairs over photos of Democratic members of Congress. Although the Times corrected the error within a day, Palin sued for defamation. The Times moved to dismiss, and the trial court took the unusual step of holding an evidentiary hearing regarding the sufficiency of Palin’s pleading of actual malice. Based on the testimony of the editorial’s author, the court dismissed. The Second Circuit reversed the dismissal.

The court first held that the trial court had erred in deciding a motion to dismiss based on material adduced in an evidentiary hearing. Procedurally, the trial court could have decided the motion on Palin’s complaint alone or converted defendants’ dismissal motion to a motion for summary judgment. Since the trial court did neither, its decision failed to comply with the Federal Rules of Civil Procedure.

The court further held that Palin could file an amended complaint plausibly alleging actual malice based on three facts. First, the author of the editorial had been an editor at *The Atlantic* and *The New York Times*, where he had been involved in publishing multiple articles regarding the background and motivations of the man who shot Giffords—and the lack of connection to Palin; this background was coupled with the author’s anti-gun advocacy and support for his brother, a Democratic politician opposed by Palin. Second, during the editorial process, the author had access to a hyperlinked source dispelling the notion that Palin’s materials influenced the Giffords shooting, a fact from which a jury could infer reckless disregard of the truth. Finally, the swift correction by the Times of the statement regarding Palin’s responsibility for the shooting was consistent with the author knowing or recklessly disregarding the falsity of his editorial initially and “then deci[ding] that the false allegation was not worth defending.”

The court further concluded that Palin had plausibly alleged that a reader would deem statements about her political action committee to be “of and concerning” her and that reasonable readers

would interpret the editorial as making the factual claim that she “was directly linked to the [Giffords] shooting.”

In *Verity v. USA Today*, 436 P.3d 653 (Id. 2019), USA Today and other media published reports that a teacher had received an Idaho teaching license despite previous sexual misconduct that had led to the revocation of his Oregon license. The teacher and his wife sued for libel, false light, and negligent and intentional infliction of emotional distress, alleging that the media defendants’ otherwise truthful accounts falsely implied that his prior sexual misconduct had included criminal intercourse with a minor, that he had hidden the misconduct from Idaho officials, and that he was a danger to female students. A district court denied summary judgment to defendants but granted the motions for permission to appeal. The Idaho Supreme Court treated the case as involving two novel issues: whether a teacher is a public official or public figure, and whether Idaho recognizes libel by implication.

With regard to the first issue, the court held that a public school teacher acting as a teacher “will rarely, if ever, qualify as a public official” for First Amendment purposes. The court noted that states have split on this issue. Although defendants contended that the teacher’s misdeeds coupled with his status as a government employee made him a public official or public figure, the court held that the teacher’s position gave him neither the authority nor the influence over policy or opinion to justify treating him a public official, despite the fact that his conduct was “a matter of broad public concern.”

The court further held that the teacher was not a public figure. The court examined the determinants of public-figure status from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The court observed that the teacher would be unable to “combat falsehood” particularly since the allegedly defamatory allegations were published nationally. Moreover, neither his position as a teacher nor his voluntary actions gave him the level of influence required to treat him as either a general or limited purpose public figure.

The second issue the court addressed was whether Idaho recognized the tort of defamation by implication. The court held that it did, but plaintiffs must make a “‘rigorous showing’” establishing that the language used by defendants could “(1) be reasonably understood to impart the false innuendo, and (2) affirmatively suggest that the author intends or endorses the inference.” The court held that plaintiffs need not prove falsity, though it appears the court meant that that the plaintiff was not required to prove the falsity of the explicit statements made by defendants, because the court refuted the defendants’ claim that its holding would make them liable for defamation based on true statements: “if a plaintiff can prove that a false implication was made with the endorsement of the publisher, or with the intent to defame, even regarding a matter of public concern, the plaintiff can state a cause of action for defamation by implication.”

Applying this rule to the case at hand, the court held that plaintiffs had provided “insufficient objective proof show[ing] that USA Today, KTVB, or either of its employees intended or endorsed any of the three defamatory inferences which the district court found were sufficient to go to trial. The implication that the teacher was a danger to students was supported by the truthful reporting of these defendants that a psychologist had recommended he “not be left along with female students over the age of twelve.” Furthermore, none of their coverage implied that the

teacher had committed a crime by engaging in sexual intercourse, since all stated that the student with whom he'd had contact was 18, and it was true that their relationship was sexual even if it did not involve intercourse. Finally, the court found that defendants did not imply plaintiff had misled state officials; their reporting instead focused on failures in state and national reporting systems.

The court did allow one claim to proceed as to defendant KGW, whose coverage could be found by a jury to imply that the plaintiff committed a crime by having sex with a minor. KGW's coverage "never mentioned the student was 18, nor did it clarify the nature of the sexual contact." Therefore, plaintiff satisfied the requirement of proving the statement was capable of bearing a defamatory implication intended or endorsed by KGW.

p. 246: Donald J. Trump became president in January 2017.

p. 261, n. 4: In *Dallas Morning News v. Tatum*, 46 Media L. Rep. 1717 (Tex. 2018), the Texas Supreme Court ruled that a columnist had published his opinion when he, in effect, accused grieving parents of misrepresenting their son's suicide as a death from a car accident and that the parents' defamation-by-implication lawsuit, therefore, failed. A second lawsuit against a different writer for intentional infliction of emotional distress based upon her urging the columnist to write the piece also failed. *Hersh v. Tatum*, 526 S.W.3d 462 (Tex. 2017). There, the court held that the defendant's suggestion that the columnist write a column critical of the plaintiff-parents could not meet the high standard for outrageous behavior, despite the parents' arguments about their special vulnerability.

p. 261, add as n.7: *Sandmann v. WP Company*, 2019 WL 3409881 (E.D. Ky, July 26, 2019), involved a Kentucky teen who was pilloried in social media after he became the subject of a viral video clip. During a school trip to Washington, D.C. in January of 2019, Nicholas Sandmann and classmates stood in front of the Lincoln Memorial waiting for buses to pick them up. While they stood there, a group of Black Hebrew Israelites approached and began shouting threats and racial epithets at them. Then, a group of Native Americans approached them singing and dancing. Members of the Native American group released a video clip of the event showing Nicholas Sandmann, who was wearing a Make American Great Again hat, face to face with Native American activist Nathan Phillips. The two were very close to each other in a seeming "face off" surrounded by a group of Native Americans and Sandmann's classmates. After the video clip hit social media, Phillips told news outlets that the teen was "blocking" him, and many of them ran the video clip along with criticisms of the teenagers, particularly Sandmann. A member of the Black Hebrew Israelites posted a video showing the events in their entirety, which dispelled the impression that the encounter between Sandmann and Phillips was confrontational. The Washington Post published seven articles and three tweets about the encounter. Sandmann sued for defamation.

The district court dismissed the suit. The court first held that the Post's criticisms of "hat wearing teens" during the event did not reflect on Sandmann individually and therefore were not "about" him.

The judge then examined a variety of allegedly defamatory statements couching criticism in terms “such as ‘ugly,’ ‘swarmed,’ ‘taunting,’ ‘disrespect,’ ‘ignored,’ ‘aggressive,’ ‘physicality,’ and ‘rambunctious.’” These terms, the judge concluded, did not convey verifiable facts: many were based on Phillips’ subjective interpretation of the situation, and were not objectively incorrect. Thus, they were constitutionally protected opinion.

Sandmann had further alleged that the articles had accused him of physical intimidation, racist conduct, and taunting Phillips, but the judge held that the plain language of the articles did not support that interpretation. Again, the judge pointed out that the criticisms of Sandmann were grounded in Phillips’ perception that the situation was threatening. Nowhere did the article state that Sandmann had engaged in racist conduct nor taunted Phillips; it merely quoted Phillips as saying he felt blocked and he and Sandmann were “at an impasse.”

The court also interpreted other statements about the encounter as either not about Sandmann or mere rhetorical hyperbole before concluding that the Post was protected by the First Amendment in publishing the opinions of Phillips “that he was being ‘blocked’ and not allowed to ‘retreat.’”

p. 263, as part of “Remedies for Online Defamation”: *Sindi v. El-Moslimany*, 896 F.3d 1 (1st Cir. 2018) likewise involved a post-trial injunction. Defendants were found liable for defamation based on a sustained online smear campaign against the plaintiff. The district court granted an injunction forbidding defendants from making six defamatory statements that they had previously used to defame the plaintiff; the injunction forbade future publication “in any medium or for any purpose.”

The appellate court vacated the injunction because it could not “survive the strict scrutiny required to legitimize a prior restraint, principally because of its failure to account for contextual variation.” The court thus avoided “the vexing question of whether a federal court may ever permanently enjoin republication of ad hoc oral or written statements on the ground that those statements will be defamatory if made anew.” The court similarly did not address “the legality of an injunction ordering ‘the removal or deletion of speech that has been adjudicated defamatory,’ such as a decree requiring the erasure of a statement from a website after an adjudication that the statement was ‘unprotected in the context in which it was made.’”

G. Publication and Republication

1. Publishers and Distributors

pp. 264: Note the California Supreme Court decision in *Hassell v. Bird*, 5 Cal. 5th 522 (Cal. 2018), a case described more fully below in this supplement, in which the court held that, because of Section 230 protections, Yelp would not be forced to remove defamatory material from its website created by unaffiliated users.

p. 265, after the *Firth* citation: See *Petro-Lubricant Testing Labs., Inc. v. Adelman*, 184 A.3d 457 (N.J. 2018), in which the New Jersey Supreme Court held that the single publication rule applies to internet articles. “However,” the court wrote, “if a material and substantive change is made to the article’s defamatory content, then the modified article will constitute a republication,

restarting the statute of limitations.” The article on bad bosses at issue had originally read that one boss “allegedly forced workers to listen to and read white supremacist materials” and had been changed to include language that suggested that the bad boss had “allegedly regularly subjected his employees to 'anti-religion, anti-minority, anti-Jewish, anti-[C]atholic, anti-gay rants.’” Such a change presented a genuine issue of disputed fact, the court held, and the case should not have been dismissed on the single publication rule. Nonetheless, the court also held that the modified article was protected by the fair report privilege and, therefore, affirmed the dismissal of the case.

p. 265, new note: *Aiding and Abetting Publication?*: A jury awarded a family bakery \$44.4 million in compensatory and punitive damages against Oberlin College, after jurors found that the college aided student protests that alleged that the bakery’s detention of a shoplifter was a racist act. The resulting boycott of the business cut its earnings by more than half. The judge instructed the jury that the college’s support of the protest, which included helping distribute flyers, could make it responsible for “aiding and abetting” publication of the defamatory statements they contained. The judge reduced the jury’s verdict to \$25 million but awarded \$6.5 million in attorneys’ fees. See Daniel McGraw, *Oberlin College Ordered to Pay \$44.4 Million Damages in Libel Case Brought By Small Business*, ABA J., June 17, 2019.

p. 273: In a key Section 230 case, *Hassell v. Bird*, 5 Cal. 5th 522 (Cal. 2018), the court decided in a plurality opinion that the website Yelp would not be forced to remove information published there by others, even though a court had found the posts to be defamatory. The intermediate appeals court had affirmed the trial court judge’s order that Yelp must remove the defamatory comments, finding that “the removal order does not violate Section 230 because it does not impose any liability on Yelp.”

In reversing that decision, the California Supreme Court rejected what it called the plaintiff’s “end run around Section 230” and suggested that its pro-Yelp decision was mandated by the legislation, noting both “the capacious language Congress adopted to effectuate its intent” and “the consequences . . . that could result if immunity were denied.” The justices in the plurality suggested that their opinion did “not connote a lack of sympathy for those who may have been defamed on the Internet.”

Despite that decision favoring websites, a small number of courts continue to order such websites to take down unaffiliated others’ defamatory or emotionally harmful material. *Glennon v. Rosenblum*, 325 F. Supp. 3d 1255 (N.D. Ala. 2018), involved a poster who had posted admittedly false information to “She’s a Homewrecker” but refused to take it down. After finding in favor of the plaintiff on her underlying tort claims, the court ordered all relevant information removed from the internet:

The Court has already concluded that Ms. Rosenblum's story is defamatory. Therefore, the Court orders those websites still carrying Ms. Rosenblum's story to remove it from their platforms. The Court also orders that search engines, such as Google, de-index the story to ensure that it does not appear as a search result when Ms. Glennon's name is searched.

Even though Section 230 continues to be interpreted broadly and most cases find in favor of websites, see, e.g., *Bennett v. Google*, 882 F.3d 1163 (D.C. Cir. 2018) (finding that plaintiff's legal remedy is not against Google but against the blogger, despite his refusal to remove the material at issue), some courts have ruled in ways that suggest some weakening of CDA immunity.

As an example of arguably weakening CDA immunity, the Seventh Circuit in *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), refused to find that the CDA protected the Jezebel website from comments posted below an article about the plaintiff's acquittal on rape charges. The court decided the case, which involved other interesting defamation matters including the innocent construction rule and the fair report privilege, mostly in favor of the website. But the court held the CDA inapplicable with regard to the comments: "[a] company can . . . be liable for creating and posting, inducing another to post, or otherwise actively participating in the posting of a defamatory statement in a forum that that company maintains," it wrote. The plaintiff had argued that the website had "'encouraged and invited' comments through selecting and urging the most defamation-prone commenters to 'post more comments and continue to escalate the dialogue,'" editing and shaping the comments, and employing people to comment on website stories. The Seventh Circuit also noted in its opinion that defamatory comments could increase traffic to the website in order to attract advertisers, implying that such a factor could be relevant to the CDA analysis. The district court had ruled in favor of the website, but the Seventh Circuit reversed and remanded, finding that the plaintiff had "adequately alleged that [the website] helped create and develop at least some of the comments." See also *FTC v. LeadClick Media*, 838 F.3d 158 (2d Cir. 2016) (holding the CDA inapplicable because the website at issue "participated in the development of the deceptive content posted on fake news pages").

The CDA's §230 immunity provision continues to attract criticism from many quarters, including some members of Congress. See Sarah Jeong, "Politicians Want to Change the Internet's Most Important Law. They Should Read It First," *N.Y. Times*, July 26, 2019. Nonetheless, in 2019 the Wisconsin Supreme Court reversed an appellate court that had denied section 230 immunity to a firearm advertising website in *Daniel v. Armslist, LLC*, 926 N.W.2d 710 (Wisc. 2019). The website had connected the private seller of a firearm with a buyer who purchased it illegally and then killed four people. The court held that the website, *Armslist.com*, was an interactive computer service provider under the CDA and that imposing liability on the website for the actions of the illegal purchaser would involve treating the website as a publisher or speaker of information posted by third parties.

H. Common Law Privileges

3. Fair and Accurate Report

p. 284, n. 3: In a bit of a twist on source attribution, the Nevada Supreme Court in *Adelson v. Harris*, 402 P.3d 665 (Nev. 2017), answered a certified question from the Second Circuit regarding hyperlinks and the fair report privilege: "whether a hyperlink in an Internet publication that provides specific attribution to a document protected by the fair report privilege qualifies as a protected report for purposes of that privilege." In that case, an online petition contained a hyperlink to an Associated Press article protected by the privilege. The court decided that that

hyperlink itself provided sufficient attribution for the fair reporting privilege to apply to the publication at issue as well.

p. 285, n. 6, after Koniak, add: See also *Lee v. TMZ Productions*, 45 Media L. Rep. 2545 (3d Cir. 2017), in which the plaintiff brought claims against media for reporting on her arrest on drug and prostitution charges that were later dropped. The coverage had included humorous descriptions of the criminal behavior at issue, such as an internet news report headlined “Police Bust Prostitution Ring Promising Cocaine & Hooker Super Bowl Party Pack.” After the dropped charges—police had apparently wrongly accused the plaintiff—she sued for defamation, but the court found all articles protected by New Jersey’s fair report privilege because the “facts described in each of the articles [were] derived from [the New York Attorney General’s Office] press release and press conference.”

KMBT Operating Co. v. Toledo, a Texas appeals court case mentioned on page 285 in the casebook, was reversed on appeal. The Texas Supreme Court ruled that the plaintiff could not prove that the news report was false. “The media may report on the proceedings themselves,” the court wrote, “without independently investigating the matters involved.” Here, because the original press release from the Texas Medical Board read that the doctor had been involved with “a patient,” the news report was accurate and the journalists did not need to go further to include the information that the patient was an adult even though they had included additional information about her pediatrics specialty. 492 S.W.3d 710 (Tex. 2016).

p. 285, add as n.7: In *Funk v. Scripps Media, Inc*, 570 S.W.3d 205 (Tenn. 2019), the court examined the relationship between actual malice, the fair report privilege, and Tennessee’s media shield law. In resolving an interlocutory appeal, the court held that a showing of actual malice would not defeat the fair report privilege. The court reasoned that “when a statement is made in a judicial proceeding, the statement is worthy of public notice, not only as a result of the contents of the statement, but also because of the context in which the statement was made.” Thus, if a reporter’s knowledge of falsity defeated the privilege, its purpose would be undermined. The court also held that common law malice would not defeat the privilege on the grounds that liability should turn on whether the purposes of the privilege were satisfied rather than the reporter’s mental state. The case was not an unmitigated win for the news media, however. The court further held that if the news media wished to assert the fair report privilege, the source of their information would reveal whether they had relied on an official action or proceeding; therefore, the source was not protected by the shield law and was subject to discovery. The court wrote, however, that “Our interpretation does *not* mean that, if the source of information is a document, a defendant must provide the plaintiff with the document in addition to identifying the document.” This interpretation seems to give media some leeway to protect those who leak official documents to them while still relying on the fair report privilege.

p. 286, as part of “Truth, Privilege, and Republication”: The Supreme Court of Texas held that a newspaper could be held liable for defamation where it did not merely report on third party allegations of impropriety but instead wrote as if it assumed them to be true in *Scripps NP Operating v. Carter*, 573 S.W. 3d 781 (Tex. 2019). The court therefore avoided the issue of whether the newspaper might have been privileged had it accurately reported the third-party allegations without more. Texas in 2015 adopted a statutory privilege for media defendants that

provides that “the defense [of truth] applies to accurate reporting of allegations made by a third party regarding a matter of public concern,” Tex. Civ. Prac. & Rem. Code § 73.005(b) (2015), but it was passed after the lawsuit at issue began.

p. 287, as part of “Wire Service Defense”: A California appeals court rejected actor Andrew Keegan Heying’s defamation claim after an online website suggested that police had arrested him for selling alcohol without a permit and cited Fox News as the source for the arrest. The court found that the writer’s dependence upon the Fox News article helped to show a lack of knowing falsity or reckless disregard as to falsity. Moreover, the court found that the website’s “business model”—a purposeful failure to double check the accuracy of republished information—did not prove actual malice. The court decided the case without regard to the wire service defense, which it explained had not been adopted in California. *Heying v. Anschutz Entm’t Grp., Inc.*, 46 Media L. Rep. 1013 (Cal. Ct. App. 2017). The actor-plaintiff’s similar claim against a news aggregator, including his suggestion that the aggregator’s motive to drive traffic to its website helped prove actual malice, also failed. *Heying v. Newsmax Media, Inc.*, 46 Media L. Rep. 1109 (Cal. Ct. App. 2018).

I. Other Issues

4. SLAPP Motions

p. 292: Noting that California’s anti-SLAPP statute requires only “minimal merit” for a case to proceed, the Ninth Circuit ruled that a woman known as Danni Ashe, described as “one of the most well-known and popular soft-core porn actresses in the world,” who had retired in 2004, had a valid defamation claim against a newspaper that had published an old photograph featuring her as part of a story headlined “Porn Industry Shuts Down With Immediate Effect After ‘Female Performer’ Tests Positive for HIV.” Editors had removed an innocuous caption for the stock photograph that had dated it to 2000 and had inserted one that read that the porn industry was shocked “by the announcement that a performer had tested HIV positive,” implying, the plaintiff had argued, that she was both HIV-positive and a sex worker. “This sort of willful blindness cannot immunize publishers where they act with reckless disregard for the truth or falsity of the implication they are making,” the court wrote. *Manzari v. Associated Newspapers*, 830 F.3d 881 (9th Cir. 2016).

p. 292: The SPEAK FREE Act was not enacted.

CHAPTER V

PROTECTING PRIVACY

A. Public Disclosure of Private Facts

1. The Tort

p. 304, after *Benz* in note 5: Meantime, in a criminal case involving the publication of unauthorized nude photographs on Facebook, the Vermont Supreme Court held in 2018 that Vermont’s “revenge porn” statute was constitutional and the poster could be held criminally liable. “The government’s interest in preventing any intrusions on individual privacy is substantial,” the court wrote, and it is “at its highest when the invasion of privacy takes the form of nonconsensual pornography.” *State v. Vanburen*, 2019 Vt. Lexis 80 (Vt. 2019).

p. 304, new note after note 5: In a 2019 case not involving media, the Georgia Supreme Court ruled that the disclosure of a person’s “name, social security number, home telephone number, email address, and age” would not be the type of information that could support a claim for public disclosure of private facts. This was so even though the plaintiff had sought services or benefits from the state—and the state had revealed the information in an email accidentally sent to 1000 others. “This kind of information does not normally affect a person’s reputation,” the court wrote, “which is the interest the tort of public disclosure of embarrassing private facts was meant to remedy.” Moreover, “even if the information were of the kind that affected reputation, the complaint would still not state a claim here because the matters disclosed were not offensive and objectionable.” *Georgia Department of Labor v. McConnell*, 305 Ga. 812 (Ga. 2019). Three years earlier, the same court had ruled that once a plaintiff admitted extramarital affairs to others and had travelled publicly with a girlfriend who had also disclosed the relationship, their relationship was not private and therefore would not support an invasion-of-privacy claim against a blogger who revealed the affairs. *Cottrell v. Smith*, 788 S.E.2d 772 (Ga. 2016).

p. 307: In the Hulk Hogan-Gawker case, the parties later settled for \$31 million and there was no appeal.

Just a few months after the jury decision in the Hulk Hogan case, a federal trial court in Florida refused ESPN’s motion to dismiss a lawsuit stemming from another public-disclosure-of-private-facts privacy claim. NFL player Jason Pierre-Paul sued ESPN after one of its reporters tweeted that Pierre-Paul had lost a finger in a fireworks accident and attached the medical chart as proof. “Here,” the court wrote, after noting that the Restatement protects private facts anchored to common decency, “Plaintiff has shown the publication of his private medical records may breach [privacy tort] limits and, thus, are not a matter of public concern.” *Pierre-Paul v. ESPN*, 44 Media L. Rep. 2452 (S.D. Fla. 2016). That case later settled for an undisclosed amount. See also *Jackson v. Mayweather*, 10 Cal. App. 5th 1240 (Cal. Ct. App. 2017) (holding that the famous boxer’s girlfriend had a privacy claim after he published sonogram images of twin fetuses: “Mayweather’s posting of the sonogram of the twins Jackson had been carrying before her pregnancy terminated and the summary medical report regarding her pregnancy falls outside the protection accorded a newsworthy report”); *Judge v. Saltz Plastic Surgery*, 367 P.3d 1006 (Utah

2016) (holding that plaintiff’s publication-of-private-facts claim could proceed and noting that “the dispute as to whether there was legitimate public interest in the photographs [of the plaintiff’s body before and after breast augmentation surgery] based on [her] participation in [a news] broadcast or whether the inclusion of those photographs was gratuitous or overly intrusive made summary judgment inappropriate in [the] case”).

p. 312, after *Hall*: In 2019, a judge in the Eastern District of Virginia suggested that the Commonwealth of Virginia did not recognize the public disclosure of private facts tort either. *Cockrum v. Donald J. Trump for President*, 365 F. Supp. 3d 652 (E.D. Va. 2019).

B. False Light Privacy

p. 332, after quote from *Prosser & Keeton on Torts*: In 2019, the Tenth Circuit ruled that Oklahoma required the actual malice standard in false light cases and then found that the plaintiff had not proved it. The underlying case involved a several-part series published in *Sports Illustrated*, one that the plaintiff argued had painted him in a false light by suggesting that he had “grossly overpaid” student players “for jobs they did or compensated them for jobs they didn’t do.” The court found no actual malice, given the magazine’s strong reporting and editing procedures included multiple source interviews and re-interviews, substantial fact-checking, and pre-publication legal review. A plaintiff-alleged “sensationalized narrative” would not change that, the court wrote, even though additional facts may well have painted the plaintiff in a much more “favorable or balanced light.” *Talley v. Time, Inc.*, 923 F.3d 878 (10th Cir. 2019).

p. 336: On remand after the Supreme Court’s decision on unrelated matters in *Franchise Tax Board*, the Nevada Supreme Court reiterated its acceptance of the false light tort, suggesting that it was worried that without such acceptance, those “falsely portrayed as a victim of crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute,” would have no remedy, given that such allegations “do[] not rise to the level of defamation.” 407 P.3d 717 (Nev. 2017).

C. Appropriation

1. Nature of the Tort

p. 337, after first sentence in second full paragraph: Courts have found that only individuals can bring such a privacy-based claim, not corporations. See, e.g., *Doggett v. Travis*, 555 S.W.3d 127 (Tex. Ct. App. 2018) (finding that a law firm itself could not recover for misappropriation privacy action because “Texas courts have not recognized a corporation’s right to privacy”).

p. 340: In a closely watched case involving the docudrama miniseries “Feud: Bette and Joan,” that featured in part actress Olivia de Havilland’s friendship with Bette Davis, a California appeals court ruled that the First Amendment protected the producers’ “use” of de Havilland’s story. *De Havilland v. FX Networks*, 21 Cal. App. 5th 845 (2018). “That [the miniseries’]

creators did not purchase or otherwise procure de Havilland's 'rights' to her name or likeness does not change this analysis," the court wrote. "Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections or 'story' the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements." The California Supreme Court and the United States Supreme Court both denied certiorari in the case.

Meantime, the U.S. Copyright Office in 2019 suggested that Congress consider creating a federal right-of-publicity statute to help with "uncertainty and ambiguity" at the state level regarding personality rights. The Copyright Office's report, "Authors, Attribution, and Integrity: Examining Moral Rights in the United States," available at <https://www.copyright.gov/policy/moralrights/full-report.pdf>, suggested that "any federal law should provide, at a minimum, protection for an individual's name, signature, image, and voice against commercial exploitation during their lifetime" with "explicit carve-outs for expressive works and other exceptions for First Amendment-protected activities."

p. 345, addition to n. 5: Actress Lindsay Lohan was not as lucky in *Lohan v. Take-Two Interactive Software, Inc.*, 97 N.E.3d 389 (N.Y. 2018). There, New York's high court ruled that computer game creators would not be liable for the misappropriation of Lohan's identity given that the character at issue was merely an "actress slash singer" and "modern, beach-going young woman" who had starred in romantic comedies, the "voice of a generation," and "really famous"—and, therefore, not recognizable as Lohan. The court nonetheless recognized for the first time that "a computer generated image may constitute a portrait within the meaning" of New York's misappropriation-like law. See also *Martin v. Wendy's Int'l*, 714 F. App'x 590 (7th Cir. 2018) (dismissing athlete's misappropriation action based on ads that mentioned his "footbag" kicking record; the Illinois right-to-publicity statute allows advertisers and others "to identify truthfully the performer of a particular performance") and *Sivero v. Twentieth Century Fox Film Corp.*, 2018 Cal. App. Unpub. Lexis 1022 (Cal. Ct. App., Feb. 13, 2018) (rejecting the *Godfather* and *Goodfellas* actor's claim against *The Simpsons* for featuring a character like him: "Even if Louie [the Simpson's character] resemble[d] Sivero [the actor], the Louie character contains significant transformative content other than Sivero's likeness" including "yellow skin, a large overbite, no chin, and no eyebrows").

p. 345, as part of "Athletes and Appropriation": The Sixth Circuit ruled in an unpublished opinion that college athletes do not have an appropriation-related right to their images in television broadcasts. "The plaintiffs claim that, under Tennessee statutory and common law, college players have a 'right of publicity' in their names and images as they might appear in television broadcasts of football or basketball games in which the plaintiffs participate," the court wrote. "But that argument is a legal fantasy." *Marshall v. ESPN*, 668 F. App'x 155 (6th Cir. 2016). See also *Maloney v. T3Media*, 853 F.3d 1004 (9th Cir. 2017) (holding that student-athletes' lawsuit based upon key-moments-in-college-sports photographs offered for sale for a buyer's personal use are best suited to a copyright claim and inappropriate for a tort action).

The fantasy sports website FanDuel was successful in a related lawsuit. In *Daniels v. FanDuel, Inc.*, 884 F.3d 672 (7th Cir. 2018), the Seventh Circuit certified a question to Indiana Supreme

Court: “Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both.” The Indiana Supreme Court responded that the Indiana right of publicity statute’s newsworthiness exception protected “use of players’ names, pictures, and statistics by fantasy sports operators” and that news value did not transform into something more commercial merely “because [such information] is placed behind a paywall or used in the context of a fantasy sports game.” The court, however, suggested that its finding “[d]id not foreclose a court from closely scrutinizing the actions of a particular defendant to ensure no unauthorized endorsements are being made”—suggesting that an endorsement implication could potentially support a claim under the statute—but refused to address the matter because the Seventh Circuit’s certified question had been so specific. *Daniels v. FanDuel, Inc.*, 109 N.E.3d 390 (Ind. 2018). The Seventh Circuit ruled for FanDuel based on the answer to its certified question but criticized the plaintiffs’ attorneys for not arguing the separate question asked but not answered by the Indiana Supreme Court about specific endorsement. 909 F.3d 876 (7th Cir. 2018).

D. Protective Privacy in Europe and Its Effect in the United States

p. 352: In May 2018, Europe enacted strict new data protection laws that address in part the sharing of user data. This was a major change that impacted companies around the world as they scrambled to comply. The full impact in the United States is still not known. Some news websites, for example, have blocked readers in Europe from accessing their content, apparently believing that the news websites’ data usage might well not align with the new privacy-protective laws. Adam Satariano, “U.S. News Outlets Block European Readers Over New Privacy Rules,” *N.Y. Times* (May 25, 2018).

The change in European data privacy came at a time when social media giants, especially Facebook, faced strong criticism for sharing user data with interested others. See, e.g., Cecelia Kang & Sheera Frenkel, “Facebook Says Cambridge Analytica Harvested Data of Up to 87 Million Users,” *N.Y. Times* (April 4, 2018). In the U.S., court challenges based on privacy interests that parallel in part new European data privacy interests have appeared. See, e.g., *Patel v. Facebook, Inc.*, 290 F. Supp. 3d 948 (N.D. Cal. 2018) (the court allowed the plaintiffs’ class action based upon allegations that Facebook “unlawfully collected and stores their biometric data without prior notice or consent” to continue over Facebook’s jurisdictional arguments). But see *Rivera v. Google*, 366 F. Supp. 3d 998 (N.D. Ill. 2018) (the court agreed with Facebook that plaintiffs failed to allege “concrete injuries” based upon collection of face scans and, therefore, found their claim insufficient to support Article III standing).

Relatedly, some who have won delisting cases in courts outside the United States have asked that the same information be blocked in the U.S., but at least one court ruled that Section 230 of the Communications Decency Act prevented such an order. *Google v. Equustek Sols. Inc.*, 2017 U.S. Dist. Lexis 182194 (N.D. Cal. Nov. 2, 2017). See also *Popa v. Moritz*, 2019 U.S. Dist. Lexis 58458 (S.D.N.Y. Apr. 3, 2019) (European Union citizen cannot argue for GDPR protections for court documents arising from a lawsuit she filed and made available generally because of freedom-of-access laws in the U.S.; “[h]er current regrets regarding the public nature of her proceeding amounts to nothing more than filer’s remorse.”)

CHAPTER VI

LIABILITY FOR EMOTIONAL, ECONOMIC, AND PHYSICAL HARM

p. 370, additions to n. 7: There are two recent decisions involving Intentional Infliction of Emotional Distress that are relevant here. In the first, *Doe v. HarperCollins Publishers*, 46 Media L. Rep. 2039 (N.D. Ill. 2018), a federal trial ruled that a student featured by description in the book “Unwanted Advances: Sexual Paranoia Comes to Campus” had a viable intentional infliction claim in addition to her publication-of-private-facts and defamation claims, based upon the book’s publication of alleged private text messages and other private information the court called “intensely private facts”:

Defendants' conduct, as described in the complaint, could be seen by a reasonable jury as extreme and outrageous. Taking Plaintiff's allegations as true, [the professor-author] documented a false and misleading account of Plaintiff's travails, taking facts out of context and falsely characterizing confidential investigation materials, to paint Plaintiff as a liar—and not just any liar, but a liar about matters of sexual conduct, sexual consent and allegations of rape. Worse yet, [the professor-author] did so to get revenge on Plaintiff, a graduate student at the same university, for complaining about the alleged sexual predation of a professor and for complaining about [the professor-author's] initial attack on Plaintiff. Allowing such content to be published, with knowledge of the parties' history and without any investigation (which is what Plaintiff alleges HarperCollins did) could also satisfy the extreme and outrageous standard.

The book’s publisher had argued that speech on a matter of public concern could not provide a satisfactory basis for an intentional infliction claim, but the court rejected that argument.

Second, in a Connecticut case focused on the publication of graphic video from a car accident scene of a person near death, the trial court found potential intentional infliction of emotional distress and negligent infliction of emotional distress claims. The defendant, a website called American News and Information Services, posted nineteen minutes of raw video that featured the extraction from a crumpled car of the plaintiff’s son shortly before he died from his injuries. He was “clinging to life,” the court explained, and “reaching from the stretcher to grab the arm of one of his rescuers.” The website had argued that the video’s newsworthiness supported its motion to strike the plaintiff’s complaint, but the court disagreed, explaining that it could not conclude that the plaintiff could never prevail on such claims and asking the parties for more substantial briefing on First Amendment implications. *Gonzalez v. Am. News & Info. Servs.*, 2018 Media L. Rep. 74 (Conn. Super. Ct. 2018).

p. 378: The Sixth Circuit refused to find that Twitter, Facebook, and Google had a direct connection to the man who opened fire at the Pulse Nightclub in Orlando, Florida, and, therefore, refused to find the social media companies liable under the Anti-Terrorism Act. The plaintiff had

argued that the terrorist organization ISIS had posted propaganda and recruitment videos that led to the shooting. “[E]ven if Defendants somehow supported ISIS, and even if the shooting were an act of international terrorism,” the court wrote, “Plaintiffs’ ATA claim for secondary liability still fails because [the shooter] ‘committed’ the terrorist act.” The plaintiffs’ claims for negligent infliction of emotional distress and wrongful death failed for the same reasons. *Crosby v. Twitter*, 921 F.3d 617 (6th Cir. 2019).

CHAPTER VII

COPYRIGHT

A. A Brief Survey of Copyright Law

p. 410: In 2019, a unanimous United States Supreme Court held in a case involving news media that “registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright.” Moreover, the Justices ruled, once that copyright has been registered, “a copyright owner can recover for infringement that occurred both before and after registration.” The case involved news articles that appeared on a website in apparent violation of a licensing agreement. *Fourth Estate Pub. Ben. Corp. v. Wall-Street.com*, 139 S. Ct. 881 (2019).

2 a. Fair Use and the News

p. 421, after the *Monge* case description: See also *Otto v. Hearst Communications, Inc.* 345 F. Supp. 3d 412 (S.D.N.Y. 2018) (man who took photo of President Trump—who had crashed wedding at Trump National Golf Club and had posed for photo with newlyweds—had copyright claim after *Esquire* used the image without permission).

C. First Amendment Implications of Copyright Enforcement

p. 438: Several interesting copyright decisions that affect journalism and other media are now working their way through lower federal courts. See *Goldman v. Breitbart News Network*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018) (finding that embedded photo of Tom Brady in sports news tweet violates the photographer’s copyright, even though the photo remained on the Twitter server, but suggests fair use and other defenses may ultimately protect the news publisher); *Hirsch v. CBS Broadcasting*, 45 Media L. Rep. 2173 (S.D.N.Y. 2017) (refusing to dismiss copyright claim based upon a two-second use of copyright-protected photograph licensed to others and used without permission on CBS’s true crime television show “48 Hours”); and *Barcroft Media v. Coed Media Group*, 297 F. Supp. 3d 339 (S.D.N.Y. 2017) (rejecting fair use defense for celebrity gossip website that had posted photographer’s copyrighted photographs; the website’s “business model turned on displaying, without authorization, paparazzi photographs on its websites” including those “that it did not—and admittedly could not afford to—license in order to lure traffic”).

p. 440: Although this chapter addresses mainly First Amendment limitations on copyright law, the Supreme Court in *Matal v. Tam*, 137 S. Ct. 1744 (2017), recognized that the First Amendment also limits trademark law. There, the Court held, 8-0, that the government cannot deny federal trademark registration (and the protections that go with it) to trademarks that disparage “persons, institutions, beliefs, or national symbols.” The case is not a press case, but it strongly reaffirms the principle that the State may not certain regulate speech simply because it finds that speech offensive.

The case involved a band called The Slants that had tried to trademark the band name “to ‘reclaim’ the term and drain it of its denigrating force as a derogatory term for Asian persons.” The Patent and Trademark Office denied registration, citing section 2(a) of the Lanham Act, which has long barred registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead.” The Supreme Court held that this clause was unconstitutional because it discriminated on the basis of viewpoint: trademarks that disparage persons, institutions, beliefs, or national symbols are barred from registration, while trademarks that praise them or are neutral are not. All eight justices agreed that this type of viewpoint discrimination was constitutionally impermissible. Justice Alito wrote, “Speech may not be banned on the ground that it expresses ideas that offend,” and even if the court were to treat trademarks as commercial speech subject to only intermediate scrutiny, the clause was not narrowly drawn “to drive out trademarks that support invidious discrimination.”

In a concurring opinion, Justice Kennedy, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, was even more forceful: the fact that the disparagement clause employed “viewpoint discrimination” made “unnecessary any extended treatment of other questions raised by the parties.” Viewpoint discrimination is always subject to heightened scrutiny, said Kennedy, and he further warned that “[a] law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.” See also *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (FUCT trademark denial based on Lanham Act’s prohibition on immoral or scandalous material is substantially overboard and, therefore, unconstitutional; “[t]here are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all [and] therefore violates the First Amendment”).

CHAPTER VIII

NEWSGATHERING

TORTS

A. Intrusion

p. 457: In *Safari Club International v. Rudolph*, 862 F.3d 1113 (9th Cir. 2017), the court found that the plaintiff had a valid privacy claim against the defendant, an acquaintance who had secretly recorded their conversation and posted it to YouTube. The defendant had argued that an

intrusion claim was invalid, given that the conversation had taken place at a public restaurant, but the court sided with the plaintiff: “The take-home message is that privacy is relative and, depending upon the circumstances, one can harbor an objectively reasonable expectation of privacy in a public location.” See also somewhat conflicting outcomes in *Moran v. Lewis*, 114 N.E.3d 1254 (Ohio App. 2018) (private investigator who used GPS to surveil individual found not liable for invasion of privacy; “the GPS tracking devices in this case recorded his movements on public roads and there were no allegations that the recording or dissemination of the information intruded into [the individual’s] solitude, seclusion or private affairs”) and *Demo v. Kirksey*, 2018 WL 5994995 (D. Md. Nov. 15, 2018) (GPS tracking devices placed on vehicle and in diaper bag could well violate individual’s right to privacy).

p. 459: In a case involving a photographer who argued that the California anti-paparazzi legislation was unconstitutional because it infringed upon newsgathering, a California appeals court held that the statute was a law “of general application that does not target speech or single out the press for special treatment and is neither vague nor overbroad.” *Raef v. Appellate Div. of Superior Court*, 240 Cal. App. 4th 1112 (Cal. Ct. App. 2015). The California Supreme Court denied review.

B. Trespass

p. 463, new paragraph titled “Ag-Gag and Related Laws”: As suggested in Chapter VI, in recent years, some legislatures have passed so-called ag-gag anti-trespass laws in an effort to stop undercover reporting of agricultural and other operations. Although the plaintiffs who challenge such laws are mainly public interest groups, journalism organizations have filed amicus briefs in some of the cases.

In 2018, federal appeals courts heard two such statutory challenges: one substantive and the other procedural. In January, the Animal Legal Defense Fund argued that Idaho’s law that criminalized the unauthorized entrance to a production facility violated the First Amendment. The Ninth Circuit agreed in part. “We are sensitive to journalists’ constitutional right to investigate and publish exposes on the agricultural industry,” the court wrote. “However, the First Amendment right to gather news . . . does not exempt journalists from laws of general applicability.” It therefore upheld certain provisions of Idaho’s law, including its criminal prohibition against preemployment falsehoods, although it struck down others, including “criminalization of misrepresentations to enter a production facility” and a “ban on audio and video recordings of a production facility’s operations.” *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

A few months later the Fourth Circuit held that the People for the Ethical Treatment of Animals had standing to challenge North Carolina’s Property Production Act, one that holds liable any person who intentionally enters a non-public area for unauthorized purposes including recording. “Plaintiffs,” the court wrote, “alleged injury for standing purposes [because] they have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant exemplary damages under the Act if they move forward at all.” *PETA v. Stein*, 737 Fed. App’x 122 (4th Cir. 2018). See also *Animal Legal Defense Fund v. Reynolds*, 297 F. Supp. 3d 901 (S.D. Iowa 2018) and 353 F. Supp. 3d 812 (S.D. Iowa

2019) (rejecting the defense’s motion to dismiss, agreeing that the plaintiffs had provided sufficient evidence that Iowa’s “agricultural production facility fraud” statute criminalizes lies that “facilitate core First Amendment speech regarding issues of public import” and, later, declaring the statute unconstitutional) and *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193 (C.D. Utah 2017) (holding that Utah’s ag-gag law that criminalizes lying and filming violates the plaintiffs’ First Amendment rights).

In a case involving seemingly broader state statutes—criminal and civil laws in Wyoming that prohibited people from entering land “for the purpose of collecting resource data”—the Tenth Circuit similarly decided that the statute failed to pass constitutional muster. *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). “An individual who photographs animals or takes notes about habitat conditions,” the court wrote, should be protected as much as one who records a police encounter because both actions facilitate protected speech. Wyoming’s high court later that year accepted intrusion as a viable tort for the first time, applauding its protection for individual privacy. *Howard v. Aspen Way Enterprises*, 406 P.3d 1271 (Wy. 2017). And in *In re Murphy Brown*, 907 F.3d 788 (4th Cir. 2018), the Fourth Circuit held that a North Carolina court’s gag order banning all parties, including “all potential witness[es],” from speaking on hog industry lawsuits was so expansive that it “impair[ed] legitimate news gathering activities” and that any interests in a fair trial were not strong enough to outweigh First Amendment interests. “Whatever differences the parties and their supporters have, they possess in common a passionate First Amendment interest in debating their futures,” the court wrote. “It seems very wrong that a court would take that from them.”

p. 463: The FAA’s drone registration rule suffered a setback in 2017 when the D.C. Circuit decided that the FAA did not have statutory authority to enact such a rule. “Section 336 of the FAA Modernization and Reform Act,” the court wrote, “prohibits the FAA from promulgating ‘any rule or regulation regarding a model aircraft.’ The Registration Rule is a rule regarding model aircraft. Therefore, the Registration Rule is unlawful to the extent that it applies to model aircraft.” *Taylor v. Huerta*, 856 F.3d 1089 (D.C. Cir. 2017). After Congress restored the registration rule, the court found all related regulations to be constitutional and within the FAA’s statutory authority: “The rule regulates recreational non-section 336 model aircraft more broadly, but that regulation is . . . consistent with Congressional directives.” *Taylor v. FAA*, 895 F.3d 56 (D.C. Cir. 2018). Shortly thereafter, the FAA issued a fact sheet explaining that “[a]nyone flying under [the FAA’s most recent enactment] has to register each drone they intend to operate.” See also 14 C.F.R. §§ 107.13, 91.203(a)(2).

C. Constitutional Violations

p. 466, as new n. 4: Media have for some years now played a role in certain police-related reality television programming. Recall, for example, the *Conradt* case discussed in Chapter VI in which a federal trial court ruled that NBC could be liable for the emotional distress suffered by a prosecutor who committed suicide before his arrest as part of NBC’s “To Catch a Predator” series. The court in that case also criticized the police-journalist relationship that led to such coverage.

In 2018, the Eleventh Circuit decided that police could also be liable for their roles in participating with media in such programming, including providing access to police investigations and interrogation videos. The case, *Smart v. City of Miami*, 740 Fed. Appx. 952 (11th Cir. 2018), focused on the A&E program “The First 48,” one that follows detectives as they try to solve murders. Police had arrested the plaintiff while producers were on the scene, and after charges were dropped, he sued the city of Miami on Section 1983 violations for its part in allowing videographers to record inside his apartment, his questioning, his arrest, and his interrogation. As the court explained, the case in large part was based “on filming and broadcast by ‘The First 48’ without [the plaintiff’s] consent.”

A jury awarded the plaintiff approximately \$450,000 in damages stemming from the police-journalist relationship that allowed such access and coverage, and the federal appellate court upheld most of that verdict, citing in part *Wilson v. Layne*. The jury could find that “the filming and broadcast of Mr. Smart in handcuffs before and after his arrest constituted a seizure of Mr. Smart’s image and implicated Mr. Smart’s privacy rights under the Fourth Amendment,” the court wrote, also criticizing the access that producers had been given to his interrogation.

p. 467: A related issue involves the so-called ballot selfie, an image of a voter taken inside a voting booth and posted on social media. Some states have passed laws prohibiting such photographs. The First Circuit ruled a month before the presidential election in 2016 that the New Hampshire statute against ballot selfies was unconstitutional. “Ballot selfies have taken on a special communicative value,” the court wrote, in that the photographs both “express support for a candidate and communicate that the voter has in fact given his or her vote to that candidate.” *Rideout v. Gardner*, 838 F.3d 55 (1st Cir. 2016).

D. Wiretapping and Eavesdropping

p. 480: In 2017, the Third Circuit held that individuals have the right to record police. “Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public,” the court wrote. “Today we join this growing consensus. Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.” *Fields v. City of Phila.*, 862 F.3d 353 (3d Cir. 2017). Recent state courts have agreed. See, e.g., *State v. Russo*, 407 P.3d 137 (Hawaii 2017) (“We join those jurisdictions that recognize that there is a constitutional right of the public to film the official activities of police officers in a public place”).

In a related case, the Ninth Circuit held that border agents cannot necessarily assert national security interests to halt all filming in public areas near the border. *Askins v. United States Dep’t of Homeland Sec.*, 899 F.3d 1035 (9th Cir. 2018). There, two people standing on a public bridge photographed United States Customs and Border Protection officers inspecting female individuals crossing the border at the security checkpoint. Officers confiscated the individuals’ phones and destroyed their photos. The Ninth Circuit vacated the lower court’s opinion dismissing the case and suggested that further fact development was necessary: “We do not mean to suggest that all or even any areas within a port of entry are necessarily public fora,” the court wrote. “We decide today only that plaintiffs have adequately pleaded their claims and that further factual development

is required before the district court can determine what restrictions, if any, the government may impose in these public, outdoors areas.”

p. 481: The Crawford v. Geiger appellate decision, reported at 656 F. App'x 190 (6th Cir. 2016), does not address the right to record in detail.

E. Misrepresentation

p. 501, addition to n. 1: Several pending cases involve the undercover group Project Veritas—an organization described as one that “uses its employees to infiltrate organizations for the purpose of securing proprietary information” that it finds of public value— that might help answer that question in part. In AFT Michigan v. Project Veritas, 2017 U.S. Dist. Lexis 211760 (E.D. Mich. Dec. 27, 2017), Project Veritas was accused of sending a young woman into the Michigan branch of the American Federation of Teachers. The woman represented herself as a college intern and allegedly accessed key files using that persona. Project Veritas later uploaded hidden camera video and documents to YouTube, and AFT Michigan sued the organization for fraud, trespassing, eavesdropping, and other related claims. In 2019, a federal trial court judge decided that Michigan’s eavesdropping law would not permit such a recording, but stayed the proceeding, allowing Project Veritas an appeal to the Sixth Circuit. 2019 U.S. Dist. Lexis 99896 (E.D. Mich. June 14, 2019). A Florida federal trial court judge had decided earlier in 2019 that covert recording of a teachers union official would not be illegal under Florida, Kansas, and federal wiretapping statutes. “[B]ackground noise can be heard throughout the conversation,” the court wrote after reviewing the subject tape, and “multiple people, including but not limited to a bartender, were in close proximity” to the discussion. Therefore, the court reasoned, the plaintiff had no reasonable expectation of privacy in the conversation. Wentz v. Project Veritas, 2019 WL 1716024 (M.D. Fla. Apr. 16, 2019). See also Project Veritas Action Fund v. Conley, 270 F. Supp. 3d 337 (D. Mass. 2017); Democracy Partners v. Project Veritas Action Fund, 285 F. Supp. 3d 109 (D.D.C. 2018); Martin v. Goss, 2019 WL 2194779 (D. Mass. May 22, 2019). See also National Abortion Federation v. Center for Medical Progress, 2018 WL 5879786 (N.D. Cal. Nov. 7, 2018) (alleged “phony corporation” gained access to National Abortion Federation conferences and recorded staff and speakers there in violation of terms of entrance; court refused to dissolve permanent injunction).

CHAPTER IX

SUBPOENAS AND SEARCHES

B. How the Privilege Works

p. 524, as part of “Defeating a Qualified Privilege”: The New Hampshire Supreme Court decided that the newsgathering privilege under that state’s constitution did not protect journalists from testifying in criminal cases about non-confidential information eventually published in the news story itself, rejecting arguments that such testimony would chill the free flow of information when sources realized journalists would be forced to testify. State v. Gibson, 172 A.3d 529 (N.H. 2017).

In a procedural case, New York’s high court decided that a non-party journalist could not appeal a lower court’s decision forcing her to testify in a criminal case. *Matter of People v. Juarez*, 107 N.E.3d 556 (N.Y. 2018). No direct appeal was possible under New York’s statutory law, the court decided over strong dissents that focused on journalism’s countervailing interests, including the impact the decision would have on newsgathering and journalists’ ability to promise confidentiality to sources. Given that the legislature had decided that such non-party appeals could cause extreme delay in underlying criminal cases, and finding that those interests trumped despite “the State’s longstanding interests in protecting the newsgathering role of reporters,” the court held that no direct appeal of a lower court’s denial of a journalist’s motion to quash a subpoena was possible under current procedural law.

C. Who is a Reporter?

p. 538, new n. 5: In *United States v. Glassdoor, Inc.*, 875 F.3d 1179 (9th Cir. 2017), the court used *Branzburg*’s rejection of the reporter’s privilege to find that Glassdoor, a website on which posters post reviews of companies, had to comply with a grand jury subpoena asking it to reveal the names of certain anonymous posters. Glassdoor had argued that, given that it is not a journalism site and that *Branzburg* addressed solely journalists’ First Amendment right to gather news, it should not be forced to reveal the posters’ identities, but the Ninth Circuit disagreed:

Although Glassdoor is not in the news business, as part of its business model it does gather and publish information from sources it has agreed not to identify. It argues that “[a]nonymity is an essential feature of the Glassdoor community,” and that “if employees cannot speak anonymously, they often will not speak at all,” which will reduce the availability of “information about what it is like to work at a particular job and how workers are paid.” In other words, forcing Glassdoor to comply with the grand jury’s subpoena duces tecum will chill First Amendment-protected activity. This is fundamentally the same argument the Supreme Court rejected in *Branzburg*.

The court explained that *Branzburg* “does not provide reporters—or anyone else—with a privilege against responding to a grand jury’s inquiries,” suggesting that interests in newsgathering and in protecting others’ anonymous speech should be assessed by courts in the same way. Finally, it noted that Glassdoor’s privacy policy did not promise posters anonymity and, as such, put posters on notice that their names could be revealed in the event of litigation.

A New York court decided in 2017 that a publication that sends daily emails to subscribers about debt-distressed companies was an entity protected by the state’s shield law. *Matter of Murray Energy Corp. v. Reorg Research, Inc.*, 58 N.Y.S.3d 369 (N.Y. App. Div. 2017). “Extending protection to respondent under the Shield Law is consistent with New York’s ‘long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press,’” the court wrote. It decided that further investigation into the publication’s subscribers and other matters could lead to a chilling effect. See also *Brooks v. State*, 2017 Tex. App. Lexis 11577 (Tex. App. Dec. 13, 2017) (finding that the privilege applies to the reality television program “The First 48” that follows detectives as they attempt to solve murders, over the criminal

defendant’s argument that such a program “does not disseminate news or information to the public”).

CHAPTER X

ACCESS TO INFORMATION

A. Access to Records

1. Freedom of Information Act

p. 570, as part of n. 4: A Washington state intermediate appellate court cited *Marsh* when it decided in 2018 to withhold from public access autopsy photographs of Nirvana singer Kurt Cobain. *Lee v. City of Seattle*, 46 Media L. Rep. 1841 (Wash. Ct. App. 2018). “Pursuant to the analysis set forth in *Marsh*, the trial court correctly concluded that the release of the death-scene photographs would shock the conscious and offend the community’s sense of fair play and decency, violating the Cobains’ substantive due process rights under the Fourteenth Amendment,” the court wrote. “Permanently enjoining the City from disclosing those photographs is a reasonable way to prevent such a violation.” Washington’s high court denied review in the case.

Other recent 7(C) cases include *Judicial Watch v. National Archives*, 876 F.3d 346 (D.C. Cir. 2017) (holding that *Judicial Watch* had not shown the “exceptional interests” that would warrant disclosure of an alleged draft indictment of Hillary Clinton in the decades-old Whitewater investigation, given the “serious privacy concerns” at issue); *Eil v. United States Drug Enforcement Administration*, 878 F.3d 392 (1st Cir. 2017) (refusing journalist writing book on drug deaths linked to doctor access to living former patients’ medical records or deceased patients’ death-related records: “First, the release of the requested records is unlikely to advance a valid public interest, given the amount of relevant information that Eil already has access to, [and,] second, the substantial privacy interests implicated by the records would outweigh any public interest in disclosure,” citing *Favish* in part); *Tuffly v. United States Dep’t of Homeland Sec.*, 870 F.3d 1086 (9th Cir. 2017) (refusing access to names of non-citizens released from border detention based upon “significant privacy concerns” and because, under *Favish*, “public interest in evaluating the effects of government actions would be advanced only minimally”). See also *Sikes v. United States Department of the Navy*, 896 F.3d 1227 (11th Cir. 2018) (suicide note left for loved ones by then-Chief of Naval Operations is private based upon family privacy interests expressed in *Favish*; “the note would reveal the deeply personal sentiments [the dead person] chose to share with his wife in the last moments of his life”).

p. 570, as part of “Personnel and Medical Files”: See also *Bloomgarden v. United States Department of Justice*, 874 F.3d 757 (D.C. Cir. 2017) (refusing access to information regarding former prosecutor’s termination despite prisoner’s argument that it was relevant to his appeal; “the substantial privacy interest in this case outweighs the rather modest public interest” in it, especially given that the requested information was more than twenty years old). After remand, the federal trial court held that the former prosecutor’s “privacy interest in the details of his

termination is not lessened because the fact of his termination is already in the public domain,” that the prosecutor had interests in “avoiding embarrassment and harm to his reputation and livelihood” in the legal field, and that the files requested applied to a termination “over two decades ago for relatively unremarkable reasons” and therefore were of limited public interest. 344 F. Supp. 3d 66 (D.D.C. 2018).

p. 570, as new section “Agency Records”: The Tenth Circuit decided in 2018 that private third party contractors for the government had no duty to disclose information in their possession because the government itself did not “create, obtain, or control” the records). *Rocky Mt. Wild, Inc. v. United States Forest Serv.*, 878 F.3d 1258 (10th Cir. 2018). See also *DomainsNewMedia.com v. Hilton Head Island-Bluffton Chamber of Commerce*, 814 S.E.2d 513 (S.C. 2018) (deciding under a state access statute that a local Chamber of Commerce was not a public body and, therefore, not subject to South Carolina’s FOIA law despite its receipt of public funds for tourism).

p. 570, as new section “Trade Secrets and Commercial Information”: In 2019, the United States Supreme Court rejected a newspaper’s request for information about redemption patterns at each store that accepts federal food stamps. Under FOIA Exemption 4 such information would be considered “commercial or financial information obtained from a person and privileged or confidential,” the majority decided, because not only was such information kept secret by stores more generally, the government had promised that such data would be kept secret. “At least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy,” the Court wrote, “the information is ‘confidential’ within the meaning of Exemption 4.” In doing so, it rejected the newspaper’s argument that substantial competitive harm be shown before Exemption 4 applied. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

p. 573, as part of “‘Misuse’ and Delay”: Those numbers continue to grow since the publication of the casebook in 2015. “In F[iscal] Y[ear] 2016, the federal government overall received a record high 788,769 FOIA requests,” the Justice Department reported in its annual FOIA review. “This is a 10.6% increase of 75,601 requests from the 713,168 requests received during FY 2015.” The number of backlogged requests was down from the extraordinary 160,000 figure from 2014 but up from 2015 numbers: “The total number of backlogged requests across the government at the end of FY 2016 was 115,080, which is an 11.9% increase from the number of backlogged requests reported at the end of FY 2015.”

The 2017 report showed another record rise in FOIA requests. “Agencies responded by processing more than they received at over 820,000 requests,” the government explained, with the suggestion that the backlog had been reduced by 3.2%. “As in prior years,” the report noted, “the most cited FOIA exemptions were for the protection of personal privacy (Exemptions 6 and 7(C)). The top four agencies that received and processed the most requests as part of these efforts were the Departments of Homeland Security, Justice, and Defense, and the National Archives and Records Administration.”

In 2018, there was still greater growth as the federal government received a record high of 863,729 Freedom of Information Act (“FOIA”) requests. Meantime, the total number of backlogged

requests at the end of FY 2018 was 130,718, a 17.4% increase from the number of backlogged requests reported at the end of FY 2017.

At the end of the 2018 fiscal year, agencies reported collecting a total of \$2,981,312.77 in FOIA fees.

During this time, the D.C. Circuit criticized the government's response in two FOIA-based cases. In the first, the court condemned the Secret Service for failing to promptly respond to requests regarding government VIP travel expenses when FOIA mandates that agencies make information "promptly available." The court found such a failure—the Secret Service had apparently been non-responsive until the requester filed a lawsuit—sufficient evidence of a "policy or practice" of withholding records antithetical to FOIA's purpose. On remand, the court wrote, the Secret Service should "explain its delays [and] confirm how it intends in the future to conform to FOIA's mandate to make requested non-exempt records 'promptly available.'" *Judicial Watch, Inc. v. United States Dep't of Homeland Sec.*, 895 F.3d 770 (D.C. Cir. 2018).

In the second, the D.C. Circuit decided that the FBI had failed to prove that it had adequately searched for pertinent records regarding its purported undercover tactic of impersonating media and creating fake news. The trial court had decided that the FBI had done the necessary work to find those records, but the appellate court reversed. Among other things, the appeals court found that the record was "utterly silent" as to precisely what files had been searched and called that a clear "defect" when compared with more substantive FBI responses. *Reporters Comm. for Freedom of the Press v. FBI*, 877 F.3d 399 (D.C. Cir. 2017).

On the state level, covered in greater depth later in this chapter, the Associated Press reported in 2017 that a different type of delay tactic by government entities had emerged: Instead of responding to requests for access, states had started to file lawsuits against the requesters, arguing that the information requested should be protected before any response was due. Ryan J. Foley, "Governments turn tables by suing public records requesters," *Associated Press* (Sept. 18, 2017). The lawsuits do not ask for damages but ask courts to rule that the requested information is off limits before any response from the state. The AP interviewed FOIA advocates who maintained that this "recent trend" was "a new way for governments to hide information, delay disclosure and intimidate critics."

p. 574: In 2016, Congress amended FOIA in part to describe more clearly the role of the Office of Governmental Information Services. The new provisions increased the number of disputes mediated by OGIS. In 2018, OGIS reported that it had handled more than 15,000 cases since its inception in 2009 and had closed approximately 4,700 requests for assistance that year alone.

p. 574: The D.C. Circuit decided that a government official's emails on a private organization's server that related to official government business must be turned over. "If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his department emails on an account in another domain," it would be inconsistent with FOIA. "It would make as much sense to say that the department head could deprive requestors of hard-copy documents by leaving them in a file at his daughter's house and then claiming that they are under her control." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016). See also *Toensing v. Attorney General of Vermont*, 178

A.3d 1000 (Vt. 2017) (state definition of “‘public record’ includes digital documents stored in private accounts” and, therefore, state must ask its employees to search personal accounts in response to a public records request); *Center for Biological Diversity v. U.S. Environmental Protection Agency*, 369 F. Supp. 3d 1 (D.D.C. 2019) (EPA must disclose PowerPoint slide presentation files containing “non-deliberative, factual information”).

a. Access to Information and National Security

p. 576-578: The court in *Cameranesi v. United States DOD*, 856 F.3d 626 (9th Cir. 2017), held that the names of students and teachers affiliated with the Western Hemisphere Institute for Security Cooperation, a training facility that includes mandatory training in human rights and civilian military control, should not be released to a human rights advocacy group that had requested the information. “Here, the evidence submitted by the [Department of Defense] demonstrated that disclosure of the identities of foreign WHINSEC students and instructors would give rise to possible harassment, stigma, or violence as a result of their association with the United States,” the court wrote. These are “exactly the sorts of risks that courts have recognized as nontrivial in previous cases.” It further held that disclosure of the names would not contribute to the public’s understanding of government operations. See also *Dhiab v. Trump*, 852 F.3d 1087 (D.C. Cir. 2017) (holding that secret recordings of government individuals forcefeeding a detainee who was on a hunger strike would remain sealed because of national security interests, including “detainees triggering forcible encounters and developing countermeasures”). See also *Clark County School District v. Las Vegas Review-Journal*, 429 P.3d 313 (Nev. 2018) (applying state access law and adopting the test from *Cameranesi* that “shifts the burden of proof onto the party seeking disclosure, to show the interest in the information sought”; but the nontrivial personal privacy interest of a person named in an investigative report may warrant redaction,” the court wrote, including those “who may face stigma or backlash for coming forward or being part of [a school district’s] investigation” into sexual harassment by an elected trustee).

p. 578, as part of “State Secrets”: In 2018, the United States Army Court of Criminal Appeals rejected Chelsea Manning’s First Amendment-based defenses to her conviction for “wantonly causing intelligence to be published” to Wikileaks. *United States v. Manning*, 78 M.J. 501 (Army Ct. Crim. App. 2018). “United States courts have repeatedly held that the First Amendment does not protect unauthorized disclosures of classified information,” the court wrote, explaining that to hold otherwise would “permit the thief . . . to prostitute the salutary purposes of the First Amendment.”

b. Open Government: Promises and Responses

p. 579: “A growing body of evidence indicates that all levels of government in the United States are becoming more secretive and controlling of information,” a 2017 Knight Foundation report on FOIA maintained, predicting even greater secrecy under President Trump. A 2018 Associated Press report found that that prediction had materialized: under the Trump administration, “the federal government censored, withheld or said it couldn’t find records sought by citizens, journalists and others more often [during the studied period] than at any point in the past decade.”

Ted Bridis, “US sets new record for censoring, withholding gov’t files,” Associated Press (Mar. 12, 2018).

In 2019, the Foundations of Evidence-Based Policymaking Act which included the Open, Public, Electronic, and Necessary Government Data Act (OPEN Government Data Act) became law. The OPEN Government Data Act requires federal agencies to make government data assets available to be published as machine-readable data. The government agencies are required to: (1) make the data inventories available to the public on data.gov; (2) use an open format when they obtain a new government data asset; and (3) consult with the Office of Management and Budget, the General Services Administration, and the National Archives and Records Administration to review their enterprise data inventories.

2. State Open Records Acts

p. 582: In *ACLU v. City of Eugene*, 380 P.3d 281 (Ore. 2016), the court ordered certain police personnel records released, ruling that the public interest in use of force by police officers—here, the use of a Taser and other physical force during a protest gathering—was a stronger interest than the police officers’ privacy interests. A civilian review board, founded as an independent oversight body, had agreed with police authorities that the officers had used appropriate force, and the statute at issue exempted from public access personnel information if the original complaint did not result in disciplinary charges. The court wrote that such an exemption was conditional and required balancing with the public interest in the case, noting the “full disclosure may serve the public’s interest in promoting public trust in governmental action.”

p. 582-584, add to “Crime-Related Information and State Access Laws”: See also *ACLU v Superior Court*, 400 P.3d 432 (Cal. 2017) (refusing to release raw video from police license plate scanners given that “the public interest in nondisclosure of raw [police license plate] scan data clearly outweighs the public interest in disclosure” but also remanding “for further consideration of whether the raw data may reasonably be anonymized or redacted such that the balance of interests would shift and disclosure of the data would be required”); *Matter of Friedman v. Rice*, 90 N.E.3d 800 (N.Y. 2017) (ruling that victim statements filed as part of police reports should be disclosed unless the source was promised confidentiality or the need for confidentiality could reasonably be inferred from case facts); *State ex rel. Cincinnati Enquirer v. Ohio Dep’t of Pub. Safety*, 71 N.E.3d 258 (Ohio 2016) (deciding that dash-cam videos of police pursuits are “records” within state FOIA law but also ruling that such dash-cam videos require case-by-case review to decide how much should be disclosed). See also *N. Jersey Media Grp., Inc. v. Tp. of Lyndhurst*, 163 A.3d 887 (N.J. 2017) (deciding that certain records of fatal police shooting, including dash-cam recordings and use-of-force reports, were subject to disclosure). But see *Paff v. Ocean County Prosecutor’s Office*, 192 A.3d 975 (N.J. 2018) (a mobile video recorder recording depicting an arrest in a public place that reveals no private information and does not reveal the driver’s face may be released, but “[i]n other settings, a third party’s reasonable expectation of privacy may warrant withholding a record from disclosure” and a court should, “in making these sensitive determinations,” “give serious consideration to the objections of individuals whose privacy interests are implicated”).

p. 584: In *Detroit Free Press v. United States DOJ*, 829 F.3d 478 (6th Cir. 2016) (en banc), the court overturned its 1996 mugshot decision, noted on page 583-84 of the casebook, as “untenable” and ruled that “[i]ndividuals enjoy a non-trivial privacy interest in their booking photos.” It noted that today mugshots could well haunt an individual for decades and that therefore a policy favoring disclosure was inappropriate. Instead, it created a balancing test in which the public interest in some arrests can outweigh an individual’s privacy interests but described those public interests as only those that would contribute to understanding of government and its operations and activities, not simply public interest in seeing others’ mugshots.

p. 587: In a FERPA-FOIA conflict case, the court ruled that a balancing test was appropriate, one that considered both public interest in the underlying matter and privacy interests in a case involving a records request at a public university regarding a student accused of sexual assault. “Both parties argue at great length about various factors at issue here,” the court wrote, “such as the publicity that has followed this case, the source of the original request, the reasons behind the request, the named student’s status as an athlete at a publicly-funded university, and the prior litigation, all of which may be considered and [weighed] by the District Court when conducting the balancing test.” *Krakauer v. State*, 381 P.3d 524 (Mont. 2016).

B. Access to Governmental Meetings

2. State Laws

pp. 591-592: See also *Boelter v. Board of Selectmen of Wayland*, 93 N.E.3d 1163 (Mass. 2018) (finding that a board’s review of the town administrator, including its electronic circulation of “board members’ individual written evaluations as well as a composite written evaluation” in advance of the public meeting, violated the open meeting law because such electronic opinion-related discussion fell within “deliberation” contemplated by the law); *Krueger v. Appleton Area School Board*, 898 N.W.2d 35 (Wis. 2017) (ruling that the school board’s Materials Review Committee was a governmental body and, therefore, subject to the state’s open meetings law).

C. Access to Institutions

p. 602, add to “Inmate Interviews”: In 2018, the Sixth Circuit upheld a restriction on in-person interviews with former prison rioters. Prisoners could talk on the phone or write letters to communicate with journalists, the court held, rejecting the journalists’ argument that “in-person interviews are an ‘essential part’ of journalism with ‘no ready substitute.’” *Hanrahan v. Mohr*, 905 F.3d 947 (6th Cir. 2018)

p. 603: Additional cases involving requests for execution information have been decided in a way that protects the privacy of those who contribute in some way to executions. See *Mississippi*

Department of Corrections v. Roderick & Solange MacArthur Justice Center, 220 So. 3d 929 (Miss. 2017) (execution protocols not released) and Bray v. Lombardi, 516 S.W.3d 839 (Mo. Ct. App. 2017) (identities of pharmacists not released). See also Arkansas Department of Corrections, 541 S.W.3d 410 (Ark. 2018) (identity of execution drug manufacturers not confidential but redaction of “lot, batch, and/or control numbers was necessary because that information could lead to the identification of other sellers and suppliers in the chain of distribution” and state law protects the identities of those involved in executions).

p. 624, add to “Discrimination Against Individuals”: In 2018, after the White House revoked correspondent Jim Acosta’s credentials, Cable News Network (CNN) sued the Trump Administration in the United States District Court for the District of Columbia. The judge ordered that Acosta’s pass be reinstated pending the trial’s outcome, explaining that Acosta had been denied appropriate process. CNN dropped the lawsuit once the White House agreed to reinstate Acosta’s pass. Paul Farhi and Meagan Flynn, “CNN drops suit against White House after Acosta’s press pass is fully restored,” Wash. Post (November 19, 2018). The network had used President Trump’s words in its complaint—that reporter Jim Acosta had failed to “treat the White House with respect” at a White House press briefing and, therefore, had lost the right to attend such events—arguing that such denial of access violated the reporter’s First Amendment rights as well as the Administrative Procedure Act. Cable News Network v. Trump, 2018 WL 5920424 (D.D.C. Nov. 13, 2018) (complaint only).

Chapter XI

Access to Judicial Proceedings

A. Access to Courtrooms

a. Criminal Proceedings

p. 648, as part of “Voir Dire”: The District of Columbia’s highest court refused to reverse a defendant’s firearm convictions after a trial court judge conducted individual voir dire at the bench with a white noise machine turned on so that those in the courtroom could not hear what was being said. The court reasoned that the defendant’s right to a public trial had not been violated. Blades v. United States, 200 A.3d 230 (D.C. 2019).

c. Terrorism Cases

p. 662, add to “Secret Dockets”: See also In re Leopold, 300 F. Supp. 3d 61 (D.D.C. 2018) (“This is not the only court with a significant volume of sealed government surveillance records on secret dockets that remain inaccessible to the public.”)

2. Civil Trials

p. 664-66, add to “Immigration Hearings”: See also *Stevens v. Osuana*, 877 F.3d 1293 (11th Cir. 2017), finding that an immigration hearing judge was entitled to absolute immunity for his decision to close an immigration hearing to a journalist-professor. The judge had authority to close the hearing to protect witnesses, parties, or the public interest and such authority “implies necessarily the power to remove a person from the courtroom (and court building),” the court wrote, finding that the judge did not act in “clear absence of all jurisdiction” in ordering the journalist-professor’s removal because rules gave immigration hearing judges the power to close hearings in the interests of protecting witnesses, parties, or public interests).

C. Access to Judicial Records and Discovery Materials

p. 678: *Brown v. Maxwell*, 2019 U.S. App. Lexis 19981 (2d Cir. July 3, 2019), considered both the common law and First Amendment access to court records. The case concerned financier Jeffrey Epstein’s original criminal proceedings for soliciting and procuring girls under 18 for prostitution purposes, a publicist’s claims that the girls’ allegations were untrue, and resulting defamation claims brought by those alleged victims. While the judges ordered that summary judgment documents in the case be minimally redacted for personally identifying information and unsealed—deciding that the lower court judge had not given proper weight to a presumption of access, had failed to review the documents at issue specifically and had instead handed down a sweeping closure order, and that there was “no countervailing privacy interest sufficient to justify their continued sealing”—they ordered that the trial court review other sealed documents for privacy interests. The court was especially concerned about the use of court filings “to ‘promote scandal arising out of unproven potentially libelous statements’” and suggested that certain filings in the continuing case—“motions to compel testimony, to quash trial subpoenas, and to exclude certain deposition testimony”—did not have the same strong presumption of access as did the summary judgment materials because they were not necessarily “relevant to the performance of the judicial function” that supported access.

The Second Circuit then suggested that trial court judges could keep certain scandalous filings out of public hands by issuing protective orders forbidding dissemination of certain material “to protect a party or person from annoyance, embarrassment, oppression, or undue burden,” to explain on the record that the statements seemingly lack credibility, to use the federal rules to strike filings that are “redundant, immaterial, impertinent, or scandalous,” and to sanction attorneys who file such materials.

Finally, the judges suggested that media and other courtwatchers educate themselves about such filings—those “prepared by parties seeking to advance their own interests in an adversarial process.” The media, the opinion reads, “does the public a profound disservice when it reports on parties’ allegations uncritically.” Media should hesitate to use the term “court records” when referring to such filings, the court wrote, because it gives credibility to allegations even when they lack credibility. “We therefore urge the media to exercise restraint in covering potentially defamatory allegations, and we caution the public to read such accounts with discernment.”

As the Second Circuit had ordered, certain documents in the case were released in August 2019. Jeffrey Epstein was found dead the next day. “Epstein dies after release of documents,” CBS News (Aug. 10, 2019).

2. First Amendment Access

p. 680: See also *People v. Owens*, 420 P.3d 257 (Colo. 2018) (holding that post-conviction motions should remain sealed and upholding a protective order in a 2017 murder case because neither the First Amendment nor the Colorado constitution provide an unfettered access right to all court documents, even when the underlying cases are ones of public concern).

A legal information service known as Courthouse News Service has sued court clerks around the country for immediate access to court filings, including complaints, arguing that the First Amendment is implicated when clerks do not instantly give the press and public such access. In 2018, the Seventh Circuit reversed a lower court’s order and refused to find a First Amendment violation. An order forcing court clerks to give immediate access would be “perhaps even hypocritical,” the court explained, because federal courts did not give immediate access. “Adhering to the principles of equity, comity, and federalism, we conclude that the district court should have abstained from exercising jurisdiction over this case,” the court wrote, adding that “the press’s right of access to court documents is not absolute—it is qualified.” *Courthouse News Service v. Brown*, 908 F.3d 1063 (7th Cir. 2018). See also *Courthouse News Service v. Yamasaki*, 2018 Media L. Rep. 397 (C.D. Cal. Aug. 13, 2018) (because “95% to 99% of new complaints are made available within one business day,” the clerk’s review to be sure that no private information is within a complaint before posting it “does not burden substantially more access than necessary”).

3. Access to Specific Types of Documents

b. Documents Related to Civil Proceedings

p. 691: In 2017, the Sixth Circuit decided a case involving post-trial secrecy, one it described as a case of first impression, asking “whether and under what circumstances a court can properly protect a party’s anonymity after judgment.” *Signature Mgmt. Team v. Doe*, 876 F.3d 831 (6th Cir. 2017). The case involved a blogger who had released a copyrighted book as a part of work that criticized marketing companies. In the resulting copyright infringement action, the court agreed to protect the blogger’s identity, reasoning that a fair use defense could ultimately protect the blogger and make his identity immaterial. When the blogger lost the case, the trial court still found his identity immaterial to the copyright holder’s winning claim for injunctive relief.

On appeal, the Sixth Circuit remanded, explaining that a presumption existed in favor of unmasking anonymous defendants when plaintiffs win, given longstanding interests in open judicial records. It also recognized, however, that the presumption may be stronger or weaker depending upon the precise facts of the underlying case—and held that a defendant such as the blogger might be able to rebut the presumption by showing that his speech would be chilled if his identity were revealed.

On remand, the trial court held that the blogger’s identity should continue to be protected, concerned that another blogger in a similar situation had been threatened and harassed once his identity became known. 323 F. Supp. 3d 954 (E.D. Mich. 2018).

pp. 693-694, add to “Settlements”: Two trial court decisions involved high-profile parties and apparent settlements in their high-profile litigation.

In the first, *Hardy v. Kaszycki & Sons*, 46 Media L. Rep. 1466 (S.D.N.Y. 2017), the court unsealed information regarding a settlement between Donald Trump and the Trump Organization and a New York demolition workers union after a request by news organizations. Trump attorneys had argued that continued sealing was appropriate given society’s general interest in maintaining settlement agreements and the Trump Organization’s reliance on the fact that the information would not later be revealed. But the court disagreed and ordered that a settlement transcript, a brief, and two court orders relating to the settlement be unsealed on First Amendment and common law grounds.

In the second, former television host Bill O’Reilly moved to seal two settlement agreements relating to claims against him for sexual harassment. *Bernsten v. O’Reilly*, 307 F. Supp. 3d 161 (S.D.N.Y. 2018). The court refused, citing “a long-established ‘general presumption in favor of public access to judicial documents’” and noting that O’Reilly had “not even come close to rebutting this First Amendment presumption” by raising only “generalized ‘privacy interests,’ ‘embarrassing conduct’ and the overarching policy goals of maintaining confidentiality in private agreements.” The court also rejected O’Reilly’s request for partial redaction of the agreements.