

January 22, 2014

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

– U.S. Constitution Amendment 1

## The Changing Face of the Supreme Court

- Justice M. Sonia Sotomayor – October Term 2009
- Justice Elena Kagan – October Term 2010

## Who’s Next...

- Ruth Bader Ginsburg – 81
- Anthony Kennedy – 77
- Antonin Scalia – 78

## Does Anyone Care?

- Supreme Court seeing lowest popularity numbers in history

## Cell Phones

- For years, the National Security Agency has been monitoring phone calls, emails and Internet use of private citizens and Edward Snowden is in trouble for making that known.

## Cigarette Labels

- The U.S. Court of Appeals for the D.C. Circuit rules that compelled graphic warnings on cigarette labels are a violation of the First Amendment.
- The Sixth Circuit issued a contrary ruling in a similar case.
- The U.S. Supreme Court may decide the issue.

## Facebook

- Is it speech to “like” a Facebook page?
  - Hampton Sherriff tried to fire employees who “liked” his opponents Facebook page.
- What about being a friend?
  - McGaha v. Commonwealth, 2013 WL 3123446 (Ky. June 20, 2013) (Being a “friend” does not establish a close relationship.)
  - Sluss v. Commonwealth, 382 S.W. 3d 215 (Ky.2012) (Being a “friend” does not establish juror bias.)

## Redskins

- Is the nickname of one of America’s favorite professional football teams disparaging to “a substantial composite” of American Indians?
- Government cannot force private business to change the name

- A civil wrong is called a "tort"

**Tort:** A civil wrong by one person against another

*January 29, 2014*

"The freedom that the First Amendment protects is not... an absence of regulation. It is the presence of self-government." – Alexander Micklejohn

## Jurisdiction

**Jurisdiction:** The area over which a court has authority; The power and authority of a court to hear and determine a judicial proceeding; The area may be geographic or based on subject matter of the case. If a court does not have jurisdiction, it may not render a legal decision in the matter

- Federal
- State

## Types of Lawsuits

- Criminal
- Civil

## Types of Courts

- Trial

- Courts of original jurisdiction

- Fact finding courts

- A jury or judge determines what the facts are and based on those facts render a verdict

- Appellate

**Appellate Court:** A court that has jurisdiction to hear cases on appeal

**Appeal:** A plea to a higher court to alter or overturn a judgment of a lower court because of errors of law

**Appellant:** The party who appeals a court's decision, requesting that a higher court review the ruling or rulings of the lower court

**Appellee:** The party against whom an appeal is taken; that is, the party who won the case in the lower court

- Courts of review
- Determine whether the law has been properly applied

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- Name of lawsuits
  - Name bringing the lawsuit always comes first
    - Commonwealth of Virginia v. Putney Pornographer – Commonwealth v. Pornographer
      - Putney Appeal: Pornographer v. Commonwealth
      - Reaches Supreme Court: Pornographer v. Virginia

## The Supreme Court

- Writ of certiorari filed

**Certiorari:** The name of a writ issue by the U.S. Supreme Court when it agrees to review a case; It is an order to the lower court to send up the records. Some state supreme courts also use the term

**Writ:** An order by a court requiring some action or giving authority and commission to that act

- Cert is granted
  - Takes four votes for the court to accept the case
  - Dissent from the denial of court may be written by a justice as to why he or she did not vote to accept the case
- Oral Arguments
  - 30 minutes per side
  - Party bringing the case speaks first
- Discussion of conference
- Opinions circulated to the justices
- Opinion delivered

## Supreme Court Opinions

- Tells us the outcome of the case and the rationale of the outcome of the case
- Opinion of the Court: The majority, and therefore, controlling opinion. It expresses the judgment of the Court and the rationale behind that judgment
  - What happen and why it happen
- Judgment of the Court: The result or outcome
- Plurality Opinion: In the absence of an Opinion of the Court, the opinion that commands the most votes
- Per Curiam: An unsigned opinion "by the court"
- Concurring Opinion: An opinion agreeing with the Opinion of the Court but written to highlight or emphasize a particular point or points
- Opinion concurring in judgment: An opinion agreeing with the majority or plurality opinion, but not with the rationale
  - The justice is not counted as part of the majority or plurality

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# Communication Law

EXAM 1

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## Expressive Conduct and the Court

- Is the conduct expressive?
  - Is there an intent to express a message?
  - Is a likelihood the message will be understood by witnesses?
- Is the regulation aimed at suppressing speech?
  - Yes: Strict Scrutiny
  - No: Intermediate Scrutiny

February 5, 2014

"Assassination is the most severe form of censorship" – Oscar Wilde

## Strict Scrutiny

**Strict Scrutiny:** A test to determine whether a regulation is constitutional; The test is used when regulation is directed at the suppression of expression; Under the test, the regulation is constitutional if it meets a compelling government interest and is narrowly tailored

- Does the regulation advance a compelling government interest?

**Compelling Government Interest:** An overriding interest advocated by the government that must be proved in order for a regulation aimed at suppressing expression to be found constitutional. In such cases, the government must also prove the regulation is narrowly tailored

- Is the regulation necessary and narrowly tailored?
  - Specifically aimed at restricting the content of expression

## Intermediate Scrutiny Test (The O'Brien Test)

- Is the government regulation within the constitutional power of the government?
- Does the regulation advance an important or substantial government interest?
- Is the expressed interest unrelated to the suppression of free expression?
- Is the incidental restriction of expression no greater than necessary to further the government interest?

## Texas v. Johnson

- 1989
- Was the conduct expressive?
  - "The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent."

- Texas expressed two governmental interests in prohibiting flag burning
  - The prevention of a breach of peace
    - Does the government have the constitutional power to regulate activity that might breach the peace?
      - Yes
    - Does the regulation further an important or substantial government interest?
      - Yes
    - Is the interest in maintaining the peace unrelated to the suppression of expression?
      - Yes
    - Is the incidental restriction of free expression no greater than is essential to the furtherance of the stated interest?
      - No
  - Preserving the flag as a symbol of nationhood and national unity
    - Is that interest directly related to freedom of expression?
      - Yes: Strict Scrutiny
        - Is there a compelling government interest?
          - Yes
        - Is the regulation necessary and narrowly tailored to advance that interest?
          - No
- Is the regulation aimed at suppressing speech?
  - Yes

## Speech As Conduct

- Cohen v. California
  - 1971
  - "Cohen's absurd and immature antic... was mainly conduct and little speech."
  - "We cannot overlook the fact, because it was well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: It conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive function. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for the emotive..." – Justice John Marshall Harlan

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### Federal Trade Commission Remedies After the Fact

- Consent Decrees
  - The FTC and advertiser agree on how the complaint will be resolved
  - Asks advertiser to change their ad
  - Almost 90% of their cases settled this way
- Cease and Desist Order
  - Order to stop the advertising following a complaint filed by the FTC
  - Field if the order is in the public interest and issued by an administrative law judge
    - An order can be appealed to the full commission and then into federal courts
- Injunction
  - Orders by federal judges
  - Orders and immediate halt of an ad
  - Usually when the public health might be at risk
- Affirmative Disclosure
  - An order requiring statements in future advertising designed to provide certain information that was not provided in previous advertising
- Corrective Advertising
  - A requirement that an advertiser use language specifically designed to correct impressions that may have been caused by misleading language in previous advertising
- Civil Penalties
- Criminal Penalties

### Advertising and the Law

- Advertising is a "particularly sturdy" form of speech
- Commercial speech enjoys limited First Amendment protection
- The Supreme Court established the Central Hudson test to determine when regulation is constitutional
- The Federal Trade Commission regulates speech

March 5, 2014

"Red Lion adopted and *Pacifica* reaffirmed a legal rule that lacks any textual basis in the Constitution... Moreover, traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were." – Justice Clarence Thomas: *FCC v. Pacifica*

- The Supreme Court denies certiorari
- Miler still won't talk and is sent to jail
- Cooper's source gives him permission to talk
- Karl Rove is source
- Wen Ho Lee sues the federal government
  - Five reporters refuse to reveal their sources and are held in contempt of court
  - The case is appealed
  - Five major news organizations pay \$750,000 to settle
    - Jane Kirtley calls this "blood money"

**Reporter's Privilege:** The right of a journalist to keep the identities of sources or other information confidential

#### Shield Law

**Shield Law:** A statute providing journalists a testimonial privilege

- Protect journalists from being forced to reveal their sources unless government demonstrates a crucial need for the information
- Shield laws vary widely from state to state but all share three basic characteristics
  - Define whom laws protect
  - Define what the laws protect
    - Confidential sources identities
    - Unpublished non-confidential information
  - Define how the protection is qualified
    - Sometimes by omission
- Advantages
  - Legislatures can define classes of persons to favor, as long as by doing so they do not strip others of their constitutional rights
  - Courts can often take years to fully develop the parameters of constitutional rights
    - Legislatures can move much more quickly if they choose to do so
  - Legislatures can amend shield laws to take account of new technologies or controversies more quickly than the other courts can react to the same issue

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### Pre-Defense Defenses

- Summary judgment

**Summary Judgment:** A ruling by a judge that there is no dispute of material fact between the two parties in a case, and that one party should win the case as a matter of law

- Taking all reasonable inferences in a light most favorable to the plaintiff
- A reasonable juror acting reasonably could not find for the plaintiff
- Under the appropriate burden of proof

- Statute of Limitations

**Statute of Limitations:** The time period in which a civil tort or criminal action must be brought

- Varies from jurisdiction

### Defenses Strategies

- Defeat an element of the plaintiffs burden of proof
- Assert a complete defense

- Truth

- Very difficult

- What was published must be true

- The proof must be as broad as the charge

- Substantial truth is sufficient

- Qualified Privilege

- Opinion

- Assert a partial defense

- A defense that works in some but not all states

- A defense that may mitigate or eliminate some or all defenses

*April 28, 2014*

### Qualified Privilege

**Qualified Privilege:** A privilege to report information that appears absolutely privileged for a, if certain conditions or qualification are met, that is, if the report is accurate, fair and made without common law malice

- Best defense to use
- Easy and complete

- Restatement (Second) of the Law of Torts
  - 1965
  - William L. Prosser and Privacy
  - 48 Cal. L. Rev. 383 1960
    - Appropriation
    - Intrusion
    - Private information
    - False light

#### Appropriation Tort

- The use of a persons name, likeness or image without permission for commercial gain
- Usually involves advertising
- The law allows news media to sell themselves

#### Intrusion Tort

- The act of physically invading a place where a person has a reasonable expectation of privacy
- Ride-alongs revised
  - Wilson v. Layne
  - Hanlon v. Berger

#### Publication of Private Information

- There is publicity about private facts that are not legitimate public interest and are highly offensive nature to a reasonable person
  - Note every state recognizes this
  - In Virginia this does not exist
- There is publicity
- About private facts
- Of a highly offensive nature to a reasonable person
- That are not of public interest

#### False Light Invasion of Privacy

**False Light:** The privacy tort which protects individuals from the publication of material that is not necessarily defamatory but is false and offensive

- The widespread publication of false information that is highly offensive to a reasonable person with actual malice
- Defamation is not an element
- Cases have been won based on publications that were positive

### Privacy in the Digital Age

- Giving up your own privacy by sending nudes, does that make it okay for me to go take pictures of her through her window is she willingly sent me the pictures to begin with?
- If it's in public can it be private?
- Are there times when what occurs in public should be private?
  - Kevin Ware's injury

*May 5, 2014*

### **Intentional Infliction of Emotional Distress**

#### The Conduct

1. Must be intentional or reckless
2. It must offend generally accepted standards of decency or morality
3. It must cause emotional distress
4. The emotional distress must be severe
5. And for public persons the publication must be made with actual malice

#### Hustler v. Falwell

- 1988
- Larry Flynt and Jerry Falwell were best friends
- Campari ad in Hustler magazine
  - "You'll never forget your first time"
- Assumed it was talking about their sexual experience, but it is the first time they tasted the liquor
- Hustler took the format and this fictional interview, Falwell says his first experience was drunk in an outhouse with his mother – was not happy
- Falwell sued Hustler for invasion of privacy, libel, and intentional infliction of emotional distress
  - The judge dismissed the invasion of privacy because it is not recognized in Virginia
  - Jury found in favor for Hustler for Libel
    - No reasonable person would believe this to be true
  - Also rewarded him in compensatory and punitive damages for infliction of distress