

(Intro music)

Hillel Aron: Welcome to Sidebar, a podcast from Courthouse News. Today: jokes – the good, the bad, the illegal and the ones left unprotected by the Constitution. Maybe. From our Rocky Mountain bureau high up in Denver, here's Amanda Pampuro with the story. Hey Amanda.

Amanda Pampuro: Hey Hillel.

HA: So, you want to hear a joke?

AP: OK.

HA: Why don't lawsuits last very long?

AP: I don't know, why?

HA: Because most lawyers have briefcases. Brief. Cases. Get it?

AP: Yeah, I got it.

HA: OK, let me try another one. Why did the judge throw out a lawsuit against Starbucks? He said the plaintiff had no grounds. No grounds. It's a double meaning.

AP: Man, that's really bad.

HA: You want to hear another one?

AP: No, please no.

HA: But they were pretty funny, right?

AP: Eh.

HA: Aren't jokes great? But there's a dark side to jokes, isn't there? A dark, legal side.

AP: My "Walking Dead" collection has its own bookshelf, so when the pandemic broke out in March 2020, I remember sitting in this weird space between laughter and fear asking, is this what it would be like?

Waylon Bailey: The whole premise behind the joke was that people will believe anything they see on Facebook.

AP: This is Waylon Bailey, he's from a small town in Louisiana known for growing trees. It's called Forest Hill.

WB: Everything we talked about growing up, if it was a serious situation or wasn't, we just kind of got through it, you know, with laughter. My mom, she's really quick, she's really sharp and it kept me on my toes all growing up. Still does, I mean, I'm 30 years old and she still keeps me on my toes for sure.

AP: When the pandemic hit in March 2020, Waylon, like a lot of Americans, was already spending a lot of time on Facebook.

WB: I was semi-addicted to that thing. I was just you know, your typical Facebook comedian regular guy that just would post funny stuff that I thought was funny just to get a kick out of things. I wouldn't have posted anything like political or about race. I like to post what everyone's thinking, but no one says.

AP: One post in particular got him in trouble. Big trouble.

WB: I thought about that post too, and I was like this meets all the criteria. I even showed it to my brother and my dad, they laughed about it. They were like, "I don't know," and I was like, "No, I'm pretty sure it's all good."

AP: In all caps, Waylon wrote:

WB: Share, share, share.

AP: Followed by four red exclamation points and, "JUST IN: RAPIDES PARISH SHERIFFS OFFICE HAVE ISSUED THE ORDER, IF DEPUTIES COME INTO CONTACT WITH 'THE INFECTED' SHOOT ON SIGHT....Lord have mercy on us all. #Covid9teen #weneedyoubradpitt"

Brad Pitt: Just know I'm coming back.

AP: That's the 2013 movie "World War Z" where Brad Pitt's character springs into action to save the world from a zombie plague. Finally, Waylon typed a gasping emoji and a big red "X."

WB: A lot of laughs. I was waiting, and if there's a mad face or is upset, I will take it down immediately. And no one ever did. And then I forgot about the post, it was about an hour afterwards, I was like, "OK, well, that's dead, I'm over now." So, I was cleaning up my shop that I was trying to hang some bags and stuff in and workout because all the gyms were closing, and then all of a sudden, I look up from sweeping the floor and like there's like 15 guns in my face. And I was like, "Oh, OK, how can I help you guys?" And it was hard, really hard to take seriously at the time because like, I was just, I was like, "this is just so crazy. Somebody's got to be playing a joke on me."

AP: Nobody was laughing. In court documents, Detective Randall Iles said he did not draw his weapon before approaching Waylon and that he told Waylon the charges right then and there. Iles' attorney and the sheriff's department both declined to speak with us for this story. Waylon was booked. His fiancée posted bail, and Waylon says he didn't know what he'd been charged with until he got home.

WB: I was getting out of jail right then, and I was like, "what did I even get arrested for?" And my wife's like, "felony terrorism." And I'm like, "Uh, excuse me? Like what? There's no way." She's like, "Yeah, Waylon. Yeah, yeah, there is way because it's all over the news."

AP: Whether you're a professional or of the living room variety, it is rare to be prosecuted for telling a joke. But not unheard of. Over decades, the courts have opined on what it means to have the First Amendment right to free speech. Standup comic Lenny Bruce broke through some of the toughest barriers in the 1960s.

Lenny Bruce: Truth is what if every politician from the beginning is crooked, there is no crooked.

Douglas Linder: Prior to the Lenny Bruce trial, there was a great deal of confusion about the law as it relates to indecency and obscenity and at the time of the Lenny Bruce trial, those two words were used rather interchangeably.

AP: This is--

DL: --Douglas Linder. I teach constitutional law at the University of Missouri in Kansas City. Prior to the Bruce trial, you had the Supreme Court not really coming to a clear consensus as to what the law should be. You had nine justices, and they each oftentimes apply their own idiosyncratic facts for what violates the First Amendment and what doesn't. Right. You had some justices kind of throwing up their hands, like Justice Potter Stewart famously said, "You know, I can't define obscenity, but I know it when I see it."

AP: On October 4, 1961, police arrested Lenny Bruce at the Jazz Workshop in San Francisco where he was doing his set. They charged him with criminal obscenity for two phrases in particular:

LB: Cocksucker.

AP: --and--

LB: To is a preposition, come is a verb. To is a preposition, come is a verb. The verb intransitive, to come.

AP: You're hearing these how the prosecutor took them, totally out of context. Bruce was narrowly acquitted at his first trial in San Francisco. But one juror said he wanted to find Bruce guilty and thought the law should be changed to catch him the next time. They needn't worry about that. Over the next seven years, Bruce was arrested again and again in LA and Chicago and New York—sometimes for his speech, sometimes for his increasing dependency on drugs. Police asked to testify had to read out loud what they heard Lenny Bruce saying at the club, and Bruce would complain he was going to lose his case because of the cop's lousy delivery. All the while his act was on trial, prosecutors had to make the case that what Lenny Bruce said was illegal under the obscenity laws in light of *Roth v. United States*, decided in 1957. In that case, an erotica publisher prevailed because the work was not "utterly without redeeming social value." That standard held until 1973's *Miller v. California*, which established the three-prong Miller test. So, under Roth, is the word cocksucker inherently obscene, or is there a context where it has artistic merit? Twenty years later, the great George Carlin would argue it did.

George Carlin: We'll divide the word cock and sucker. Sucker isn't dirty, sucker, it's suggestive as hell, but it isn't dirty. And cock, that's not dirty all the time. That's one of those words that's only partly filthy. Cock, if you're talking about the animal, it's perfectly alright. They used to read that to us from the Bible in third grade.

DL: The Bruce trials focused on the language that the Supreme Court was using in its opinions at the time, they asked whether there is significant social value in what Bruce was saying, or was it just there for shock value? You had a number of people testify on that question. You know there was a lot of testimony as to whether it was patently offensive, applying the community standards, so the Supreme Court's language was kind of picked apart.

AP: Bruce beat charges in San Fran and Hollywood, but in New York he was sentenced to four months in a workhouse. They let him out on bail during the appeal. He died from a morphine overdose on August 3, 1966, just before the Court of Appeals overturned his conviction. He was just 40 years old. On paper, Lenny Bruce was cleared, but some say the prosecution killed him. One assistant district attorney confessed, "We drove him into poverty and bankruptcy and then murdered him. ... We all knew what we were doing. We used the law to kill him."

DL: The '60s were a turning point for a lot of things, it was a cultural revolution the '60s, the judiciary absorbed those changes like everybody else in some way and began to see things in a new light. There was more of an openness to ideas and recognition of the importance of allowing speech on controversial topics and even speech that might offend people. In fact, you really don't need a First Amendment to protect speech that doesn't offend anyone. That's why the First Amendment is there, to protect speech that is controversial and does offend people.

AP: Over the decades, the courts have hammered out very clear protections for free speech, comedy included.

HA: So, you know our producer, Kirk? I'm thinking about murdering him.

AP: Whoa, no, not cool.

HA: No, it's cool, I'm only joking.

AP: Well, first of all, not funny. Second of all, not all jokes are protected.

HA: Explain.

AP: There are still quite a few things you can get arrested or sued for.

Mike Gillis: You're calling for somebody to be murdered in a completely unsatirical way.

DL: If you're trying to incite a crime.

Marc Osrow: And fraud. Defamation is also not protected by the First Amendment if it's found to be defamation.

AP: Even then, the case has to be made in court.

HA: So, you can't threaten anyone, incite a crime or commit fraud in a joke. What else can't you do?

AP: Well... it's complicated.

HA: Like when a dog walks into a bar?

AP: Huh?

HA: The bartender says, “Hey dog, haven’t seen you in a while, how are things going?” The dog looks at him and says, “Ruff.”

AP: Eh, let me tell you one. What’s the difference between a bottle of Jack Daniel’s and a bottle of dog poop? Give up? That’s what’s so funny, apparently the average consumer can’t tell the difference either. At least that’s part of a lawsuit Jack Daniel’s filed against VIP Products in 2014 over the Bad Spaniels dog toy. The squeaky toy looks strikingly like the whiskey brand’s square bottle even though the label promises to be 100% smelly. A federal judge entered summary judgment on behalf of the booze company, then the Ninth Circuit reversed, so Jack hit the road to the Supreme Court.

Jim Flynn: There is a case I think that is gonna go a long way to defining how humor is viewed in the law and that’s the *Jack Daniel’s vs. VIP Products* case. My name is Jim Flynn. I’ve been an attorney now over 30 years and that whole time been involved in intellectual property matters, including trademark copyright defamation. So, trade dress is how does the product look? It includes the trademark but goes a little bit beyond that. The reason I think it’s so important from the perspective of humor and the law is it’s really a case about commercial speech. If you go back, when you look at humor in the law, Lenny Bruce was wrapped up really in the First Amendment because the claim was that what he was doing was obscene. Fast forward about 20 years: *Hustler vs. Falwell*, 1988.

AP: Italian liqueur company Campari used to run ads asking famous people about their “first time.” So, Hustler ran a spoof saying televangelist Jerry Falwell lost his virginity to his mom in an outhouse. Falwell’s defamation case went all the way up to the Supreme Court which found Hustler’s ad--

JF: --was imbued with the notion of social commentary. There was a lot of politics behind it.

AP: And Hustler won.

JF: Falwell was important because it eliminated not only the defamation claims, but the intentional infliction of emotional distress claims, and said, “hey, if somebody’s being humorous, or trying to be humorous or claiming to be humorous, you got to protect that.” Not subjectively, depending on whether the butt of the joke thought it was funny.

AP: Jack Daniel’s takes issue with VIP’s bottle of “Old Number 2 on your Tennessee Carpet,” and that raises new questions.

JF: The Jack Daniel’s case is interesting because under the First Amendment, what’s deemed commercial speech has always gotten a lower level of protection than political speech. And when you look at what the Supreme Court’s defined now in the Jack Daniel’s case, it’s really very commercially focused. It’s not about does VIP products want to make some political statement about Jack Daniel’s or Jerry Falwell or anyone else.

AP: There are a few ways the court can analyze the issue. First, under the Lanham Act, you can use the likelihood of confusion test. That’s the bedrock trademark law signed by President Harry Truman in 1946. To protect its trademark, Jack Daniel’s has to make sure no one else on the market has anything like it so customers don’t grab a bottle of cola or something, thinking it’s Jack Daniel’s.

Lisa Blatt: After a four-day trial, the district court found both infringement and dilution, the Ninth Circuit erroneously reversed both holdings.

AP: This is attorney Lisa Blatt, arguing before the Supreme Court on behalf of Jack Daniel's.

LB: As to infringement, the Ninth Circuit did not disturb the trial court's finding of likelihood of confusion. It instead reversed by applying an exception to the Lanham Act, that the Second Circuit in *Rogers vs. Grimaldi* invented for movie titles. Under Rogers an expressive work is allowed to confuse as long as the use of a mark is artistically relevant and not inherently misleading, but the Lanham Act has no exceptions for expressive works.

AP: Under the Ninth Circuit ruling, Jack Daniel's worries humor becomes a "get-out-of-the-Lanham-Act free card," making trademarks worthless.

LB: Ha, ha, ha is not a standard under the Lanham Act.

AP: This matters, VIP's attorney Bennett Cooper argued.

Bennett Cooper: In our popular culture, iconic brands are another kind of celebrity, people are constitutionally entitled to talk about celebrities, and yes, even make fun of them. Jack Daniel's advertised in its self-serious way that Jack is everyone's friend and Bad Spaniels is a parody playfully comparing Jack to man's other best friend. And it's clear in this case that what Jack Daniel's is complaining about is not Bad Spaniels as a designation of source. They are complaining about the speech, the parody, the comparison to dog poop and a Bad Spaniel, not the mark.

AP: Some are worried that if the court totally throws out the Rogers test, it could outlaw other parody products, not just Bad Spaniels. Too broad of a reading could also chill the speech of perfectly legal parodists without the resources that defend their claim in court. But unless they prevail, Jack Daniel's warned the precedent would stop someone like Nabisco from going after a marijuana edibles company that make Stoneos look too much like Oreos. A more narrow reading is more likely, but we don't know how or when the high court will decide the low-brow joke.

Kelsey Reichmann: Hi, this is Kelsey Reichmann, a reporter for Courthouse News based in Washington, D.C., where I cover the Supreme Court. From rulings on abortion and gun rights to who gets to decide if your student loan debt gets forgiven, we're covering everything that happens on 1 First Street. You can read more of my work at courthousenews.com. You can also follow me on Twitter @KelseyReichmann where I'm tweeting all things SCOTUS and the occasional cat photo. Now back to Sidebar, a podcast from Courthouse News.

HA: So, whatever happened to Waylon Bailey, the guy who made the zombie Facebook post. Is he in Guantanamo Bay or something?

AP: No. The district attorney never pursued the terrorism charge against Waylon Bailey, but he was still upset. He thought the police violated his right to free speech.

WB: I had some friends that worked for the other local police department, the APD. They're all "Yeah, it's messed up. It's messed up." But at the end of them saying "it's messed up," they said, "but you got to watch what you say." And I'm like, "no, no, I don't have to watch what I say. That's the First Amendment, that's in the Constitution." This is America. And everyone talks about freedom and all their rights, but I mean, like, they threw mine directly out the window.

AP: Waylon sued Rapides Parish Sheriff Mark Wood and Detective Randell Iles on September 21, 2020 in the Western District of Louisiana, citing First and Fourth Amendment violations. The judge found Wood and Iles entitled to qualified immunity and threw out the case in July of 2022.

Caroline Grace Brothers: So, qualified immunity is a doctrine invented by the Supreme Court in the 80s.

AP: This is--

CGB: --Caroline Grace Brothers, and I am an attorney for the Institute for Justice.

AP: The Institute picked up Bailey's case on appeal.

CGB: If you're trying to hold state or local government officials accountable for violating your rights, they are not going to be held accountable for that unless you can show that A. they violated your rights, and B. that your rights were clearly established at the time of their actions. And what that means in practice is even if the officials violated your rights, unless you can point to an identical case with identical facts, those officials are going to be let off the hook and you're not going to have a remedy for your right.

AP: Brothers also represented Anthony Novak in Parma, Ohio, when he made a Facebook page parodying his local police department. The posts included an equal opportunity job ad discouraging minorities from applying. There was also a new policy prohibiting people from feeding the homeless so they could starve them out of town.

AP: Would you mind introducing yourself for the tape?

Anthony Novak: I'm Anthony Novak and I was arrested for making a parody of my local police department.

AP: The Parma Police Department arrested Anthony Novak on the charge of disrupting public services, that's a fourth-degree felony. After he was acquitted by a jury, Anthony sued. And his First Amendment claims were shielded by qualified immunity.

AN: The court just basically said, "we don't actually care about you, or what you went through. We're just gonna protect the cops because they're cops."

AP: Anthony appealed to the Sixth Circuit, which affirmed. He petitioned the Supreme Court and was denied, but he did make a new friend.

MG: Mike Gillis, head writer for The Onion. Satire is very powerful rhetorical mode that allows you to hold up the foibles of society and sort of explode them and in the case of parody, do that by inhabiting the form itself and kind of making it devour itself from within.

AP: The satire publication The Onion submitted an amicus brief to the Supreme Court in support of Anthony Novak's case. It was written as a parody mocking legal briefs.

MG: I think what was very satisfying about writing the amicus was that its success, in itself, was a vindication of the defense that this should be a protected form of speech. What still exists in America is a very established tradition of First Amendment and parody law protection for parodists, like The Onion and for the average person. So, I think the unfortunate thing with this case is that there wasn't a definitive flow with the Supreme Court saying look, police should watch out when they try to trample on somebody's rights. With that said, I do think that like the history of precedent and for the First Amendment is still there and it's still intact. And it doesn't seem like it's being disassembled completely right now, although I do worry about cases like this being kind of a foot in the door.

AP: I still wonder is it legal for me to create a parody Parma Police Facebook page at this point.

MG: Yeah, no and I think that is we get into that in the brief as well. That's very real for us that discussion over what is the legal line for what we can publish, and even just a whiff of potential prosecution or legal fines that has a very significant chilling effect. And it's even sort of the intimation that this might happen, which I would also say not to be overly dramatic, but that's how most authoritarian regimes operate. It's not that Xi Jinping cracks down on everybody posting a Winnie the Pooh meme about him. It's that some people get hassled, some people get arrested, some people get threats. And then that's enough to create this cloud of confusion where you're suddenly wondering, oh, maybe I should just not do this. Maybe I shouldn't mock the government at all.

AP: I found it interesting on your website's FAQ it mentions do you want to sue us, well you can't. So how often does that arise?

MG: Well, it hasn't happened very recently, I would say that Donald Trump was one of the repeat offenders of threatening to sue us, and we just ignored it. So, I think that knowing that we stand on firm ground is really helpful there that, you know, when we got threats from him, this was pre-presidency when we were making fun of his tiny, shriveled penis. The claims that was libelous and they were going to sue us into the ground. We just had legal counsel that told us we're fine and that's not how it works. The reason we need blanket protection for speech is that everyone has that instinctive drive to shut down conversation when they deem it offensive or when they feel like it's threatening their power. Until I think when you have the most powerful people in the country, like police officers, Supreme Court justices, responsible for deciding where that line is when something has gone past offensive and needs to be shut down because it's dangerous, I think that's a set up for a really troubling future.

AP: At this point, the way that Anthony Novak's case ended, is it or is it not legal to put up a parody page of the Parma Police Department?

CGB: It is an open question, unfortunately.

AP: Caroline Grace Brothers.

CGB: Let me back up. Parody is broadly protected by the First Amendment. That has never been a question. The Sixth Circuit Court of Appeals ended up basing its qualified immunity decision on the fact that Novak had reposted a warning that the police department posted on its official page, saying that this was the official page and that they were investigating the fake page and he reposted that to his page, and then deleted comments saying that his page was fake. The court ended up focusing in on those two-minute details of the case, saying that, well, no previous cases clearly established that those

two actions were protected by the First Amendment, therefore the officers get qualified immunity because they reasonably could have arrested him based on those actions.

AP: Do you think you'll ever put a similar police parody up again?

AN: If I move out of the county, I will definitely make a new fake Parma Police Facebook page.

AP: It's good to have goals in life.

AN: It's good to have goals. I don't care how old I am. I'll be 50 and I'll make one.

AP: Is there anything you would tell yourself back in 2016 if you could talk to yourself right before you hit post?

AN: I mean, in the end, it worked out in the sense that I didn't go to jail. And I showed them for what they were I think, at least as best as I can. But I don't think I should ask myself that question. I feel like the police should ask themselves that question, because I didn't actually do anything wrong. I just did something that I would normally do, not necessarily with the police Facebook page, but in general making a parody of something. I was just being myself and they were just being dicks.

AP: The reason I'm so curious about like, would someone post this again, is I wonder if you feel like your speech has been chilled?

AN: It has. One hundred percent. I would make on and off parody pages and stuff like that, goofy things, that I just haven't done, pretty much because of this. And when I say I'll make another police Facebook page if I move out of the county, that's sort of a joke. I would think about it, though. I would be afraid that I wouldn't want to leave the state like, I don't want to go to jail, because it's not guaranteed even if you're right, that you won't just get a bad jury that sends you to prison.

CGB: I agree that qualified immunity is a huge barrier to people remedying First Amendment wrongs, and it's also because courts are able to skip to the clearly established part of the analysis, they aren't deciding whether the right actually was violated. And so, they aren't establishing new First Amendment case law, aren't taking that opportunity to elaborate on the facts. And so, you get in a situation where if your First Amendment rights or any other rights are violated in a novel way, there isn't gonna be much case law, any case law establishing that those rights were violated.

AP: Any comedian will tell you context is key and jokes age badly. When Waylon posted #WeNeedYouBradPitt, it was just after the president of the United States declared a national emergency and right before the state governor locked down Louisiana. So, when Detective Iles said he thought the post was "an attempt to get someone hurt," the judge agreed.

CGB: The court kind of focused in on the context of the Covid-19 pandemic, and argued basically that because it was such a stressful time that the arrest was reasonable, to charge him with terrorizing based on that post. But to do that, the court relied on these World War I cases from the Supreme Court that created the now infamous clear and present danger test, where the line "shouting fire in a crowded theater" comes from. The clear and present danger test says that speech is protected unless it creates a clear and present danger of a crime or violence. Under that test, the court allowed the government to jail political dissenters during World War I. As any First Amendment lawyer or scholar will tell you, that's

not the correct standard for evaluating speech under the First Amendment and it hasn't been for decades. Instead, speech is broadly protected by the First Amendment unless it falls into certain narrow categories, such as true threats or incitement, and those are those are two very high bars to meet.

AP: Waylon stayed off social media as long as he could, but there are a lot of jobs that require you to be out there, promoting yourself. Professional boxing included.

WB: I'm a professional boxer now. I'm actually living in Dallas, training and fighting here. I just had to get back on Facebook to kind of market my boxing stuff. So, it's like, as much as I did not want to be back on Facebook, just because I had a sour taste about it, I went ahead and did it just because it was better for my career, I guess.

AP: How did it feel to log back into the platform and start it back up?

WB: Oh, I didn't. My wife did all that for me. She's my PR girl. So, she made me a page and a profile, a new profile page and everything. I'm just now kind of logging back into it and looking at it, I was off of it, I've been off Facebook since March 2020. The day I got arrested, I got off of Facebook. So, being away from it for that long, to be honest, just sort of making me a lot more productive because I was semi-addicted to that thing. Getting back on it, I see all this from my friends and everything, and I'm like dang, y'all are the same exact people that I left Facebook when I did, and it's been years and no one's changed. Nothing has changed and it kinda made me grateful for getting my attention away from that thing and focusing on other stuff like fighting and all that.

AP: The Fifth Circuit will decide whether Waylon Bailey's call to "share, share, share," is more like Lenny Bruce saying "cocksucker" on stage, or if it's better measured by the proverbial person shouting fire in a crowded theater. Then again it might be something else entirely in the eyes of the law. Muhammad Ali said truth is the funniest joke of all. Maybe that's why it seems like human nature to tell jokes, especially when what you have to say is going to get you in trouble.

HA: Alright, Amanda. One last joke. You ready?

AP: No?

HA: How do you know Abraham Lincoln was Jewish?

AP: I don't think I want to know.

HA: Alright, how about a cop joke?

AP: After that episode? No.

HA: OK, what about cancer. I know one that'll kill you.

AP: And that's our show. Before we go, I want to give a quick thanks to Marc Ostrow, Paula Greisen and Nick Marx for talking to me. Also, thank you to our hilarious host Hillel and life-saving producer Kirk McDaniel, this show would be a jumble of sound without you.

HA: Thanks Amanda. And remember to visit www.courthousenews.com for all the legal news that's fit to file. Next on Sidebar—

News clip: We have some more breaking news for you, this time in Beverly Hills where the FBI executed a search on a business on Palm Drive and Olympic Boulevard this morning.

HA: Last year's raid of US Private Vaults, a safety deposit box business in Beverly Hills, made big news. And the company pled guilty to multiple counts of money laundering. But what happened to the people who kept their money there? Two years later, some still don't have it back yet.

(Outro music)