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Factoids

Allen K. Rostron

FACTOIDS

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WHILE DOING RESEARCH on the First Amendment's protection of commercial speech, I came across something in a federal district court opinion that made me pause. The case concerned a San Francisco ordinance that requires cell phone sellers to give their customers a sheet with information about the possibility that radio frequency energy emitted by cell phones could be dangerous.[1] Cell phone companies objected that this law violates their freedom of speech. In a crucial passage of the opinion, the judge described San Francisco's warning sheet as containing a "series of factoids."[2]

I had heard or read the word *factoid* before but never really had a reason to think about what it means. The gist of the judge's opinion was that each of the statements on the warning sheet was true, when viewed in isolation, but together the statements added up to a misleading exaggeration of the risk posed by cell phones. For example, the warning sheet stated that the World Health Organization has classified radio frequency energy as a possible carcinogen, but it didn't explain that scientific studies generally have found no link between cell phones and cancer.[3] A factoid, the opinion seemed to

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[1] *See* CTIA–The Wireless Ass'n v. City & Cty. of San Francisco, 827 F. Supp. 2d 1054 (N.D. Cal. 2011), *aff'd in part, vacated in part, and remanded*, Nos. 11-17707, 11-17773, 2012 WL 3900689 (9th Cir. Sept. 10, 2012).

[2] *Id*. at 1060.

[3] *See id*. at 1061.

imply, is a fact that doesn't tell the whole story or has been used without sufficient context.

That seemed plausible. But still, I wondered, what exactly is the difference between a factoid and a fact? What puts the *-oid* in a factoid? I was intrigued enough to take a little detour in my research and try to find out more about the use of the word, especially in legal writing. I was surprised to find a more complex story than I had anticipated, as well as a dilemma for those who use the word now.

While it is usually difficult to pinpoint exactly when and where a word was first used, *factoid* is an exception. The late, great Norman Mailer invented the term in his 1973 biography of Marilyn Monroe.[4] He dismissed an earlier biography of the actress as "a book with facts embellished by factoids (to join the hungry ranks of those who coin a word)."[5] Mailer described factoids as "facts which have no existence before appearing in a magazine or newspaper, creations which are not so much lies as a product to manipulate emotion in the Silent Majority."[6] The word had a nice ring, and it made logical use of the suffix *-oid*, meaning "resembling" or "having the form or likeness of."[7] Just as a humanoid is something less than human, and a planetoid is not quite a planet, a factoid resembles but falls short of being a fact.

The word caught on. It was a neat way to describe things that seem to be facts but really are not. The best factoids get repeated so often that people become convinced they must be true. For example, the notion that the Great Wall of China is the only human creation that can be seen from the moon (or some say, from outer space) is one of the more "tenaciously incorrect" factoids.[8] It even slipped by the fact-checkers to appear on a Trivial Pursuit card.[9]

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[4] NORMAN MAILER, MARILYN: A BIOGRAPHY 18 (1973).

[5] *Id.*

[6] *Id.* Adding what was then a timely political jab, Mailer suggested that Richard Nixon may have "spoken in nothing but factoids during his public life." *Id.*

[7] -oid, *suffix*, OXFORD ENGLISH DICTIONARY (online version Sept. 2012), www.oed.com/view/Entry/130874.

[8] *See* Great Walls of Liar, www.snopes.com/science/greatwall.asp (last visited Sept. 16, 2012).

[9] *See* The Great Wall of China, About.com, geography.about.com/od/specificplac

Like many factoids, it's such a nifty bit of information that one can't help thinking it *ought* to be true.

The first use of the word that I have been able to find in legal writing came in 1980, when Victor Navasky reviewed Bob Woodward's Supreme Court exposé *The Brethren* for the *Yale Law Journal*.[10] A journalist and author as well as a Yale Law graduate, Navasky had just become the editor of *The Nation*, the weekly magazine of politics and culture for the American left, so it was not too surprising that he would be the one to import a new word from the literary world into the legal one. Navasky not only used the word *factoid*, but in keeping with law reviews' fetish for footnotes, he included a citation crediting Mailer.

The word appeared in a smattering of law review articles over the next decade.[11] Judges were slower to get in on the action, with the Sixth Circuit's Danny Boggs breaking the judicial ice with a concurring opinion in an unpublished decision in 1993.[12] Sustaining a conviction for failure to file federal income tax returns, Judge Boggs referred to the litany of factoids embraced by tax protestors, such as the notion that wages are not really taxable income. Again, it was not at all surprising that Boggs would be the first judge to make use of an obscure word, as he is known for testing prospective law clerks' knowledge of history, science, and literature with a very challenging trivia quiz.[13]

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esofinterest/a/greatwall.htm (last visited Sept. 16, 2012). Many man-made objects, such as highways and cities, can be seen from low orbits of the earth; none can be seen from the moon. *Id.*

[10] Victor S. Navasky, *The Selling of the Brethren*, 89 YALE L.J. 1028, 1034 & n.28 (1980) (reviewing BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979)).

[11] *See, e.g.*, Mark V. Tushnet, *Separation of Church and State: Historical Fact and Current Fiction*, 45 LA. L. REV. 175, 175-76 (1984) (discussing the factoids used in a work of "crank constitutional law"); Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 552 (1990) (debunking a factoid about the origins of the doctrine of employment at will).

[12] United States v. Taylor, 991 F.2d 797 (Table), 1993 WL 94319, at *5 (6th Cir. 1993) (Boggs, J., concurring).

[13] *See* Jonathan Kay, *Dept. of Trivia: The Honorable Answer Man*, NEW YORKER, May

As the word began to creep into legal circles, change was already afoot. While *factoid* originally meant something that was not true, people began using it to mean a nugget of information that is true but trivial or presented without adequate context.[14] This use of the word essentially treated *-oid* as if it were a diminutive suffix, like *-let* (as in *booklet* or *piglet*) or *-ette* (as in *cigarette* or *kitchenette*). Although it was a departure from the word's original meaning, this new use seemed to fill a need for a pithy way to describe the blizzard of information fragments being churned out by new media formats and technologies.[15] For example, after *USA Today* made its debut in 1982 and began to influence the style of other newspapers, critics latched onto *factoid* as a way to describe the new profusion of small bits of information.[16] The advent of 24-hour television news channels also contributed to the phenomenon with their quick delivery of bite-sized news morsels. CNN Headline News even made factoids an explicit part of its programming, periodically flashing the word *factoid* on the screen followed by some interesting informational tidbit.[17]

The possibility for confusion arose, because *factoid* now could mean a widely believed falsehood or a trivial truth. What to do?

Michael Saks (then a law professor at Iowa; now at Arizona State) proposed a solution. In a 1992 article on empirical evidence about tort litigation, he drew a distinction between factoids

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14, 2001, at 49.

[14] PAUL BRIANS, COMMON ERRORS IN ENGLISH USAGE 79 (2003).

[15] *See, e.g.*, Bernard E. Boland, *The Future of Callings–An Interdisciplinary Summit on the Public Obligations of Professionals*, 25 WILLIAM MITCHELL L. REV. 117, 127 (1999) (discussing how the Internet and television news provide "flashes of factoid and image without analysis").

[16] *See, e.g.*, Arthur D. Austin, *Storytelling Deconstructed by Double Session*, 46 U. MIAMI L. REV. 1155, 1159 (1992); David Shaw, *More Color, Graphics; Newspapers Going for a New Look*, L.A. TIMES, Mar. 13, 1986, at 1; Jonathan Yardley, *A Paper for a U.S.A. on the Go*, WASH. POST, Sept. 20, 1982, at C1.

[17] William Safire, *On Language; Only the Factoids*, N.Y. TIMES, Dec. 5, 1993, § 6, at 32.

and factlets.[18] Citing Mailer's original intent, Saks described a factoid as information that seems to be a fact but turns out, upon examination, to be either false or meaningless.[19] Saks used *factlet*, a seldom seen but not entirely unprecedented word,[20] to mean "bits or pieces of real information about the problem, pieces one may hope can be sewn together into a serviceable quilt, but which by themselves leave much more unknown than known."[21] A year later, language guru William Safire endorsed essentially the same solution in his *New York Times* column, declaring that he would prefer *factoid* to be used only in its original sense but doubting whether that meaning could survive with "CNN Headline News, every day, pounding away with the 'factlet' sense."[22]

Alas, *factlet* never caught fire, in legal writing or otherwise. While it does not appear to be headed for complete extinction, it shows up only once or twice a month in expansive news databases.[23] It almost never appears in legal scholarship aside from occasional discussions of Professor Saks' article,[24] and judges have never embraced it.

Meanwhile, *factoid* has proliferated, and it is now rare to find the word used in its original sense. The word has a strong negative connotation in judicial opinions, but judges invariably use it to describe scattered fragments of fact rather than false information. For example, a court will condemn a party for relying on selected factoids

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[18] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System–And Why Not?*, 140 U. PA. L. REV. 1147, 1162 (1992).

[19] *Id*.

[20] *See, e.g.*, Janet Maslin, *Excesses and Eccentrics*, N.Y. TIMES, Jan. 20, 1985, § 7, at 9 (criticizing a book for containing stale factlets).

[21] Saks, *supra* note 18, at 1162.

[22] Safire, *supra* note 17.

[23] For example, in the Lexis "News, All" file, *factlet* appeared in twenty items in 2010 and ten items in 2011.

[24] For two exceptions, see Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1138 (2009), and Steven Lubet, *Rumpled Truth on Trial*, 94 NW. U. L. REV. 627, 630 (2000).

rather than comprehensively addressing the entire evidentiary picture,[25] or a judge will declare that "it is not the place of a reviewing court to extract factoids from the record in an attempt to salvage a bad decision."[26] In legal scholarship, the word's meaning is often somewhat ambiguous, but the vast majority of uses involve trivial or uncontextualized facts rather than erroneous information.[27] One analyst, for example, recently condemned the U.S. Sentencing Commission for issuing a report that buried readers in factoids, but he clarified his meaning by adding that "[t]o say the report is full of 'factoids' does not mean the numbers are false."[28]

Language reference works, from the most venerable dictionaries[29] to the trendiest compilations of new slang,[30] still typically list *factoid*'s original meaning as the primary or preferred definition.[31]

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[25] *See* Slick v. Reinecker, 839 A.2d 784, 790 (Md. Ct. Spec. App. 2003).

[26] Lett v. Renico, 507 F. Supp. 2d 777, 787 (E.D. Mich. 2007), *aff'd*, 316 F. App'x 421 (6th Cir. 2009), *rev'd*, 130 S. Ct. 1855 (2010). Factoid made it all the way to the Supreme Court in *Lett*, as Justice Stevens quoted the district judge's use of the term. *See* Renico v. Lett, 130 S. Ct. 1855, 1875 (2010) (Stevens, J., dissenting).

[27] The striking exception is David Kopel, a libertarian policy analyst who teaches constitutional law at the University of Denver and blogs for the Volokh Conspiracy. Kopel seems to be on a crusade to save *factoid*'s original meaning. *See* David B. Kopel, *Mexico's Federal Law of Firearms and Explosives*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 44, 47 (2012); David B. Kopel et al., *How Many Global Deaths from Arms? Reasons to Question the 740,000 Factoid Being Used to Promote the Arms Trade Treaty*, 5 N.Y.U. J. L. & LIBERTY 672, 673 (2010); David B. Kopel et al., *Global Deaths from Firearms: Searching for Plausible Estimates*, 8 TEX. REV. L. & POL. 113, 118 (2003); David B. Kopel, *Guns, Gangs, and Preschools: Moving Beyond Conventional Solutions to Confront Juvenile Violence*, 1 BARRY L. REV. 63, 63 (2000); David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 341 (1993).

[28] Paul J. Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 FED. SENTENCING RPTR. 193, 195 (2012).

[29] *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 448 (11th ed. 2003); factoid, *n.* and *adj.*, OXFORD ENGLISH DICTIONARY (online version Sept. 2012), www.oed.com/view/Entry/67511.

[30] *See* Factoid, Urban Dictionary, www.urbandictionary.com/define.php?term=factoid (last visited Sept. 16, 2012).

[31] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 632-33 (5th ed.

But in the court of popular usage, Norman Mailer's vision has been trumped by that of CNN Headline News. As a result, writers now face the hoary dilemma of what to do when language evolves in ways that seem incorrect in some sense. Prescriptivists will condemn the widespread disregard for *factoid*'s original and more etymologically sound meaning, while descriptivists will tell us to accept that language is a living and adapting organism.[32] At least one usage guide advises writers simply to steer clear of the entire mess, declaring that "the definition of 'factoid' is hopelessly confused and it's probably better to avoid using the term altogether."[33]

I would hate to see the word *factoid* disappear entirely. And while I would cheer a comeback for its original meaning, I do not expect that to happen. The use of the word to mean an inconsequential bit of information has become too widespread and entrenched. At this point, the goal should be simply to avoid confusion, and the most feasible way to achieve that would be for writers to use *factoid* exclusively to mean snippets of fact that are trivial or taken out of context, while shifting to some other term to describe information that seems factual but really is not. I would suggest that *pseudo-fact* is a great candidate to take over the role that Mailer intended for *factoid*. While rarely seen in legal writing or elsewhere, *pseudo-fact* has been around for at least a century.[34] Its meaning should be readily understandable, even to those encountering it for the first time, given its logical use of the familiar *pseudo-* prefix. Any nervous lawyers need-

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2011) (reporting that only 43 percent of usage panel members approved using *factoid* to mean "a brief, somewhat interesting fact").

[32] For a nice explanation of the prescriptivist/descriptivist battle lines, see Bryan A. Garner, *Making Peace in the Language Wars*, 7 GREEN BAG 2D 227 (2004), and Peter Tiersma, *Language Wars Truce Accepted (With Conditions)*, 8 GREEN BAG 2D 281 (2005).

[33] BRIANS, *supra* note 14, at 79.

[34] *See* pseudo-, *comb. form*, OXFORD ENGLISH DICTIONARY (online version Sept. 2012), www.oed.com/view/Entry/153742.

ing a little reassurance that *pseudo-fact* is indeed a legitimate word can take comfort from the fact that Richard Posner, indisputably a Man of Letters (if not always a Fan of Dictionaries),[35] was responsible for what appears to be its inaugural judicial use.[36]

Factoid was a clever invention, a neologism for a concept in need of a name. But with apologies to Norman Mailer, I say the time has come for us to start separating our pseudo-facts from our factoids.

[35] *See* Richard A. Posner, *The Spirit Killeth, But the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18.

[36] *See* Bastanipour v. INS, 980 F.2d 1129, 1132 (7th Cir. 1992).