

Head Notes: Thoughts from Division Head



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My term as division head is racing to a close. Thanks again for trusting me to head the division this year! I relished the experience.

Many thanks to the officers who worked so hard this year. I was fortunate to have such a great leadership team. I'm confident the division is in good hands going forward, starting with Courtney Barclay's. She'll be a first-rate head next year.

Congratulations to Genevieve Lakier, this year's winner of the Stonecipher Award for Distinguished Research in Media Law and Policy. Her article, "The Invention of Low Value Speech," is superb. Thanks to the Stonecipher Selection Committee for their work choosing the winner, and thanks to Derigan Silver for chairing the committee. And of course thanks to Kyu Ho Youm and Doug Anderson for making the award possible! Unfortunately Genevieve can't make it to Minneapolis, but we'll be recognizing her at our business meeting and again at the AEJMC-wide business meeting. She'll receive a plaque and a \$1,000 check.

I'm excited about the conference! Our full division schedule is inside. I hope I'll see you Wednesday at our preconference sessions. The first session on Wednesday, titled The Supreme Court and the First Amendment: Recent and Upcoming Cases, will run from 1 to 2:15. We're thrilled that Judge Diana Murphy of the U.S. Court of Appeals for the 8th Circuit and Aaron Van Oort, a partner with Faegre Baker Daniels, will speak on the panel, along with our own Courtney Barclay. The second session, titled Teaching Roundtables: Drawing Inspiration from

Teaching Competition Award-Winners, will run from 2:25 to 3:40. That session will showcase recent winning ideas from our teaching competition and will include roundtable discussions of teaching generally. The third session will run from 3:45 to 5. Titled Comparative Law in the Classroom: Internationalizing Your Instruction, the session will highlight ways we can and should be internationalizing our communication law syllabi. PF&R Chair Jared Schroeder has a column inside with more details about the preconference sessions, and Courtney has a column about our great PF&R panels we'll feature Thursday through Saturday.

Congratulations to those who had papers accepted in the research competition! We had another healthy competition this year. Be sure to attend our top papers panel Friday at 5. That session will showcase our top student paper, our top faculty paper, the second place faculty paper, and the third place faculty paper, which also won the top debut faculty paper award.

Our business meeting is Friday at 6:45. We'll talk some there about our division budget and spending priorities.

Then our division social will follow the business meeting. I've reserved an area of The News Room, a restaurant located near the conference hotel (the address is 990 Nicollet Mall). I recruited sponsors to help cover the costs of the social. Five sponsors stepped up: the UNC Center for Media Law and Policy, the Silha Center for the Study of Media Ethics and Law, the Media School at Indiana University, the Center for International Media Law and Policy Studies at Indiana, and Clay Calvert. Thanks to their generosity, we have a \$1,600 credit at The News Room. Come help us celebrate! We'll eat, drink, and be merry about the First Amendment.

See you in Minneapolis!

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Recording Officers: A Journalist's Guide

Frank LoMonte
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When graduate student Karen Savage set out to document citizen unrest in Baton Rouge following the videotaped shooting of an African-American man during a struggle with police officers, she didn't anticipate being drawn directly into the story herself.

Savage, a reporter for the online Juvenile Justice Information Exchange, became one of at least three journalists arrested while covering July 2016 demonstrations in Baton Rouge, accused of obstructing traffic on a public roadway where protesters had congregated. She spent a night in a crowded state prison cell – because the local jail was overflowing with detainees –

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before her news organization could get her released on bond the following day.

“They saw me filming them arrest someone and after that they started following me,” said Savage, who is enrolled in a masters’ program at the CUNY Graduate School of Journalism. “They wanted to get me and they went out of their way to get me. ...

They didn’t seem to care that we were journalists.”

Friction between police and journalists at public events is a perennial concern, but tensions appear to have escalated with the heightened capacity for journalists’ images to reach a limitless online audience. Accordingly, reporters and photographers who go into the field anticipating encounters with law enforcements at crime scenes or demonstrations should equip themselves with a working knowledge of the law – and some diplomatic skills to assert their rights without escalating a confrontation.

The First Amendment most clearly applies to the right to publish material that a journalist has already gathered. It is much less clear that the Constitution guarantees a generalized right of access to gather the material in the first place.

Importantly, in recent years two federal appeals courts have found a constitutionally protected right to record – including both audio and video – the behavior of police doing their jobs in public places. The rulings in *Glik v. Cunniffe* (1st Cir. 2011) and *ACLU v. Alvarez* (7th Cir. 2012) both arose in the context of nontraditional citizen journalists and apply to anyone engaged in newsgathering activity.

As a rule of thumb, a journalist has a right to record and publish anything viewable with the naked eye while situated on a sidewalk, street corner or similar space where it is legal for a pedestrian to stand.

Despite what some police may insist, there is no “invasion of privacy” in filming events taking place in a location that is visible to public foot traffic, even a privately owned location such as the lobby of a hotel or the waiting room of a hospital. While the proprietors of a privately owned space can remove any unwanted visitor – and being a journalist confers no special privilege to trespass on private property – police cannot seize cameras, erase photos or otherwise use their law enforcement authority to enforce individual privacy rights.

Working journalists do have one legal advantage over other citizens in dealing with law enforcement: the Privacy Protection Act of 1980. Enacted by Congress in response to a police search of the Stanford Daily newsroom, the Act requires an open court hearing – not merely a warrant or officers’ reasonable suspicion – before government agents can search for a journalist’s unpublished work. This should apply to any space where a journalist’s work product is stored – including a camera or smartphone.

Additionally, the Supreme Court’s 2014 cellphone-search ruling, *Riley v. California*, disfavors police fishing expeditions into the contents of cellphones on Fourth Amendment privacy grounds.

In preparation for encounters with law enforcement, journalists should take commonsense precautions, including memorizing key phone numbers of contacts and wearing conspicuous media credentials. Images on Internet-enabled cameras or smartphones should be uploaded regularly, since an arrested journalist’s equipment may be damaged or impounded.

To protect the contents of a smartphone, use a numerical passcode rather than a fingerprint; at least one federal court has ruled that the Fifth Amendment protects against compelled disclosure of a login code but not against a compelled fingerprint login.

If arrested, journalists should minimize communications with law enforcement that might furnish needlessly incriminating information, and be especially wary of signing any paperwork that waives the right to appear in court and dispute unfounded charges.

Because even journalists who do everything right can still find themselves on the wrong side of overzealous police, it’s essential to stay in contact with editors and family members so they know where to start looking if communications suddenly cease. During her Baton Rouge arrest, Karen Savage was lucky that her smartphone wasn’t immediately confiscated and – even with her hands cuffed – she was able to tap out vital information about her location that sped her release. Most detainees won’t be so fortunate, so it’s vital to keep furnishing updates from the field – which, thanks to Twitter and other social platforms, is easier than ever before.

Attorney Frank LoMonte is executive director of the Student Press Law Center, www.splc.org, a nonprofit legal-aid service for journalists working in the educational setting.

Women in Law Division

Tori Ekstrand wrote in the last newsletter about a “WILD” idea she had: to bring together the women in Law & Policy in the spirit of “mentorship and sisterhood.”

Although Tori is not able to join us in Minneapolis this year, I have agreed to take up the torch and begin a conversation about the next steps we can take to ensure a support network for all media law scholars, but particularly female graduate students and junior faculty.

If you’d like to join the conversation, we will be meeting for breakfast in Minneapolis on Saturday, Aug. 6 at 7 a.m. We have table reserved at the News Room, a two-minute walk from the hotel. Hopefully, you’ll already know the way there because the Law Division social will be at the News Room Friday night!

I already have a few RSVPs, so please let me know if you plan to attend so I can make sure to update the reservation. I hope to see you bright and early Saturday morning – I’ll buy the coffee!

Courtney Barclay
Vice-Head and Program
Chair

Does the First Amendment Protect People Who Film the Police?

Ed. Note: This piece first appeared in in March 18, 2016, edition of The Conversation, and is reprinted here with the author's permission.

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This October, former police officer [Michael Slager](#) will stand trial for murder in the shooting death of Walter Scott following a daytime traffic stop last year in North Charleston, South Carolina. The critical evidence in the case is a smartphone [video](#) captured by a [then 23-year-old barber](#) named [Feidin Santana](#) as he was walking to work. The video shows Slager shooting the unarmed Scott several times in the back. Santana took the video despite [another officer](#) telling him to stop.

Santana's video is just one example of a citizen using a smartphone to capture alleged police misconduct. [Ramsey Orta](#) took the infamous "I can't breathe" [video](#) of Eric Garner being placed in a [chokehold](#) by a New York City police officer shortly before Garner's death. The twin incidents conjure up memories of the 1991 [video](#) captured by [George Holliday](#) of Los Angeles police officers beating Rodney King.

And in a different but dangerous twist, an April 2015 [citizen video](#) shows a burly U.S. marshal in South Gate, California violently smash to the ground the smartphone of another citizen who was simply recording the marshals while standing on a public sidewalk.

The power of smartphones to expose abuses of power by law enforcement officials raises an important question that, as a free speech scholar and director of the [Marion B. Brechner First Amendment Project](#), I've [studied](#): do citizens have a [First Amendment](#) right to record police doing their jobs in public places, such as streets, sidewalks and parks?

The [U.S. Supreme Court](#) has never answered this question. It has been left to lower courts nationwide to sort out for themselves if such a right to film police exists.

Rejection in Pennsylvania

Last month, a federal court in Philadelphia took up the question. District Judge Mark Kearney determined [the](#)

[answer is no](#) – there is no right to film cops, “absent any criticism or challenge to police conduct.” Writing the [opinion](#) in *Fields v. City of Philadelphia*, Kearney reasoned that Pennsylvania “does not recognize a First Amendment right to observe and record without some form of expressive conduct” and that “photographing police is not, as a matter of law, expressive activity.”

In other words, Kearney is arguing that the act of pushing a record button and then holding a phone up are merely conduct, not speech. This renders the First Amendment irrelevant.

To constitute speech, according to Kearney, the person recording must do so with the specific intent of criticizing or challenging the police conduct being recorded. That was not the case in *Fields*.

Kearney determined that one of the citizens involved only “wanted to observe” a public protest against hydraulic fracturing, not to criticize or challenge to the police monitoring it. The judge also found that the other citizen, a Temple University student who took a picture of about 20 police officers standing outside a home hosting a party, did so simply because it was “an ‘interesting’ and ‘cool’ scene.”

In other words, why someone records cops is critical, in Kearney's view, in determining if the First Amendment is involved.

Other Courts see it differently

The decision in *Fields*, however, is somewhat of an outlier.

A 2015 [nationwide study](#) indicates that more courts – but certainly not all, as *Fields* indicates – are recognizing a limited First Amendment right to record police doing their jobs in public venues, regardless of the intent of the person recording.

For example, the [U.S. Court of Appeals for the First Circuit](#), which includes the states of Maine, Massachusetts, New Hampshire and Rhode Island, concluded in 2014 in [Gericke v. Begin](#) that people have a First Amendment right to record officers conducting traffic stops, subject to “reasonable restrictions.”

The problem, of course, is determining what constitutes a reasonable restriction. Reasonableness is a slippery concept. The First Circuit suggested that safety concerns might justify restricting the right to record. The court also was clear that a right to

record is not a right to interfere.

In a key passage, it explained:

The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure – for example, a command that bystanders disperse – that would incidentally impact an individual's exercise of the First Amendment right to film... . However, a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties.

The First Circuit is not alone in recognizing such a qualified or limited First Amendment right to record images of police in public. [The U.S. Court of Appeals for the Eleventh Circuit](#), which sweeps up Florida, Georgia and Alabama, also [found](#) that:

the First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.

Like the First Circuit, the Eleventh Circuit also considers this right to be “subject to reasonable time, manner and place restrictions.”

Additionally, the [Ninth Circuit](#) – the nation's largest, encompassing nine western states – recognized in [Fordyce v. City of Seattle](#) a “First Amendment right to film matters of public interest,” including police. A [federal district court in New York City](#) in 2015 acknowledged a right to film police subject to reasonable restrictions, yet the [Second Court of Appeals](#), which includes New York, Connecticut and Vermont, has not endorsed this right.

Viewed collectively, this growing spate of authority confirms that Judge Kearney's decision in *Fields v. City of Philadelphia* is an outlier and, in my view, incorrect. Police officers are government officials and public employees. They work for the very people who want to record their actions. And when citizens record police in public places – locations where cops have no reasonable expectation of privacy, like streets and parks – those citizens are acting as watchdogs on possible government abuses of power.

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as watchdogs on possible government abuses of power.

Feidin Santana's video of officer Slager shooting Walter Scott in the back is all the proof needed of the importance of the watchdog role. A simple intent to monitor and observe, not to challenge or criticize, is all that should matter in determining if First Amendment rights are at stake.

Ultimately, the Supreme Court must hear a right-to-record case to make it clear that in every jurisdiction there is a First

Amendment right to film police performing duties in public. In doing so, it also should articulate the precise factors that make a restriction on this right reasonable.

The ACLU of Pennsylvania has vowed to [appeal](#) *Fields* before the U.S. Court of Appeals for the Third Circuit. The case thus has a long way to go before it might ever reach the nation's high court, which hears only about 70 cases a year, but it could well provide an ideal scenario to resolve the issue.

42th Annual AEJMC Southeast Colloquium Call for Papers: Law and Policy Division

The Law and Policy Division of AEJMC invites scholars to submit original papers for the annual AEJMC Southeast Colloquium, which is scheduled to take place March 10-11, 2017 at Texas Christian University's Bob Schieffer College of Communication in Fort Worth, Texas. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, freedom of information, commercial speech, Federal Communications Commission issues, copyright, obscenity and other issues regarding freedom of speech and press. A panel of judges will blind referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the colloquium to present accepted papers.

Law and Policy Division papers must be no longer than 50 double-spaced pages (including

appendices, tables, notes and bibliography). Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities. There is no limit on the number of submissions authors may make to the Division. The top three faculty papers and top three student papers in the Law and Policy Division will be recognized. Student authors of single-authored papers should clearly indicate their student status to be considered for the student paper awards.

Authors should submit each paper as an email attachment (documents may be submitted in Word or PDF formats). In the body of the email, please provide the title of the paper, and the name, affiliation, address, office phone, home phone, fax and e-mail address for each author. This is where students and faculty should indicate their status for consideration of the faculty and student top paper awards. Do not

include any author identifying information on any page of the attached paper submission. Authors also should redact identifying information from the document properties. On the cover page of the attached paper, only the title of the paper should appear. Following the cover page, include a 250-word abstract.

Submissions should be emailed to mtmartinez@utk.edu. The deadline for paper submissions is 11:59 p.m. EST Monday, Dec. 12, 2016.

If you have any questions about the submission process or the paper contest, please contact Dr. Michael T. Martinez by phone at (865) 687-2564 or via e-mail at mtmartinez@utk.edu.

Helpful links:

42nd AEJMC Southeast Colloquium <http://schieffercollege.tcu.edu/aejmc/>.

Southeast Colloquium: Call for Reviewers

The Law and Policy Division has a proud tradition of hosting an engaging research paper competition at the Southeast Colloquium each year, and we anticipate that 2017 will be no different. With our growing number of papers comes a need for an equally vigorous team of reviewers. For us

to limit reviewers to three papers each, we'll need approximately 40 reviewers. If you are not submitting a paper to the colloquium this year, the division invites you to help with the competition. Reviewers will receive a package of papers in mid-December, with a mid-January deadline

for returning reviews. For more information, please contact Dr. Michael T. Martinez by phone at (865) 687-2564 or via e-mail at mtmartinez@utk.edu. For more information on the 2017 Southeast Colloquium see the website: <http://schieffercollege.tcu.edu/aejmc/>

DIVISION SCHEDULE FOR MINNEAPOLIS CONFERENCE

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We have an exciting program scheduled for this year's conference. We've partnered with four other divisions – Scholastic Journalism, Media Ethics, International Communication, and Newspaper and Online News – to produce a diverse lineup of PF&R panels. The topics range from the use of body cameras by law enforcement to the globalization of media law.

With this year's location in Minneapolis, one of our panels will feature some of the key players in the *Cohen v. Cowles Media* case. The panel, co-sponsored with the News & Online News division, includes journalists, lawyers, and scholars discussing the legacy of *Cohen* over the last 25 years.

We've partnered with the International Communications

Division for two panels, including one examining international freedom of information laws in the context of the 50th anniversary of the U.S. FOIA. This panel, organized by Kyu Ho Youm, celebrates the 50th anniversary of the FOIA in the U.S. and the 250th anniversary of the Swedish Constitution, the first legal guarantee of the right to information. A second panel co-sponsored with International Communication focuses on how the increasingly global nature of media is affecting free speech principles in the U.S. and abroad.

Technology also featured heavily in panel proposals this year. We partnered with Media ethics to present a discussion on the ethical and legal issues surrounding the use of drones and other new technology in newsgathering. A panel co-sponsored with Communication Technology explores the latest legal developments on law enforcement body cameras, including the application of privacy and public records laws.

A panel that will be of particular interest to those of us who advise student media is co-sponsored

by Scholastic Journalism and organized by Erik Ugland. *Winning the Fight for Free Expression at Private Schools and Universities* features panelists who have observed – and in many cases challenged – various restrictions on free expression at their institutions. They will discuss how faculty can engage students and administrators about these issues.

As I reflect on the planning process, I regret that we could not include all of the wonderful panels proposed by our active and thoughtful membership. However, I appreciate all of the submissions and do believe we made some good matches with the other divisions this year. I encourage everyone to keep thinking about proposal or next year and make your submissions early to our incoming vice-head and programming chair, Jason Martin.

I know I am looking forward to learning more about all of these topics and brainstorming with some of you about how we can continue these discussions. I hope you are energized and inspired by the program. See you in Minneapolis!

Law and Policy 2016 AEJMC PF&R Panels

Winning the Fight for Free Expression at Private Schools and Universities

Thursday, 1:30 – 3:00 p.m.
Co-Sponsored with Scholastic Journalism

Moderating/Presiding:
Erik Ugland, Marquette

Panelists:
Frank LoMonte, Student Press Law Center
Jennifer Henderson
Trinity Bastiaan Vanacker, Loyola-Chicago
Jason Martin, DePaul

This will bring together faculty from private universities to talk about some of the unique challenges they face in advocating for expressive freedom at institutions where the

First Amendment does not apply.

The proposed panelists, all of whom have worked with student media and have expertise in media law, have observed – and in many cases challenged – various restrictions on free expression at their home institutions, including most recently the suppression of a student newspaper, the expulsion of a student for social media posts, the denial of access to records that should be public, and the enforcement of a policy requiring university approval for assemblies and protests, among others. Many of these restrictions parallel those experienced by student media staff and advisers working in private secondary schools as well.

The aim of this panel is not merely to describe these incidents,

but to strategize about how best to respond to them. This will include some discussion of legal alternatives to constitutional protection (e.g., contract law) and statutory solutions (e.g., California's Leonard Law), but most of the discussion will focus on how faculty can engage students and administrators about these issues and to help universities find ways to respect free expression without undermining any of the guiding values of those institutions.

Ethics Aloft: Drones, Sensors and the Changing Boundaries of Media

Thursday, 5:00 – 6:30 p.m.
Co-Sponsored with Media Ethics

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Moderating/Presiding:
Jane Kirtley, Minnesota

Panelists:

Courtney Barclay, Jacksonville
Kathleen Bartzen Culver,
Wisconsin-Madison
Matt Waite, Nebraska

With the FAA currently in motion on a variety of rules and revisions regulating civilian Unmanned Aerial Vehicles (drones) in the U.S., news organizations and individual journalists face shifting legal terrain and emerging ethical questions when employing UAV technologies for a range of activities. This panel will explore the current state of laws addressing drones and sensors in journalism, as well as valuable frameworks for weighing the implications of this work for communities and journalists' relationships with them.

Freedom of Information Act 50 Years Later: The U.S. Law Still Serving as the Touchstone?

Friday, 1:30 – 3:00 p.m.

Co-Sponsored with International Communication

Moderating/Presiding:
Kyu Ho Youm, Oregon

Panelists:

Toby Mendel, executive director, Centre for Law and Democracy; author of the leading UNESCO text on FOI, *Freedom of Information: A Comparative Legal Survey*
Amy Kristin Sanders, Northwestern, Qatar; co-author of *The First Amendment and the Fourth Estate*
David Cuillier, Arizona; former president, Society of Professional Journalists (SPJ); co-editor of *Transparency 2.0: Access and Privacy in a Wired World*
John P. Gavin, CFA, founder of *Probes Reporter*, an independent investment research firm and a noted FOIA researcher/practitioner.

The year 2016 marks the 50th anniversary of the FOIA in the U.S. and the 250th anniversary of the Swedish Constitution,

the first legal guarantee of the right to information. Freedom of information as a legal right was the exception, not the rule, even in the mid-1980s. Today, however, access to information is on the books in more than 100 nations as a constitutional or statutory right. The European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee have all held that it is a fundamental human right. In celebrating the landmark FOI events in 2016, an important question is what is the actual or perceived impact of the American FOI law abroad and how does it compare with other countries' laws. This panel proceeds from the premise that the tide has turned on government secrecy in recent years but that access to information remains an ongoing challenge for journalism and mass communication educators and practitioners around the world in the post-9/11 era of the global "war on terrorism."

Cohen v. Cowles Media at 25: Its Lasting Legacy

Friday, 3:15 – 4:45 p.m.

Co-Sponsored with News & Online News

Moderating/Presiding:

Joseph Russomanno, Arizona State

Panelists:

Elliot Rothenberg, attorney, author, *The Taming of the Press: Cohen v. Cowles Media Company*
Paul Hannah, Assistant Hennepin County Attorney
Bill Salisbury, Capitol bureau reporter, *St. Paul Pioneer Press*
Susan Keith, Rutgers

The locale of the 2016 AEJMC conference affords a special opportunity to examine the past, present and future of one of media law's most important rulings – *Cohen v. Cowles Media*, a media law hall of fame case that originated in the Twin Cities. Moreover, 2016 marks the 25th anniversary of the U.S. Supreme Court's ruling. All panelists not only were on the

front lines as the case unfolded – attorneys, reporters and editors – but they all have seriously reflected on the case and its impact on news media since the 1991 ruling. The session will examine the legacy of *Cohen* and what it will mean to the future of journalism, specifically the practice of granting sources confidentiality.

The Internationalization of Media Law & Policy

Saturday, 3:30 – 5:00 p.m.

Co-Sponsored with International Communication

Moderating/Presiding:

Amy Kristin Sanders, Northwestern-Qatar

Panelists:

Erik Ugland, Marquette
Anthony Fargo, Indiana
Lyombe Eko, Texas Tech
Leonardo Ferreira, Florida International

This panel will examine how media law and policy are being shaped by global communication patterns and the extent to which media laws and policies are flowing across borders. Since the dawn of the digital era, many scholars and policymakers have predicted that new media technology would globalize communication and lead inevitably to the spread of liberal-democratic values and to a wider international embrace of Western (indeed, American) conceptions of free expression. This view was ascendant through the Arab Spring, but since then we have seen, in all parts of the world, a tightening of media regulation, a revival of sedition laws, the criminalization of newsgathering, and many other measures designed to narrow the scope of acceptable public discourse.

Not only are American free-expression principles not flowing across the globe in ways that

many predicted, the opposite

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is occurring ~~from some~~ cases. Recently the European Union, for example, instructed Google that it must, as a condition of doing business in the region, comply with the EU right-to-be-forgotten protocol on its European sites and its sites in the U.S.

This panel will examine these trends and discuss their implications for law, policy and communication scholarship.

(Sun)light, Cameras, Legal Action: A Look at Developments Related to Police Body Cameras
Saturday, 5:15 – 6:45 p.m.
Co-Sponsored with Communication Technology

Moderating/Presiding:
Patrick C. File, Nevada, Reno

Panelists:
Jane Kirtley, Minnesota, Twin Cities
David Cuillier, Florida
Paul Schnell, Chief of Police, Maplewood, MN
Jason Sole, Hamline University and Metropolitan State University, Minneapolis NAACP

The new spirit of transparency and

accountability that has led law enforcement agencies across the country to adopt body cameras has also raised a host of legal questions: how should open records laws apply to the recordings? How should privacy rights apply to the people recorded? How should law enforcement agencies store all of this data and how can they ensure its security? These questions have important implications for newsgathering and the public's right to information about law enforcement, particularly at a moment of heightened scrutiny of the use of force and community policing.

Minnesota, like the rest of the nation, is grappling with these emerging issues. Police departments large and small are adopting camera programs; lawmakers considered amending the state open records law in 2015, and will revisit the issue in 2016; local media have carried commentary on all sides of the issue; an active local Black Lives Matter movement has called for reforms that include body cameras.

This panel would draw on both local and national expertise to provide a look at the latest legal developments on body cameras, as well as a look toward what journalists and educators can, and should, expect going forward.



Law & Policy 2016 AEJMC Pre-Conference Sessions

Jared Schroeder
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Pull yourself away from hunting Pokemon in downtown Minneapolis for a few hours on Aug. 3 and attend the Law and Policy Division's three excellent, teaching-focused preconference sessions.

I actually know almost nothing about Pokemon, but I do know that one of the great aspects of teaching communication law is that the concepts that are fundamental to our courses are consistently being debated in the news media and considered in new ways because of technological and social change. This summer's Pokemon Go craze, and its privacy and other legal

concerns, is a perfect example. The division's pre-conference sessions have been organized to help us hear about upcoming First Amendment issues and excellent teaching techniques as we head into the new school year.

The sessions begin at 1 p.m. with "The Supreme Court and the First Amendment: Recent and Upcoming Cases." The panel includes Judge Diana Murphy from the U.S. Court of Appeals for the 8th Circuit, Attorney Aaron Van Oort from the Faegre Baker Daniels law firm, and incoming division head Courtney Barclay.

The second session, which begins at 2:25 p.m., will showcase some of the division's teaching award-winners. Genelle Belmas from Kansas, Roy Gutterman from Syracuse, Andrew Pritchard from Iowa State, and Peggy Watt from Western

Washington will present their teaching ideas. The session will be conducted in a small-group format, allowing all involved to interact with the presenters and with others who attend. Ideally, the session will provide a great chance for all who attend to exchange ideas about teaching.

The final session begins at 3:45 p.m. and is titled "Comparative Law in the Classroom: Internationalizing Your Instruction." The panel includes Ed Carter from BYU, Eric Easton from the Baltimore School of Law, and Kyu Ho Youm from Oregon.

The division's pre-conference teaching sessions are a great way to get ideas for how you can freshen your classes for the new school year. Maybe you'll even find someone to hunt Pokemon with after the sessions are over.

Legal Annotated Bibliography

Minch Minchin
Doctoral Student
University of Florida



Free Speech and Democracy in the Video Age

Marceau, Justin & Chen, Alan (2016)
116 Colum. L. Rev. 991

The smartphone revolution and the pervasiveness of video-recording equipment has given rise for the need to comprehensively re-address the constitutional implications of video capture—both at the policy level and the theoretical realm that undergirds it. Although addressing several contexts, the article primarily focuses on non-consensual video recordings on private property. The authors pose four questions.

First, is video recording per se speech or merely an “intrinsic precursor” to expression? The authors argue that it qualifies as speech because it furthers the goals of both democratic self-governance—especially when considering surreptitious videos taken of political candidates in a post-Citizens United context—and the marketplace of ideas search for truth.

Second, if video recording is speech, does the First Amendment apply to all recordings or only those that occur in public (or with the consent of all parties involved)? The article says there ought to be no difference between whether images are recorded on public or private property because regardless, image capture “inherently involves communication of information and ideas.”

Third, is First Amendment protection here limited to matters of public concern that facilitate public discourse? In public places, the public-concernedness of videos is of little importance. However, in the context of non-consensual, private-property video recording, First Amendment protection should ideally apply only when the video images capture content that is of public concern—though the authors admit that delineating between what is and is not of public concern is no simple matter.

Finally, what standard of review should apply to video capture? The authors suggest this depends on context. Laws prohibiting nonconsensual capture of nudity are based

on powerful interests, whereas ag-gag laws are less compelling. Each interest must be weighed critically.

In conclusion, the authors call for a more recording-friendly set of policies, or else “the government puts at risk the modern-day muckrakers who have the greatest potential to shape political debate on issues of grave public concern.”

Free Speech Consequentialism

Goldberg, Erica (2016)
116 Colum. L. Rev. 687

Free speech consequentialism promotes the idea that courts must balance the harms and benefits of speech to determine constitutionality. When harm outweighs benefit, speech should be suppressed.

The article reviews empirical data on harm caused by speech and suggests that if courts seriously analyzed the data, they would inevitably conclude that certain speech, including some core speech, would be unacceptably harmful. However, courts lack the appropriate framework to engage in this analysis. The speech-balancing attempts are “half-hearted,” such as selectively applying the high-value vs. low-value speech distinction and unevenly applying the content-neutrality doctrine. The article attributes this to the lack of normative, consequentialist language in the First Amendment.

Still, some form of free-speech balancing must be proper. Absent this balance, “First Amendment doctrine would be absolutist in ways that yield unpalatable results.” In the free speech context, allowing judges to ascertain which speech is protected for ideological reasons or which speech harms both them personally would essentially give the judiciary censorial legislative power.

One of the solutions to curb the consequentialist onslaught is start with the assumption that speech is “special” and to differentiate harms caused by speech and harms caused by conduct. Only the latter would be subject to “consequentialist balancing.” The comparatively abstract speech harms are usually emotional and are “bound up in our values, perceptions, and identity.” The rise of trigger warnings on public university campuses—a trend that Goldberg frowns upon—illustrates why the emotional impacts of expression should be downplayed in the consequentialist calculus.

Ultimately, by considering only the

speech harms that can be analogized to harms generally caused by conduct, the caprice and arbitrariness of consequentialism can be rightly constrained while emerging harms caused by speech can be rightly regulated.

Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism and Partisanship

Calvert, Clay & Bunker, Matthew D. (2016)
24 WM. & MARY BILL OF RTS. J. 943

Over the last half-decade, the three variables of avoidance, minimalism and partisanship have “thwarted the advancement and coherence of First Amendment doctrine, if not tossed it into greater confusion.” This article suggests that this trio of trends, as applied, is deleteriously affecting several First Amendment doctrines, including “established ones, such as the long-standing dichotomy between content-based and content-neutral laws [and] nascent ones, such as the government speech doctrine.”

Partisanship has been illustrated in the recent freedom-of-expression cases of *Walker v. Sons of Confederate Veterans* (affecting the government speech doctrine), *Williams-Yulee v. Florida Bar* (affecting the intermediate vs. strict scrutiny distinction) and *McCullen v. Coakley* (affecting the content-based vs. content-neutral dichotomy). In each of these examples, the Court members split along—or at least close to—ideological lines, perhaps suggesting more of an adherence to political inclination than jurisprudential principle—and giving little guidance to lower courts in the process.

As for avoidance, the oft-used canon proposes that judges ought not reach the Constitutional questions of a case if the case can be decided on narrower grounds, such as on procedural or statutory matters. A related concept, minimalism, allows law to evolve gradually and suggests that judges avoid constitutional questions whenever possible in order to “decide cases in small, incremental steps, and to respect the holdings (although not necessarily the dicta) in prior cases.”

Continued on page 9

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One of the primary problems with the Roberts Court's penchant for these two canons is that the Court seems to use them at the expense of seizing opportunities to clarify muddled First Amendment doctrines. In one recent examples of this phenomenon, *Elonis v. United States*, the Court had a chance to resolve a circuit split on the matter of scienter in the true threats doctrine and address whether posting messages to social media platforms affects the true threats analysis. Instead, the Court decided *Elonis* on a narrow, federal statutory issue.

Similarly, in *Fox v. FCC*, the Court declined to revisit the arguably outmoded indecency rationale from *FCC v. Pacifica Foundation*. And although it featured not so much avoidance as minimalism, the Court in funeral-picketing case *Snyder v. Phelps* arguably did little to clarify the confusing conflation of tort law and the First Amendment, instead issuing an extremely narrow decision.

Although the authors establish the caveat that "avoidance, minimalism, and partisanship—either individually or collectively—cannot fully explain the outcomes in any of the cases examined or the long-term impact of those cases on First Amendment doctrines," taken together, they illustrate the existence of a "doctrinal predicament over the past five years on the Roberts Court."

Volokh, Eugene (2016)
The "Speech Integral to Criminal Conduct" Exception
101 CORNELL L. REV. 981

The doctrine of "speech integral to criminal conduct" has played an increasing role at the Supreme Court level during the last decade. The doctrine is best described as the judicial allowance of possible First Amendment speech exceptions if the "speech tends to cause, attempts to cause, or makes a threat to cause some illegal conduct (illegal conduct other than the prohibited speech itself)—such as murder, fights, restraint of trade, child sexual abuse, discriminatory refusal to hire, and the like." Perhaps the biggest concern with this exception is ensuring that the scope is sufficiently narrow.

The article criticizes the doctrine, but recognizes it has staying power. It traces the roots of the doctrine, which played an important role in First Amendment jurisprudence during the early and middle portions of the twentieth century and was manifest in rudimentary form in concepts such as the "clear and present danger" and "incitement" tests.

The paradigm case on the matter, *Giboney v. Empire Storage & Ice Co.* (1949), was not cited by the Supreme Court a single time between 1991 and

2005. Yet in the last ten years, the Court has cited *Giboney* six times, in cases "involving child pornography, crime solicitation and those regarding discriminatory policies." Lower courts have also cited it for a variety of reasons, and government agencies have used it to justify speech restrictions in contexts ranging from publishing bomb-making instructions to tour guide speech.

Volokh sums up the contemporary state of the doctrine by restating the following general elements: "(1.) When speech may cause other unlawful (criminal or tortious) conduct, or threatens that the speaker will engage in such illegal conduct, (2.) courts are entitled to develop rules defining some such speech as restrictable, (3.) much as the Court has done for advocacy of crime (under the rubric of the incitement and solicitation doctrines), for fighting words, for threats, and for child pornography, all of which have at times been viewed as special cases of the 'speech integral to [unlawful] conduct' doctrine."

The word "integral" in the third element implies that the Court requires the speech to be sufficiently connected to some other crime in order to be punishable. Only speech that caused or threatened other illegal conduct could be restricted.

The article concludes that to ensure a robust freedom of expression, the Court must keep the doctrine "well-defined and narrowly limited."

The Law and Policy Division would like to extend our thanks to the sponsors of our division social this year:

UNC Center for Media Law and Policy

Silha Center for the Study of Media Ethics and Law

The Media School at Indiana University

Center for International Media Law and Policy Studies at Indiana University

Clay Calvert

The social will be at The News Room on Friday, August 5, at 8:30 p.m. Please join us in thanking our sponsors!



Professor Genevieve Lakier

Stonecipher Winner

The Law and Policy Division is pleased to announce that Professor Genevieve Lakier has been awarded the 2016 Stonecipher Award for Distinguished Research in Media Law and Policy for her article, "The Invention of Low Value Speech," which appeared in the Harvard Law Review.

Professor Lakier, an assistant professor in the law school at the University of Chicago, teaches courses on Constitutional Law, Criminal Law, and Freedom of Expression in the Digital Age. According to her bio, Professor Lakier "is currently engaged in a long-term project exploring the cultural history of the First Amendment, and another project exploring the changing role of the state in the regulation of sex."

Named after the late Harry W. Stonecipher, the Stonecipher Award recognizes the top work in legal scholarship concerning freedom of speech, freedom of the press, and communication law and policy published in the past year. Preference is given to research with a strong theoretical component that demonstrates the potential to have a lasting influence on the field. The award comes with a \$1,000 cash prize.

This year, the committee received eight nominations that covered a wide range of topics, including

the First Amendment right to record police in public places, the free speech "revolution," and constitutional protection for "high value lies," such as those used to gain access to agricultural and livestock facilities. While all the submissions were highly rated, Professor Lakier's rose to the top, garnering a majority of first place votes.

While it is widely accepted that the First Amendment does not apply or only applies weakly to "low value" speech, Professor Lakier's article challenges the assumption that the existence of these categories of unprotected speech extends back to the ratification of the First Amendment. In the article, Professor Lakier argues that early American courts and legislators did not in fact tie constitutional protection for speech to its value. By challenging the historical accuracy of claims the U.S. Supreme Court has used to justify the doctrine of low-value speech, her article examines the validity of the basis for granting or denying low-value speech full First Amendment protection.

Professor Lakier's article was selected both for its contribution to First Amendment theory and for addressing the practical implications of the application of that theory in "a way that many theory-heavy articles fail to do," one reviewer said. According to another reviewer, the article deserved to be recognized for "its impact on modern Constitutional analysis – particularly [Lakier's] warning about the potential misuse of historical analysis – the 'invented

tradition' – to create new doctrine while claiming it's grounded in history." One reviewer described the article as "a well-written historical account that raises questions about the conventional wisdom of speech protection." Another reviewer wrote simply, "This is a brilliant piece."

This is the second year the Law and Policy Division has awarded the Stonecipher Award. Douglas Anderson, former dean of Penn State's College of Communications, and Kyu Ho Youm, professor and Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication, established the award to memorialize Stonecipher's contributions as a media law scholar and teacher. Stonecipher, who died in 2004, was one of the most acclaimed and influential First Amendment educators in the United States. He nurtured a number of media law scholars during his 15-year career at Southern Illinois University-Carbondale, beginning in 1969.

Youm said of this year's winner, "I am delighted that Prof. Lakier's article has been selected for the Stonecipher Award. It is truly path-breaking. We now have to rethink the First Amendment doctrine of low-value speech. Prof. Lakier's study illustrates historical and legal research at its best: identifying a rarely examined topic, reexamining its widely accepted assumption, and refuting the high-value vs. low-value speech dichotomy. It should be a must read for those of us in media law and policy."

Law and Policy Division Schedule

2016 AEJMC Conference
Minneapolis, MN
August 3-7, 2016

Wednesday, Aug. 3

1-2:15

Title: *The Supreme Court and the First Amendment: Recent and Upcoming Cases*

Panelists:

Courtney Barclay, Jacksonville

Judge Diana Murphy, Circuit Judge, U.S. Court of Appeals for the 8th Circuit

Aaron Van Oort, Partner, Faegre Baker Daniels, Minneapolis

Moderator: Jonathan Peters, Kansas

2:25-3:40

Title: *Teaching Roundtables: Drawing Inspiration from Teaching Competition Award-Winners*

Panelists:

Genelle Belmas, Kansas

Roy Gutterman, Syracuse

Andrew Pritchard, Iowa State

Peggy Watt, Western Washington

Moderator: Jared Schroeder, Southern Methodist

3:45-5

Title: *Comparative Law in the Classroom: Internationalizing Your Instruction*

Presiding/Moderating:

Amy Kristin Sanders, Northwestern University in Qatar

Panelists:

Ed Carter, Brigham Young

Eric Easton, Baltimore School of Law

Kyu Ho Youm, Oregon

Thursday, August 4

8:15-9:45 a.m.

Refereed Research Paper Session: New Perspectives on Enduring Free Speech Questions

Counterspeech, Cosby and Libel Law: Some Lessons About "Pure Opinion" and Resuscitating the Self-Defense Privilege

Clay Calvert, Florida

Doctrine at Risk: Content-Neutrality in a Post-Reed Landscape

Minch Minchin, Florida

Escaping the "Bondage of Irrational Fears": Brandeis, Free Speech and the Politics of Fear

Joseph Russomanno, Arizona State

The Holmes Truth: Toward a Pragmatic, Homes-influenced Conceptualization of the Nature of Truth

Jared Schroeder, Southern Methodist

Moderator: Roy Moore, Middle Tennessee State

Discussant: William Lee, Georgia

10:00-11:30 a.m.

Refereed Research Paper Session: Digital Data Law and Policy

Examination of Ag-gag and Data Trespass Statutes

Ray Whitehouse, North Carolina at Chapel Hill

Cyber Breach: Where Privacy Ends and Data Security Begins

Angela Rulffes, Syracuse

Student Data in Danger

Chanda Marlowe, North Carolina at Chapel Hill

EU v. U.S. Data Protection: An Unsafe Harbor?

Holly Hall, Arkansas State

Moderator: Jennifer Henderson, Trinity

Discussant: Jason Shepard, California State, Fullerton

1:30-3:00 p.m.

PF&R Panel: Winning the Fight for Free Expression at Private Schools and Universities

(co-sponsored with Scholastic Journalism)

Panelists:

Frank LoMonte, Student Press Law Center

Jennifer Henderson, Trinity

Bastiaan Vanacker, Loyola-Chicago

Jason Martin, DePaul

Moderator: Erik Ugland, Marquette

5:00-6:30 p.m.

PF&R Panel: Ethics Aloft: Drones, Sensors and the Changing Boundaries of Media

(co-sponsored with Media Ethics)

Panelists:

Courtney Barclay, Jacksonville

Kathleen Bartzen Culver, Wisconsin-Madison

Matt Waite, Nebraska

Moderator: Jane Kirtley, Minnesota

Friday, August 5

1:30-3:00 p.m.

PF&R Panel: Freedom of Information Act 50 Years Later: The U.S. Law Still Serving as the Touchstone?

(co-sponsored with International Communication)

Panelists:

Toby Rendell, Centre for Law and Democracy

Amy Kristin Sanders, Northwestern University in Qatar

David Cuillier, Arizona

John P. Gavin, Probes Reporter

Moderator: Jeannine Riley, Arizona

3:15-4:45 p.m.

PF&R Panel: Cohen v. Cowles Media at 25: Its Lasting Legacy

(co-sponsored with Newspaper and Online News divisions)

Panelists:

Elliot Rothenberg, attorney and author

Paul Hannah, Assistant Hennepin County Attorney

Bill Salisbury, St. Paul Pioneer Press

Susan Keith, Rutgers

Moderator: Joseph Russomanno, Arizona State

5:00-6:30 p.m.

Top Papers in Law and Policy

Indecency Four Years After Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues

Minch Minchin, Kieran Billaud, Kevin Bruckenstein and Tershone Phillips, Florida

Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After Williams-Yulee

Clay Calvert, Florida

Not the Publisher, Still the Proprietor: Bypassing a Website's Immunity Under Section 230 in Sex Trafficking Cases

Andrew Pritchard and Elaina Conrad, Iowa State

The Right to Record Images of Police in Public Places: Should Intent, Viewpoint or Journalistic Status Determine First Amendment Protection?

Clay Calvert, Florida

Moderator: Jonathan Peters, Kansas

Discussant: Daxton Chip Stewart, Texas Christian

6:45-8:15 p.m.

Division Membership Meeting

8:30-10:00 p.m.

Off-site Social at The News Room

Saturday, August 6

8:15-9:45 a.m.

Refereed Paper Research Session: Money, Markets and the Law

Free Speech v. Fair Disclosure: Does Citizens United Create a Constitutional Challenge for the SEC?

Sonia Bovio, Arizona State

Crash and Learn: The Inability of Transparency Laws to Penetrate American Monetary Policy

Benjamin W. Cramer and Martin E. Halstuck, Pennsylvania State

Speech v. Conduct, Surcharges v. Discounts: Testing the Limits of the First Amendment and Statutory Construction in the Growing Credit Card Quagmire

Rich Shumate, Stephanie McNeff and Stephenson Waters, Florida

Congress Shall Make No Law... Unless? The Expansion of Government Speech and the Narrowing of Viewpoint Neutrality

Jason Zenor, SUNY-Oswego

Moderator: Jon Bekken, Albright

Discussant: Paul Siegel, Hartford

12:15-1:30 p.m.

Scholar-to-Scholar Refereed Research Session: Empirical Studies of Media Law and Policy

Influencing Copyright Policymaking: An Examination of Information Subsidy in Congressional Copyright Hearings from 1997 through 2014

Minjeong Kim, Hankuk University

Holding Higher Education Accountable: Three Decades of Public Records Litigation Involving the University of Wisconsin

David Pritchard, Milwaukee, and Jonathan Anderson, USA Today Network, Wisconsin

Libel by the Numbers: The Use of Public Opinion Polls in Defamation Lawsuits

Eric Robinson, Louisiana State

Dismissed: Removal of College Media Advisers and Student Journalists' First Amendment Rights

Lindsie Trego, North Carolina at Chapel Hill

Mobile Broadband: Cross Country Comparison

Hsin-yi Sandy Tsai, National Chiao Tung

Discussant: Christopher Terry, Minnesota

3:30-5:00 p.m.

PF&R Panel: The Internationalization of Media Law and Policy

(co-sponsored with International Communication)

Panelists:

Erik Ugland, Marquette

Anthony Fargo, Indiana

Lyombe Eko, Texas Tech

Leonardo Ferreira, Florida International

Moderator: Amy Kristin Sanders, Northwestern University at Qatar

5:15-6:45 p.m.

PF&R Panel: (Sun)light, Cameras, Legal Action: A Look at Developments Related to Police Body Cameras
(co-sponsored with Communication Technology)

Panelists:

Jane Kirtley, Minnesota

Sandra Chance, Florida

Paul Schnell, Chief of Police, Maplewood, MN

Jason Sole, Hamline University and Metropolitan State University, Minneapolis NAACP

Moderator: Patrick C. File, Nevada, Reno

Sunday, August 7

11:00-12:30 p.m.

Refereed Paper Research Session: Digital Threats and Free Speech Implications

Fight Terror, Not Twitter: Why Section 230 Should Insulate Social Media from Material Support Claims

Nina Brown, Syracuse

Unmasking the Anonymous Cyberbully: A New Approach

Ben Holden, Illinois

A "Net" Gain for Society?: Examining the Legal Challenge to the FCC's Net Neutrality Order

Sarah Papadelias, Florida

Proxies and Proximate Cause: The Future of Immersive Entertainment and Tort Liability

Jason Zenor, SUNY-Oswego

Moderator: Patrick File, Nevada, Reno

Discussant: Jane Kirtley, Minnesota

Do You Have News for the Division?

If you have any news or would like to contribute to the newsletter, please contact

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