#### Belmas, Genelle I

From: Nina I Brown

Sent: Wednesday, March 24, 2021 7:46 AM

**To:** Belmas, Genelle I

**Subject:** Media Law Notes: Spring 2021 (AEJMC Law & Policy Division)

# **MEDIA LAW NOTES**

Spring 2021 Volume 49, Issue 2 AEJMC Law & Policy Division





**Head Notes** 

By Nina Brown Syracuse University

When I started teaching media law, I never expected to lead a class discussion on whether the president of the United States had incited illegal and violent action. I also could not have predicted that I would be teaching students via the hybrid modality of in-person and online in the middle of a pandemic. (Or that a large part of Texas had frozen over while I, living in Syracuse, was outside in a light jacket.) In so many ways, we are living—and teaching—through history.

For better and worse, the past four years have offered a plethora of material to use in class to teach our students about media law. The Trump administration's antagonistic relationship with the press and the truth created opportunities to teach students about the importance of the press and the First Amendment in checking government power. With a new administration comes the hope that these relationships will improve—but also a reminder that we have a responsibility to assert and defend our First Amendment rights and to hold government accountable.

We must also remember that living through history is exhausting. For many of us, this toll is both physical and emotional. It is critically important to prioritize our own mental health and recognize that many of our students are struggling with this balance as well. Something that has helped me has been connecting with many of you over these past few months—colleagues from around the world who are experiencing these same challenges.

And there are great opportunities to connect just around the corner. First up is the Southeast Colloquium, from March 18-20. The conference, hosted by Elon University, will be entirely online and promises fantastic programming. A special thanks to Mike Martinez for serving as Southeast Colloquium chair.

And, of course, the 2021 AEJMC Conference will be here before we know it. It will again be virtual, but thanks to feedback from members and procuring a new vendor, the costs will be significantly lower for attendees. I hope this will enable us to attract new members and bring people into the fold who have not been able to attend in recent years. More information will be coming from AEJMC soon, and I'll send a note to the division if I learn of anything to share.

In the meantime, Jared Schroeder, research chair, has launched our paper call and is already looking for volunteers for reviewers. Caitlin Carlson, vice head and programming chair, has put together an amazing array of panels. Once the dates/times are confirmed, we will update you with that information.

Our search for the next editor of *Communication Law and Policy* is also underway. The search committee is reviewing applications and making initial determinations on whether candidates meet the listed qualifications. The committee will interview qualified applicants and reach out to references. After that, the committee will make its selection and then announce it at the business meeting during the 2021 conference, requesting ratification of the decision. If you have questions about this process, please feel free to email me.

I'd also like to thank Jon Peters, newsletter chair and clerk, for producing this excellent issue, and Genelle Belmas, webmaster, for making needed updates to the division website. If there is information you'd like to see on it, please let us know! And don't forget to connect with division members on our Facebook page.

Finally, thanks to all of you—our members—who make the division so dynamic and successful. Even though these are challenging times, it is an honor to work with you.

Nina Brown is an assistant professor of communications at Syracuse University and the head of AEJMC's Law & Policy Division. She can be reached at nmibrown@syr.edu.

# Condoms, dildos, and sexy Zoom calls: Government speech regarding safer sex during the pandemic

By Kyla Garrett Wagner Syracuse University



If you listen closely, you'll hear the faint and muffled sounds of bumping and turning—the sounds of Anthony Comstock rolling in his grave. Why? Because in the 100 years since his campaigns to rid the United States of sexual impropriety, his fears are seemingly coming true as state and local public health departments go sex-positive during the pandemic.

The government sex-positive approach started in June 2020 when the New York City (NYC) Health Department released a three-page guide for safer sex and COVID-19. The unvarnished advice (word choice credit goes to the brilliant Brooks Fuller, of Elon) tells NYC residents that "you are your safest sex partner" and "if two is company then three (or more) is definitely a crowd." Additionally, those who use or make a living through sex work should rely on "video dates, sexting, subscriptionbased fan platforms, [and] sexy Zoom parties."

But the award for explicit messaging doesn't go to NYC. No, it goes to the state health departments of <u>Oregon</u> and <u>Washington</u>, which these government messages are relatively rare, as most states are saying nothing about sex during the pandemic—even though every state has a COVID-19 website or dashboard providing all kinds of information about the virus and its spread. Credit, though, should be given to Michigan and New Hampshire, states that don't currently list safer sex and COVID-19 information but are offering to mail free condoms to their citizens.

As a sexual health and sexual expression researcher, I'm ashamed to admit that no government response is the one that least surprises me. But for First Amendment scholars, this is a situation worth monitoring. Perhaps more states will join the sex-positive speech ranks of NYC, Oregon, Washington, and a few others. As we start to think about post-pandemic life, perhaps this is the kind of safersex messaging we can expect from health departments. Or perhaps this is all a flash in the pan and will become little more than an example of the desperate measures taken during these extraordinary times.

released picture-based posters of some of NYC's advice. The depicted recommendations included condom use, pornography consumption, and dildo or fleshlight use (if you're unfamiliar with the latter, I don't recommend you Google it at work). The recommendations also included the avoidance of sex positions that interact with the buttocks, tastefully depicted with a picture of a peach.

The only thing not surprising is that

For now, I encourage my fellow First Amendment scholars to keep an eye on the government sexual health messages released (or not) in their communities. They can serve, if nothing more, as vivid illustrations sometimes literally—of government speech during the pandemic.

Kyla Garrett Wagner is an assistant professor at Syracuse. Her email: kpwagner@syr.edu.

# Journalists face arrests, attacks, threats by law enforcement during racial justice protests



By Scott Memmel University of Minnesota

From my apartment, I could hear the police sirens and smell the smoke of burning buildings stemming from the protests over the death of George Floyd in Minneapolis. At the center of the unrest were journalists documenting the historic events. But as they covered the chaotic scenes, they were met with arrests by law enforcement, as well as threats and physical attacks, including being tackled to the ground or being hit with rubber bullets, pepper balls, or tear gas.

For example, on May 29, law enforcement detained a CNN television crew that was reporting on the protests. The following day, freelance photojournalist Linda Tirado tweeted that she had permanently lost vision in one eye after she was hit with a rubber bullet while covering the demonstrations. NBC News social media strategist Micah Grimes tweeted that a police officer or National Guard member "taunted" him after "intentionally sho[oting]" Grimes "with a canister [of] green powder."

As racial justice protests spread across the United States, journalists were there, facing

arrests, attacks, and threats by police. According to the U.S. Press Freedom Tracker, there were over 880 press freedom incidents at the protests between May 2020 and January 2021, across at least 79 cities. They included at least 170 physical attacks of journalists by police and at least 115 arrests.

These types of police actions are as old as the relationship between the press and police in the United States. As I detail in my forthcoming book with the University of Missouri Press, *Pressing the Police and Policing the Press*, police arrests and attacks of journalists, as well as searches and seizures, subpoenas, and surveillance of the press, together constitute one type of interaction between these two institutions that makes their relationship contentious.

Significant negative effects arise when police target the press. First, journalists face physical harm at already dangerous scenes. Second, such actions undermine journalists' ability to do their jobs. If reporters or photographers are at a hospital, in jail, or otherwise detained, they can't inform the public, nor can they hold law enforcement accountable. Just the threat of arrest or attack can cause a chilling effect. And when members of the public see journalists arrested, it can undermine their credibility and source relationships—and when the press can't fulfill its critical functions, it's the public that suffers. Third, police can face legal action by members of the press, including under 42 U.S.C. § 1983.

The current legal landscape around the press-police relationship allows for the continuation of such actions. Although the press receives some protections against government intrusion into newsgathering, publishing and broadcasting, and editorial control, there are also limitations on the press's ability to interfere with police functions. Both institutions can, therefore, generally achieve their purposes but also interfere with the other (e.g., when the press investigates law enforcement or when police arrest or attack journalists).

Certainly, the press must be able to report critically on law enforcement. And there may be exceedingly rare instances where police justifiably arrest a journalist. However, change is needed to ensure that the press can perform its essential functions when interacting with police. Although they will not fix the press-police relationship over night, helpful first steps include better communication between the press and police, as well as improved training for law enforcement on media relations, especially at chaotic scenes like protests.

Ultimately, the importance of the press was on full display during the racial justice protests. As fires raged and sirens blared, journalists were informing all of us about issues that needed (and still need) to be aired. In doing so, they also held police accountable. But amid the protests, members of the press faced arrests, attacks, and threats for doing their jobs. Change is necessary to ensure that the press and police can better serve the public moving forward.

Scott Memmel is a postdoctoral associate at the University of Minnesota. He can be reached at memmooo5@umn.edu.

## Join us: Women in the Law Division

The Women in the Law Division will meet
Thursday, March 25, at 7 p.m. ET. Please join via Zoom.
Meeting ID: 989 0368 3692 Passcode: WILD

## Law review publications: Call for volunteers

At our 2020 business meeting, members expressed strong interest in developing a statement that could be used by media law scholars to demonstrate the value of law review articles (e.g., during promotion and tenure reviews) despite their not being peer-reviewed. We are seeking senior scholars to form a committee to develop this idea further. If you're interested, or if you would like to nominate someone you think would be a valuable voice in this effort, please email Nina Brown, head of the Law & Policy Division, at nmibrown@syr.edu.

# The year, so far, in FOI law: novel evasions and efforts to undermine



By A.Jay Wagner
Marquette University

The new year has brought with it interesting efforts to circumvent and undermine freedom-of-information (FOI) laws. The very nature of these laws—often unfunded mandates that threaten exposure of embarrassing or incriminating information—can foment hostility between requester and public body. So, yes, FOI resistance is common, but this year is off to an especially ignominious start.

In Arizona, two state legislators refused to turn over records related to requests for emails and text messages about their travel to Washington, D.C., for the January 6 attack on the

sued Gallo and asked the court for a declaratory judgment and for sealing of the proceedings. Landry also made an appeal to constitutional privacy, which, if accepted, would have the effect of expanding privacy protections far beyond the state FOI law's existing exemptions.

Recently, too, the Kentucky House voted to amend the state's Open Records Act. What began as a modest amendment regarding financial disclosures became a major overhaul the night before the scheduled vote, giving many legislators less than 24 hours to read the bill. The new

Capitol. The requests were denied under a flimsy assertion and a novel concern.

First, they said the communications are on personal devices and thus not subject to the Arizona Public Records Law. This is a weak argument, as nearly all FOI laws, including Arizona's, make records on a public official's private devices disclosable if s/he was acting in an official capacity. They were both public advocates of the "Stop the Steal" movement, and the trip was expressly political.

Second, the legislators claimed the FBI's ongoing investigations posed the "threat of criminal prosecution," which gave rise to "Constitutional rights that may overcome the duty to disclose." So far, there has been no further discussion of that threat superseding FOI law, but it sounds suspiciously close to denying a request in order to avoid self-incrimination.

Meanwhile, in Louisiana, the state attorney general, Jeff Landry, has sued reporter Andrea Gallo over a public records request. Gallo sought information regarding harassment complaints against one of Landry's top deputies. Landry initially denied the request but later

language includes a residency requirement, meaning that news organizations filing requests would have to be based in Kentucky or affiliated with a news organization in Kentucky. The bill also includes a provision establishing a legislative panel as the final arbiter of access to legislative records. This is a response to a Kentucky Supreme Court decision, in 2019, vesting such oversight in the judiciary. It remains unclear whether the bill will pass, and the governor has not yet weighed in.

FOI laws will forever produce novel evasions and denials. When weighing the potential negative consequences of disclosure against the safety of nondisclosure, and the exceedingly rare odds of a penalty for noncompliance, the incentives are clear

The press and public alike must remain vigilant in preserving one of the stronger mechanisms for achieving governmental transparency and accountability.

A.Jay Wagner is an assistant professor of journalism and media studies at Marquette University. His email: ajay.wagner@marquette.edu.



A case for comps: Embracing them with appreciation, not consternation

#### By Harrison M. Rosenthal University of Kansas

There are no exams in grad school ... until there are exams in grad school. Comprehensive examinations conjure images of Rodney Dangerfield's character in *Back to School*: a student facing down a panel of multidisciplinary scholars determined to crush his soul. *Lasciate ogni Speranza* (or: "Abandon hope, all ye who enter").

High-stakes testing, after all, is not without criticism. Some pedagogists favor abolition, arguing these assessments measure knowledge incorrectly, cause undue stress, and incentivize cheating. A minority of doctoral programs have abrogated comprehensive exams entirely. Advisors, instead, require that students publish three tier-one journal articles and defend their works orally. This makes sense. Why lock students in a conference room and make them sweat out a series of unpublishable, and barely comprehensible, essays? A committee member answered my question candidly: "Because *I* had to do it. Therefore, *you* have to do it."

But academic rites of passage are not *ipso facto* worthless. Procedurally, comps test a student's subject-matter competency, ensuring we possess the requisite theoretical and methodological know-how to continue our research. Substantively, comps are snapshot opportunities for student-apprentices to feature our breadth and depth of knowledge. They are solemn occasions to demonstrate our intellectual acuity, scholarly contribution, and oratorical prowess—and for recognized scholars to certify our mastery by conferring candidacy.

This framework is empowering: Whereas, for example, a state bar exam is a test of minimal *competency* (my adopted summertime mantra), comps are a test of future scholarly *capacity*. You have free rein to explicate concepts, probe contested issues, and philosophize alongside your committee-member experts.

In short, comps are nothing to fear; they are something to embrace. They are a structured deadline, ensuring you have digested the literature necessary to produce excellent scholarship. They are a space and place to organize your dissertation-related thoughts. And they are a supervised forum in which committee members help you structure those thoughts. That being said, I realize I am pontificating in hindsight. Time apart, even a few weeks, makes the heart grow fonder. But in case you remain unconvinced by *logos*, let me appeal via *pathos*:

Comprehensive exams are a life-cycle event, an indelible privilege and shared touchstone that puts you in league with less than two percent of the population. But more importantly, comps are an intellectual springboard, catapulting you into a life of the mind. Deep-seated intellectual fulfillment is obtainable only through examination, metaphoric and literal. Are comps painful? Yes, but so too is the examined life.

In sum, this academic rite of passage is valuable because it reinforces a mutual love of wisdom (literally, *philosophia*) between the Ph.D. apprentice and master. It is often the student's first scholarly cathexis, proving to the committee, and to herself, that she possesses the requisite insight and fitness to engage fully with difficult philosophical issues. But comps, really, are a highbrow reception into a community of wisdom-lovers who realize that intellectualism is the *sine qua non* of eudaimonia.

Harrison M. Rosenthal is a lawyer and a Ph.D. candidate at the University of Kansas. He can be reached at h373r838@ku.edu.

# AEJMC 2021 (VIRTUAL) CONFERENCE

The AEJMC Council of Divisions invites the submission of original, non-published, English-language research papers to be considered for presentation at the annual conference August 4-7. The conference mode will be virtual, and more information, including the paper call for each division, is <u>available here</u>. The submission deadline is April 1 at 11:59 p.m. (Central).

The Law & Policy Division is seeking paper/abstract reviewers. Would you be willing to help? If so, please email Jared Schroeder, research chair, at jcschroeder@mail.smu.edu. Papers will be assigned in early April, and reviewers will have roughly a month to complete their work.

Note: You may not be a reviewer if you submit a paper to the Law & Policy Division. If you aren't sure if you will submit, we encourage you to volunteer to review, and we can take you off the list if necessary. That said, if you submit to other AEJMC divisions, you may still judge for Law & Policy.

# Guardrails for describing fake news, misinformation, and disinformation



By Stuart N. Brotman University of Tennessee, Knoxville

Perhaps the most distasteful national omelet we've been served during the past four years has been the one that has mixed together an unsavory combination of three ingredients: fake news, misinformation, and disinformation.

While many express growing concerns and look for ways to deal with them, that may be difficult—if not impossible—as long as we use these terms without any agreed-upon definitions that set useful boundaries and are easy to understand among the public at large. The alternative is to continue repeating the mantra "fake news-misinformation-disinformation" so often that it

loses meaning, or using the terms interchangeably so that they become permanently blurred in our minds.

Against that background, here's my approach to developing a necessary separation of these three distinct concepts, which can be useful in sorting out what is the root problem whenever one of these terms, all too often used pejoratively, is employed to describe a particular type of communication.

#### **FAKE NEWS**

Fake news should refer to a communication in any format—print, video, or online—but only if generated by the news media itself, which is comprised of professional journalists who have chosen the career path of reporting. This staring point would delimit vast amounts of information from meeting this definition, so it could not simply be applied to any communication by anyone.

Doctors are part of the medical community, lawyers are part of the legal community, and journalists are part of the news community. How many times have you heard someone say *fake medicine* when they disagreed with a diagnosis or *fake law* when they disagreed with a legal argument? Fake news should be equally rare.

Granted, those professions have licensing requirements, but they usually are enforced by groups within them that establish ethical guidelines to be followed as a condition of being licensed. Journalists are not licensed, of course, so it is a bit more difficult to use that boundary as a basis for their professional distinction. But where fake news is concerned, it often is attributed to the news organization collectively—CNN, NBC, *The New York Times*, and the like. In turn, this organizational focus makes it easier to ascertain a defined journalistic community at the outset, and many have transparent ethical guidelines, too.

The Associated Press is an excellent baseline. It's an independent global news organization dedicated to factual reporting, founded in 1846. More than half of the world's population sees AP journalism every day, with reporting from 250 locations worldwide. About 15,000 news outlets are part of this AP community, and all of them should be considered to be a bona fide news medium. Conversely, if they are not in the AP universe, it would be inaccurate and unfair to refer to any other source of communication as fake news.

Other objective criteria also can be applied to determine the news part of fake news. For example, any media organization that has been issued a hard press pass by virtue of membership in the White House Press Association or a comparable group at the state or local level also would qualify under my litmus test.

My car dealer or grocery or bank certainly would not fit within this framework, and it would be a bit ridiculous to yell fake news if my repair bill, sales receipt, or account statement included erroneous information. Yet without any boundaries, it's easy to shout fake news without even thinking whether what is being complained about is news in any normative sense. And since these three terms should have some distinctive meaning, fake news also should not be used when misinformation or disinformation is the more applicable concept, as explained below.

#### MISINFORMATION

Misinformation is perhaps the largest category at issue. I think any communication on social media—from anyone to anyone—may wind up being called misinformation if it is inaccurate in any way. Yet that would be too broad-brushed an approach.

We tend to thrive on sending and receiving gossip, rumors, even biting satire that surely is not intended to be judged for its accuracy. So misinformation should be limited to a smaller subset that is based on information, particularly information that relies on verifiable data rather than opinions.

Misinformation is really mistaken information, and it's not essential to characterize the source as benign or malignant in order to have that information corrected. The problem in social media is that a cry of misinformation too often turns into a finger-pointing exercise aimed at denigrating the motives of the person who communicated it.

This accelerates as more people are brought into the circle, as the original misinformation becomes further distorted when new layers of information are added by another person who picks up on the mistake and passes it on. When the battle cry goes out, anyone who characterizes a post as misinformation should be prepared to point out the nature of the mistake and provide a correction. This would help minimize the weaponization of the characterization as a way to demonize or demean the conveyor of that information.

#### DISINFORMATION

This descriptive category, like misinformation, also should be applied specifically to social

media. In contrast, though, it should be focused on foreign governments and groups working on their behalf, who have the intent of providing misleading information that is designed to create confusion or dissension in our electoral process or other aspects of national security.

The behavior of these bad actors is really the central issue here, so that concrete responses by the United States are the best way to combat this threat to democratic norms. This will require robust governmental offensive and defensive measures through diplomatic channels, including targeted counter-disinformation campaigns and sanctions when specific cases of disinformation arise. The purveyors of disinformation are largely known, including Russia, Iran, North Korea and China, along with terrorist organizations. Our intelligence agencies are well equipped to identify sources and methods of disinformation, and they can, with global allies, confront current threats and deter future ones.

#### LOOKING AHEAD

My proposal of a new classification system for these three concepts is illustrative rather than comprehensive, and I hope that it will be refined through a broader discussion within our communities of interest. The best first step will be to recognize that the labels being applied to these widespread communication phenomena need corresponding definitional guardrails if we are to develop the types of effective tailored responses that each area requires.

Stuart N. Brotman is the Howard Distinguished Endowed Professor of Media Management and Law and the Beaman Professor of Journalism and Electronic Media at the University of Tennessee, Knoxville. He can be reached at sbrotman@utk.edu.

### 2021 SOUTHEAST COLLOQUIUM March 18-20

Elon University is excited to host the 46th annual AEJMC Southeast Colloquium, the oldest and most successful regional journalism and mass communication meeting. This year's virtual event has a theme centering on mentorship and will be held March 18-20. Paper submissions closed on December 30. To register to attend, or to find more information, <u>please go here</u>. **Below is the programming schedule for the Law & Policy Division.** 

Section 230: The Twenty-Six Words That Turned Online Speech Into Techlash Friday, March 19, 11:00 a.m. – 12:15 p.m.

Section 230 of the 1996 Communications Decency Act says that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 U.S.C. §230). Courts have concluded this law provides websites immunity from lawsuits for content their users post. In his book "The Twenty-Six Words That Created the Internet," Professor Jeff Kosseff insists it's been frequently misinterpreted. In 2020, it also became politically controversial, more so than in previous years.

#### Moderator

Israel Balderas, Palm Beach Atlantic University

#### **Panelists**

Jeff Kosseff, United States Naval Academy Carrie Goldberg, Civil Rights Attorney Cathy Gellis, Internet Law Attorney Christopher Terry, University of Minnesota

#### Thunderdome 3: Prometheus v. FCC

Friday, March 19, 1:45 p.m. – 3:00 p.m.

Since 2004, the FCC's media ownership policy has been bogged down in a lengthy battle over a lack of empirical evidence that the policy achieves its stated objectives and the corresponding issue about the low levels of control of media outlets by women and minorities. After four losses in the Third Circuit, in 2004, 2011, 2016 and 2019 and with a decision pending in an agency review launched in 2018, the Supreme Court has granted cert to a joint appeal from the FCC and the National Association of Broadcasters. Media ownership crosses many lines of interest to members of the Law and Policy division, including diversity of viewpoints and access to information, but also has implications for news production.

#### Moderator

Christopher Terry, University of Minnesota

#### **Panelists**

Caitlin Carlson, Seattle University Laurie Thomas Lee, University of Nebraska-Lincoln Genelle Belmas, University of Kansas

#### **First Amendment Theory and Doctrine**

Friday, March 19, 3:15 p.m. - 4:45 p.m.

"Free Expression Among the Chaos: Examining Marketplace Assumptions Through the Chaos Theory Lens" — Jared Schroeder, Southern Methodist University

"Access Denied: How Online Harassment Limits Enjoyment of Offline Public Accommodations" — Caitlin Carlson and Lily Rose Henein, Seattle University

"Times v. Sullivan Revisited: Interment or Resurrection" — W. Wat Hopkins, Virginia Tech (Top Faculty Paper)

"Speech Imperialization? Situating American Parrrhesia in an Isegoria World" — Harrison M. Rosenthal, University of Kansas

#### Moderator

Michael T. Martinez, University of Tennessee

#### Discussant

Christopher Terry, University of Minnesota

# Environmental Protests, Contractual Review, Robocalls and FOIA ... Oh My!!! Friday, March 19, 5:00 p.m. – 6:15 p.m.

"Envirodemic: Unconstitutional Restrictions on Environmental Protests from Attacks of 2001 to the Struggles of 2020" — Benjamin W. Cramer, Pennsylvania State University

"Some Lessons from *United States v. Bolton* about *United States v. Snepp* in the Internet Era" — Erin McLoughlin, University of Florida (Top Student Paper)

"Dealing with Phone-y Calls: The First Amendment and Illegal Robocalls Following *Barr v. AAPC*" — Scott Memmel, University of Minnesota

"Curiously Engaged: A Fresh Evaluation of FOI Uses and Behaviors" — A.Jay Wagner, Marquette University

#### Moderator

Michael T. Martinez, University of Tennessee

#### Discussant

Genelle Belmas, University of Kansas

#### **Research in Progress Roundtable**

Saturday, March 20, 11:30 a.m. - 12:45 p.m.

"Free Speech and the Marketplace of Emotion" — Tori Ekstrand, University of North Carolina at Chapel Hill

"A Proposed Anticanon for Freedom of Expression" — Genelle Belmas, University of Kansas

"The Future of Media Law: Defamation and Privacy in Cyberpunk" — Nikhil Moro, Kansas State University

"The Digital Age: A Review of Recent Laws Aimed at Digital Media in the U.S. and European Union" — Sheila B. Lalwani, Clemson University

<u>Moderator/Discussant</u> Caitlin Carlson, Seattle University

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