

Media Law Notes

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Head Notes

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A few months into the job, I can honestly say that the division head role is a comfortable one, thanks to my officers, who make life awfully easy! I can't thank them enough, nor can I but marvel at the Division's "can do" attitude when it comes to the administrivia required to run an AEJMC army. We're busy preparing



Charles Davis

Mid-Winter programming meeting in Jacksonville in December (that sounds so nice), and as of this writing are still accepting panel proposals for Denver.

Amy Gajda is working on a great lineup for that meeting, including plans for a pre-session legal research workshop that sounds like it's going to be highly educational.

I've been assembling links to build a blog digest on media law for one of my favorite resources, alltop.com. If you haven't been to alltop, go take a look. It's like a magazine stand for blogs - you can find a collection of blogs on a wide variety of subjects, and all are on an RSS feed, so they are updated every time the blog is refreshed. We've built on under "freedom of information" for the FOI community, and I thought it would make a nice project for the Division under my helm. By the way, if you have blogs you'd like to see included in our alltop page, send them to me at davisncn@missouri.edu. Member blogs would be especially welcome - just make sure you have an RSS feed first.

I'm also reviewing our membership as suggested by the AEJMC Assessment Committee to make an effort to diversify our leadership ranks in the coming years, and here is where I truly need your help. If you have a colleague, or know an associate in the Law School, or anywhere else on your campus or others, with an interest in media law and policy, please let me know. I will recruit them personally to the Division.

We won't diversify if we don't try extraordinarily hard at it, folks. The effort is only beginning, but I can assure you that the Division is taking the mission seriously. And we can't do it without all of your help.

Thanks again for your involvement in the life of the Division. I'm reminded daily of what a great group of colleagues I have and how much fun it is to work with you all.

Are Journalists Making the Grade? Ask the Government

By Clay Calvert
University of Florida

When you went journalism school, you expected professors to grade your writing and reporting. If you misspelled the name of someone about whom you were writing, for instance, you just might have failed that entire assignment.

But once you earned that diploma, the only people who ever graded your journalism skills again - aside from a few angry readers - were your employers.

Or so you thought.

It turns out that the federal government has been grading reporters, with those grades possibly affecting their access to cover the war in Afghanistan.

Stars and Stripes, the daily independent newspaper that dubs itself as the "hometown newspaper" for America's military, revealed in August that the Pentagon hired a public relations firm to profile and grade reporters covering the intensifying fighting in Afghanistan.

In an Aug. 29 story, Stars and Stripes reported that "secret profiles commissioned by the Pentagon to rate the work of journalists reporting from Afghanistan were used by military

(Continued on page 2)

INSIDE THIS ISSUE:

- * Boston 2009
- * Division meeting minutes
- * SE Colloquium call for papers
- * Annotated bibliography

(Continued from page 1)

officials to deny disfavored reporters access to American fighting units or otherwise influence their coverage as recently as 2008."

The Washington-based Rendon Group trumpets its mission on its website as the delivery of "insightful strategic communications services and products that provide clients tactical superiority in their complex information environments."

In a statement posted last week about its contract with the Pentagon, the Rendon Group explains its grading system.

"Any reference to positive, negative or neutral in our analysis is derived by quantifying the content in relation to mission objectives. Example: Positive to Neutral coverage could mean that it contains stories that are either neutral to or positive to a specific military objective (stability, security, captures, etc)," the statement reads.

In contrast, a rating of neutral or negative coverage "could indicate that content in stories were negative in relation to mission objectives (kidnapping, suicide bombing, etc)."

All of this should be deeply discomfiting not only to journalists, but also to all Americans who depend on journalists for supposedly objective coverage to learn about the war.

And since it is in such a grade-giving mode, the military deserves an "F" for ever adopting this program.

It's the separation of the press from the government in the United States, as provided by the First Amendment to the Constitution, that allows the press to play its vital watchdog role on government.

Independence breeds objectivity and the courage to boldly report on government operations and officials,

warts and all. But when access depends on favorable coverage, then all goes away.

If the government cherry picks only those reporters who give it the most favorable spin or coverage when reporting from Afghanistan, however, then we all lose.

President Obama has pledged transparency in government, but making sure that only military-friendly reporters cover the fighting in a war to which he has committed more troops clouds the picture of what really transpires half a world away.

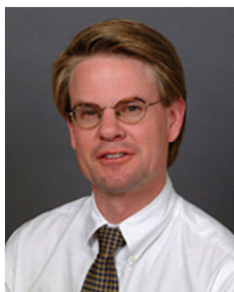
Nothing, of course, stops the government from keeping tabs on reporters, and presidents have long favored certain reporters over others when it comes to fielding questions at press conferences.

On Aug. 31, the military wisely decided to cancel its contract with the Rendon Group. Rear Adm. Gregory Smith, director of communications for U.S. Forces Afghanistan, told the Associated Press in an e-mail statement that the grading was a "distraction to our main mission here."

The move rightly drew kudos from Aidan White, general secretary of the International Federation of Journalists, who called it in a press release a "small victory for press freedom and quality journalism" that "underscores the importance of avoiding any suggestion of undue influence on the way media report and it is a sound message to send in Afghanistan where the battle for democracy is not yet won."

As our troops fight overseas to preserve the First Amendment freedoms of speech, press and religion that we enjoy and too often take for granted here in the United States, it's important for the federal government not to cross the line of independence that separates it from the press.

Clay Calvert is Professor and Eminent Scholar in Mass Communication at in the College of Journalism and Communications at the University of Florida in Gainesville, where he teaches classes on media law. Reach him at ccalvert@jou.ufl.edu.



Clay Calvert

Legal Annotated Bibliography

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Academic Freedom

Rosborough IV, R. S. (2009). "A "Great" Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court's Decision in *Garcetti v. Ceballos*." 72 *Albany Law Review* 565.

The Supreme Court's decision in *Garcetti v. Ceballos* seriously threatens academic freedom's "special niche in our constitutional tradition." By holding public employee speech pursuant to official duties unprotected under the First Amendment, *Garcetti* leaves unprotected those most in need of that protection, those who by their very job duties pursue truth and the advancement of human knowledge and are in the best position to have informed opinions on matters of public concern. Public university professors who lecture, research, and publish pursuant to their official duties must be free to perform those duties without fear of reprisal based on the content of their scholarship. Therefore, in order to best safeguard academic freedom, the courts must hold the rule in *Garcetti* inapplicable in the context of public employee speech in academia.

Copyright

Norvell, B. C. (2009). "The Modern First Amendment and Copyright Law." 18 *Southern California Interdisciplinary Law Journal* 547.

(Continued on page 4)

Scholar-to-Scholar session

AEJMC Convention

Boston 2009



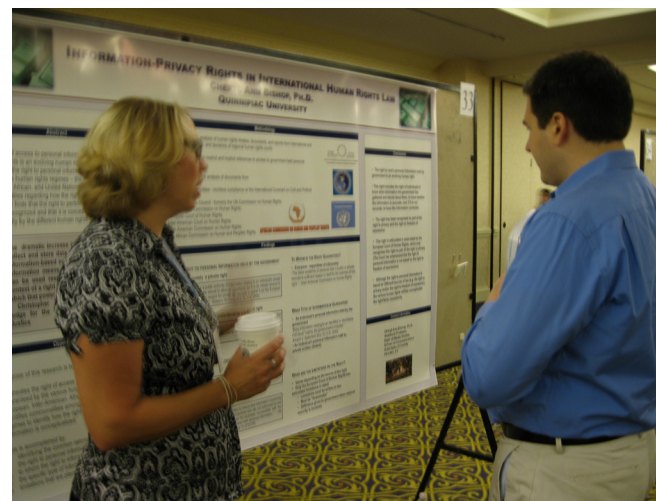
Lyombe Eko of the University of Iowa discusses international intellectual property law at the Scholar-to-Scholar session Friday afternoon.



Amy Reynolds, Bob Drechsel and Don Shaw talk about research during the poster session.



Above, Jasmine McNealy talks with Jack Breslin about her paper on legal issues surrounding media ride-alongs. Jasmine represented the University of Florida at the conference and is now an assistant professor at Louisiana State University.



At right, Quinnipiac University's Cheryl Ann Bishop won the division award for her Scholar-to-Scholar poster on information-privacy rights in international human rights law.

(Photos by Kathy Olson)

(Continued from page 2)

The United States Constitution contains within its four corners both the First Amendment to the Constitution and the Copyright Clause. In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA"), which contains an anticircumvention provision in section 1201. This Article will argue that DMCA section 1201 is unconstitutional and will utilize a wide variety of constitutional arguments to support this thesis.

FCC Regulations

Corn-Revere, R. (2008-2009). "FCC v. Fox Television Stations, Inc.: Awaiting the Next Act." 2009 Cato Supreme Court Review 295.

The U.S. Supreme Court considered the validity of the Federal Communications Commission's policies prohibiting broadcast indecency for the first time in 30 years. The widely anticipated holding in *FCC v. Fox* did not produce the constitutional confrontation some had hoped for. Nor did it vindicate the FCC's decision to enforce its indecency rules against inadvertent, accidental, or fleeting expletives. Instead, the Supreme Court decided only that the Commission's explanation for its policy change was adequate to avoid being considered arbitrary and capricious under the APA. The resulting remand proceeding will determine the extent to which the FCC's more restrictive policy is vulnerable under what Justice Ginsburg described as "the long shadow of the First Amendment."

First Amendment

Larsen, Z. A. (2009). "The Egalitarian First Amendment: Its History and a Critique on the Grounds of Text, Rights, Negative Liberty and Our Republican Constitutional Structure." 31 North Carolina Central Law Review 153.

This article articulates the growing tendency of constitutional theorists and U.S. Supreme Court justices to construe the First Amendment in the light of egalitarian principles and argues that to do so is inconsistent with the meaning and purpose of the First Amendment. The article criticizes the egalitarian approach as creating a positive right, contrary to the structure of the Bill of Rights as a "charter of negative liberties" and as diluting the right to speech by infusing in it a relative determination of speech values. Finally, the article concludes that the egalitarian reading should be rejected as endangering the very liberties the First Amendment creates.

Free Speech

Gibson, B. M. (2009). "Doninger v. Niehoff: 'Tinker is Online and In Trouble.'" 36 Northern Kentucky Law Review 185.

In May of 2008, the United States Court of Appeals for the Second Circuit issued a decision permitting a local school district to discipline a high school student for comments posted on the student's blog. *Doninger v. Niehoff* is one of the most recent decisions demonstrating the application of Supreme Court language governing on-campus student speech principles to an incident of off-campus, internet-based speech. These cyberspeech cases present a new challenge for courts attempting to apply on-campus First Amendment standards to speech created on the internet and entirely off-campus.

Newcombe, C. B. (2009). "Morse v. Frederick One Year Later: New Limitations on Student Speech and the 'Columbine Factor.'" 42 Suffolk University Law Review 427.

When Justice Samuel Alito agreed with other members of the Supreme Court that a school principal could constitutionally prohibit a student from holding up a sign with the words "Bong

Hits for Jesus," he thought that the prohibition was limited to speech about illegal drugs. He was wrong. One year later, federal courts have expanded *Morse v. Frederick* far beyond its facts to include restrictions on student speech advocating illegal conduct and speech threatening school safety. This article suggests that the expansion of *Morse* has two causes: the Court's opinion itself and what the article labels the "Columbine factor."

Norton, H. (2009). "Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression." 59 Duke Law Journal 1.

This Article identifies a key doctrinal shift in courts' treatment of public employees' First Amendment claims -- a shift that imperils the public's interest in transparent government as well as the free speech rights of more than twenty million government workers. In the past, courts interpreted the First Amendment to permit governmental discipline of public employee speech on matters of public interest only when such speech undermined the government employer's interest in efficiently providing public services. In contrast, courts now increasingly focus on--and defer to--government's claim to control its workers' expression to protect its own speech.

Privacy

Lewis, E. P. (2009). "Unmasking 'Anon12345': Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants." 2009 University of Illinois Law Review 947.

Freedom to speak, both on the record and anonymously, is one of our nation's most cherished rights. This right, however, is not absolute. Ugly, demonstrably false statements have no place in public discourse. The

(Continued on page 7)

Minutes of the Law & Policy Division Annual Meeting

Boston, Mass., August 7, 2009

By Amy Gajda, division clerk

Ed Carter calls the meeting to order. 25 Law & Policy members present.

Last year's meeting minutes motioned for approval, seconded, and accepted.

Head's Report

The Division is in good financial shape with approximately \$2600 in savings. Extra funds allowed the division to fund a new teaching award. Annual donations for Reporters Committee for Freedom of the Press (\$150) and Student Press Law Center (\$250) motioned for approval, seconded, and accepted.

Proposed Constitution and Bylaws Discussion

Both were both handed out in hard copy to membership at the meeting (both had been distributed to members previously via the website and Media Law Notes). The motivating factor for change was the ascension of officers and the incorporation of the research chair into executive officers, unlike before. Both also reflect the latitude given to the Division's head to appoint people to jobs and

(Continued on page 6)



Incoming division head Charles Davis presents a plaque to Ed Carter at the business meeting in appreciation for Ed's service as 2008-09 division head.

Call for Nominations, AEJMC Equity & Diversity Award

AEJMC is calling for nominations for the 2010 AEJMC Equity & Diversity Award, which recognizes JMC academic units that are increasing equity and diversity among their faculty. Specifically, units will be awarded for progress and innovation in racial, gender, and ethnic equity and diversity. The selection committee will evaluate efforts over the past three years in the following areas: hiring and recruitment, status of current faculty, climate, and institutionally embedded support.

Applications must be e-mailed, and may be submitted by any AEJMC or ASJMC member, by any faculty member within the nominated unit, or by the head of the nominated unit.

For more information about the awards and application requirements, see the complete call on the AEJMC Web site at http://www.aejmc.org/_awards/equity.php

Complete applications must to be received by February 1, 2010. Materials should be emailed to AEJMC at aejmchq@aol.com. Only e-mailed applications will be accepted. Applications that are incomplete will not be considered.

Please address any questions to: Jennifer McGill, AEJMC Executive Director, at 803-798-0271, or aejmchq@aol.com.

Selection of the winner is determined by the Equity and Diversity Award Advisory Committee, composed of AEJMC members. The committee reserves the right not to present an award in any given year.

(Continued from page 5)

committees. Amicus brief work and other political involvement were also added. Changes also reflect that graduate students who attend the annual meeting vote as regular members. There is discussion over the change in ascension, including concerns that the change in ascension will signal an emphasis on research over teaching. A motion to retain the three officers and the old ascension fails. A motion to accept the changes in the constitution and bylaws is made, seconded, and passed unanimously.

Communications Law & Policy

Bylaws for the Journal are being worked on and will also document the way board members are selected.

Law and Policy Division Assessment by AEJMC

Head and Vice-Head met with AEJMC officials earlier in Boston as part of the Division's five-year review. Our strengths, as suggested by AEJMC include general research, Communications Law & Policy, research competition, participation in the Southeast colloquium, Professional Freedom and Responsibility efforts and panels, Media Law Notes including legal bibliography, website, teaching competition, document bylaws and constitution. Area needing attention: diversity within the Division.

Teaching Competition Results

14 submissions, 5 judges, 4 winners, including a tie for third. Winner is Steve Helle (Blogging and the First Amendment). Second place is Robert Kerr (Multi-Media Project). Third: John Bender (Literary Works and Simulation Relevant to Privacy Law) & Brian Carroll (First Amendment in Local Action).

Research Results

69 submissions, 41% acceptance rate, 66 judges. Judges now listed by name in the convention publication. Student winners announced (third place winner is Woodrow

Hartzog; second place winner is Jennifer Harlow; first place winner is Dean Smith). Faculty winners announced (third place winner is Rob Frieden; second place winner is Stephen Bates; first place is Robert Drechsel). AEJMC award for scholar-to-scholar poster: Cheryl Bishop.

Southeast Colloquium Research Report

30 papers, all encouraged to submit papers during next competition. Attendance at Southeast Colloquium also encouraged; speakers include new FOIA official.

Report from Council of Divisions meeting

If authors are identified on electronically submitted papers, they are automatically disqualified. Concerns discussed about properties field in the document; the Division encourages authors to delete their names in properties too.

Other Business

AEJMC has a new scholars program for junior faculty, with up to \$2500 available for research. AEJMC business meeting vote leads to dues increase by \$5 to \$110 and \$50 for grad students. AEJMC reports that 5.6% of all participants in AEJMC activities were minorities; will work to increase this.

Officer Transition

Ed Carter expresses gratitude to all members; he's been grateful to serve as Division head. Meeting is turned over to Charles Davis, incoming head. Charles thanks Ed for his excellent service as Division head. Kathy Olson is nominated, seconded, and unanimously elected as Clerk-Newsletter Editor. Charles announces Dan Kozlowski as Professional Freedom and Responsibility Chair. Charles will fill Teaching Chair and Webmaster positions later. Charles will also attempt to increase diversity within the Division, looking at other membership lists and cross-recruit. Also expresses technological goals, including increasing Law & Policy presence on web, with links on media law pages.

Charles thanks Ed Carter (past head), Amy Gajda (clerk), Dave Cuillier and Chip Stewart (paper competitions), Dan Kozlowski (teaching competition), and Kathy Olson (Webmaster).

Meeting concludes.

Have you signed up for the Law & Policy Speakers Bureau?

Make yourself available for media interviews or speaking engagements in your area of expertise. Go to the division Web site at <http://www.aejmc.net/law> and click on "Speakers Bureau" to find out more.

(Continued from page 4)

Internet, though still young relative to other mediums of communication, is no different from traditional forms of communication. Though it offers easier access and more opportunity to comment anonymously, users cannot abuse this freedom by committing defamation and hiding behind the First Amendment. Congress and the courts have admirably balanced the First Amendment and the rights of public figures regarding anonymous online defamation. But in the search for a proper solution, they have failed to address the concerns of everyday, private citizens. This paper makes recommendations that standards for unmasking anonymous Internet defendants should be tiered according to whether the plaintiff is a public figure, a corporate entity, or a private individual.

Reporters Privilege

Anderson, D. A. (2009). "Confidential Sources Reconsidered." 61 Florida Law Review 883.

For fifty years, the courts have debated whether the First Amendment guarantee of freedom of the press requires that journalists be allowed to protect confidential sources. Many state and federal courts have answered in the affirmative, creating a First Amendment "reporter's privilege." The Supreme Court has declined to recognize such a privilege, but has not foreclosed the possibility. This Article suggests that the constitutional guarantee can be honored without prescribing a constitutionally defined privilege.

Bates, S. (2009). "Overruling a Higher Court: The Goodale Gambit and Branzburg v. Hayes." 14 Nexus: Chapman's Journal of Law and Policy 17.

The Supreme Court refused to acknowledge reporter's privilege in *Branzburg v. Hayes*, with five Justices holding that unless a subpoena is issued in bad faith, the reporter must testify and provide documents. Thanks in part to creative lawyering by New York Times attorney James Goodale, lower courts proceeded to turn *Branzburg* on its head. No longer did *Branzburg* reject a reporter's privilege; it created one. Lower courts generally cited the Justice Lewis Powell's concurring opinion for the proposition that reporters are entitled to some sort of privilege, and then applied a three-part test from Justice Potter Stewart's dissent. Within a few years, all but one circuit had converted a three-justice dissent into the holding of the Court. This judicial disregard lasted for more than thirty years, until the Seventh Circuit reassembled the tatters of *Branzburg* in 2003 and other judges took notice.

Southeast Colloquium Call for Papers

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 11-13 at the University of North Carolina at Chapel Hill. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, freedom of information, FCC 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 convention to present accepted papers.

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 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 one original and three copies of each paper. Each copy should include a 250-word abstract. On the cover page of the original, authors should include the title of the paper, and the name, affiliation, address, office phone, home phone, fax and e-mail address for each author. Student submissions should clearly be indicated on the cover page of the original as well. On the cover page of the three copies, only the title of the paper should appear, with no information identifying any author and no mention of the author's status as faculty or student. The originals and copies should be sent via first-class U.S. mail, postmarked on or before Dec. 4, 2009, to:

Chip Stewart
Schieffer School of Journalism
Texas Christian University
TCU Box 298060
Fort Worth, TX 76129

If you have any questions about the submission process or the paper contest, please contact Chip Stewart by phone at (817) 257-5291 or via e-mail at d.stewart@tcu.edu.

For more information on the Southeast Regional, go to <http://www.jomc.unc.edu/SEC2010>

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