Media Law Notes

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Head Notes

Beth Blanks Hindman
Division Head
Washington State University
ehindman@wsu.edu

Wow. What a conference! As I headed for the airport on Aug. 12, family in tow, I began to reflect on Law & Policy's presence at AEJMC this summer. An insider tour of the Supreme Court, a conversation with two FCC commissioners, a panel with the "whole class" of Supreme Court reporters, great research sessions, C-SPAN coverage of the pre-conference workshop, no C-SPAN coverage of another session (more on that later)…the list goes on. I hope all of you had a chance to participate in one or more of our sessions, because they all were great. I'd like to note a few highlights for you.

First, the research. Thanks to the excellent shepherding skills of Ed Carter, we accepted and heard 26 fine research presentations. Our student award winner this year was Derigan Silver of North Carolina, and the faculty winner was David Cuillier of Arizona. David, our new teaching chair, also won the Nafziger-White Dissertation Award for his work on access to information (shameless plug here: he received his Ph.D. from my university, Washington State), which

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INSIDE THIS ISSUE

Engage Them

David Cuillier
Division Teaching Chair
University of Arizona
cuillier@email.arizona.edu

When I first started teaching, I thought it would be neat to be like Professor Charles Kingsfield, the curmudgeonly law professor played by John Houseman in the *Paper Chase.*

"Want an 'A' in my class? Then you must EARNNNN it," I would say sternly to my students as I had hoped they would sit in rapt attention for two-hour lectures on prior restraint.

But I soon found out that students don't care for John Houseman impressions, and they really don't like two-hour lectures. They don't retain a thing.

So I don't do Professor Kingsfield anymore. Now I do Flavor Flav, complete with clock and Viking hat. Not as dignified, albeit, but it gets the job done.

Engaged students learn, so in addition to assigned readings, case briefs, lectures, tests, and papers, I try to integrate into my courses experiential exercises. Sometimes it's a role-playing interactive exercise. Sometimes it's making a project relevant to their lives.

The best ideas I've gotten were from other professors or online resources, including sites geared to scholastic journalism. High school journalism teachers have to make the material compelling, so their exercises are educational and engaging. I don't dummy down the curriculum; I just deliver it in a way students readily absorb.

In the spirit of collegial sharing, I've gleaned a variety of resources, most online, that provide exercises helpful for teaching media law (see accompanying sidebar). This winter I would like to post these and other ideas on the teaching area of the Media Law and Policy Division Web site.

This is where you come in:

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Legal Annotated Bibliography

Penelope B. Summers
Northern Kentucky University
summerspb@nku.edu

Access to Information

Friedman, H. (2006) ***Where public and private spaces converge: Discriminatory media access to government information,*** 75 **Fordham Law Review** 253. While First Amendment prohibitions against prior restraint are clear, deference to news media for newsgathering is not so well established, partially because the Constitution places no absolute affirmative duty on the government to give access to information and sources not generally available to the public. The author claims the question of whether the government may discriminate based on viewpoint among media in granting access to information becomes constitutional in several doctrinal areas including First Amendment, equal protection, wartime practices and public forum. Friedman discusses theories such as futility (why keep media out when information is already available), multiplicity of views (diverse media lead to robust debate), and a right to receive information. Analyzing court decisions from four federal circuits, the author suggests that the Second Circuit offers a tenable solution in that it defines and incorporates public forum doctrine into a media context; uses an irreparable harm test to determine if the such exclusion would block the public from a right to receive a multiplicity of views; and accounts for how media gather news.

Halstuk, M. & Easton,E. (2006) ***Of Secrets and Spies: Strengthening the Public's Right to Know About the CIA,*** 17 **Stanford Law & Policy Review** 353. The authors examine the Intelligence Reform and Terrorism Prevention Act of 2004. Congress passed the Act in the aftermath of government investigations into the Sept. 11, 2001, terrorist attacks. The authors demonstrate how the new law — the first significant change in national security policy since the National Security Act of 1947 was enacted — creates a new intelligence-information dissemination model, which substantially narrows Central Intelligence Agency discretion to withhold information under the Freedom of Information Act (FOIA). Halstuk and Easton argue that the 2004 law nullifies a landmark 1985 Supreme Court decision that granted the CIA a near blanket exemption to the FOIA, enabling the agency to insulate itself from the twin spurs of public criticism and public accountability for more than two decades. Indeed, the authors note, the CIA's widely publicized failures in connection with the 9/11 attacks and the 2003 invasion of Iraq illustrate the folly of unchecked secrecy, which cloaks questionable Agency activities, conceals grave problems in CIA management and undermines the public's faith in government. (Authors' Abstract)

Electronic Media

Gottfried, B. & Taubman, J. (2006) ***What is left of listener standing? The D.C. Circuits continuing flirtation with a dying doctrine,*** 14 **CommLaw Conspectus** 403. In 1966 the D.C. Circuit outlined listener standing in the United Church of Christ case against WBLT **(CITE CASE)** when it granted the church standing to "vindicate the public interest" through the private interests of two of its members claiming harm by WBLT's discriminatory practices based on the concepts of public interest and duopoly/localism. In 1988, reaffirmation came in ***Llerandi v. FCC***, when the court said that "listeners are, by definition, 'injured' when licenses are issued in contravention" to policy requirements. The authors argue that the U.S. Supreme Court decision in ***Lujan v. Defenders of Wildlife*** (1992) essentially gutted Llerandi by asserting that legislative action cannot statutorily define injury in such a way that any member of the public can vindicate it without specific showing of personal and concrete harm. Since the *Lujan* case, Gottfried and Taubman say listeners must overcome the hefty challenge of showing real and ongoing harm if they are to get standing to challenge FCC actions. They conclude the D.C. Circuit either has a dedication to a doctrine it perceives in the public interest, or it is simply reluctant to overturn its own precedent.

Matheson, D. (2006) ***No moderator needed: A liberty tradition right to broadcast advertorials,*** 33 **Hastings Constitutional Law Quarterly** 255. Using the individual liberty perspective of the First Amendment, the author argues that broadcaster refusals to sell advertising time based on viewpoint, especially regarding political speech, are unconstitutional because broadcasters are simply managers of public property entrusted to them

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for public discussion. He claims court doctrine reflects a strong individual liberty approach to the First Amendment in contrast to a civic republican approach. He argues that requiring broadcasters to be viewpoint-neutral in carrying issue advertisements does not compel speech because such ads are not construed to be supported by or the viewpoint of the broadcaster. Matheson concludes that whether treated as traditional public fora or non-traditional public fora, broadcast media have a constitutional duty to carry issue advertisements on the public property they manage in a viewpoint neutral fashion.

First Amendment

Weeden, L. (2006) ***Hurricane Katrina: censorship and the news media,*** 31 **Thurgood Marshall Law Review** 479. Within the framework of media and legal studies, the author, considers three methods of media censorship: external/government restraints, cooperative restraints between the government and media, and media self censorship. The first method, he says, raises First Amendment issues; the second raises both First Amendment and public interest issues; while the third raises a public interest issue. In delineating the methods through the coverage of Hurricane Katrina, Weeden cites the Joint Task Force Katrina zero access plan to "bar, impede or prevent news media … (from covering) the deceased Hurricane Katrina victim recovery efforts." He also references NBC's self-censorship in deadening Kayne West's microphone at a live telethon when West criticized the Bush administration's response. Weeden surmises that an offer of cooperation between media and officials was rejected based on the need of the public to know. Overall in the Katrina case, the author concludes media succeeded in what they should do in the wake of important information of public concern, demonstrating checking value of a free press, but he cautions that self-censorship by traditionally private concerns who manage public property should not be disadvantaged under the First Amendment by the non-state actor analysis.

Free Press/Fair Trial

Erskine, D. (2006) ***An analysis of the legality of television cameras broadcasting juror deliberations in a criminal case,*** 39 **Akron Law Review** 701. Based on Article III, section 2 and the Sixth and First amendments to the constitution; an analysis of selected state constitutions and federal rules and allegations of unfairness inherent in jury trials in the European Court of Human Rights (ECHR), the author examines the long tradition of secret jury deliberations. Erskine claims (1) jury privilege bears similarity to attorney/client privilege and can be waived by the juror; (2) the federal courts have recognized, in the interest of fairness, a public right to attend trials as a shared right with the accused; (3) federal rules of procedure explicitly prohibit monitoring jury deliberations; and (4) certain states provide for access to deliberations, and trial parts, at the discretion of the judge. Considering these U.S. factors, the author turns to civil court claims of unfair jury practices and verdicts in the ECHR and in Scotland courts, which he said are contemplating whether juries should provide reasons for their decisions. While the European model may have only slight effect on U.S. law, Erskine claims the U.S. Supreme Court's growing references to foreign judiciary may influence future decisions. In the meantime, he says, participant consent and waiver of appeals seem the preferred practices of states in allowing juror access. He suggests the logical route for constitutional consideration of access to criminal jury deliberations may lie in a defendant's challenge to consent.

Intellectual Property

Zemer, L. (2006) ***The making of a new copyright Lockean,*** 29 **Harvard Journal of Law & Public Policy** (3) 891. Drawing from John Locke's Second Treatise of Government chapter "On Property" and his essays on "Liberty of the Press" and "Concerning Human Understanding," the author argues that Locke balances private rights and public interest addressing both private intellectual property and social dimensions of creativity. Zemer claims copyright laws reflect elements of the state of nature in that they recognize ownership both publicly and privately, on one hand because they do not protect facts or ideas, and on the other because they recognize that creativity is a manifestation of self. Under Locke's charity principle, commoners are allowed to use resources of others' labors, in much the same way the creator must leave enough and as-good-as resources for others, as exemplified in his essay on the press calling for limits on exclusive rights. The author concludes that this concept, coupled with Locke's insistence that the knowledge emanates both innately and through shared social experience, provides both rights to the individual creator and to the public through its role in the creation.

Pornography/Indecency

Rosenblat, G. (2006) ***Stern penalties: How the Federal Communications Commission and Congress look to crackdown on indecent broadcasting,*** 13 **Villanova Sports and Entertainment Law Journal** 167. In this comment, the author claims the Federal Communications Commission has been inconsistent in both its definition of indecency and in its enforcement of indecency standards resulting in a chill on speech that punishes

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FEMA must release data under FOIA

Charles D. Tobin
Holland & Knight, LLP

Following months of foot-dragging and propaganda, the Federal Emergency Management Agency has finally provided journalists with the data to help the public evaluate the agency's ability to send aid where it is most needed following a disaster.

FEMA has released to Gannett and Tribune Co.'s Florida newspapers the addresses of the recipients of funds under the individual households program – aid designed to help rebuild homes and replace contents – and the national flood insurance program. The newspapers have now begun to draw conclusions and hope to help answer why the agency was unable to prevent millions of dollars in documented fraud and abuse.

The data releases in late August and early September culminated two years of litigation in Ft. Myers and Ft. Lauderdale, which finally resulted in sweeping appellate precedent in support of the public's rights under the Freedom of Information Act.

On the same day in 2005, *Gannett's News-Press, Pensacola News-Journal, and FLORIDA TODAY* filed a federal suit in Ft. Myers, and Tribune Co.'s *South Florida Sun-Sentinel* filed a similar action in Ft. Lauderdale. Both newspapers asked the courts to force FEMA to disclose the names and addresses of people who received aid and federal flood insurance proceeds in the wake of hurricanes Charley, Frances, Irene and Jeanne, which devastated much of Florida in 2004. The newspapers cited FEMA's award of more than $30 million in aid to people in Dade County – where the hurricanes never struck – and the indictments for fraud of several people, as evidence of the public interest in greater scrutiny of FEMA.

FEMA strongly contested the litigation, arguing that under FOIA Exemption 6, the privacy interest clearly outweighed the public interest in the information. FEMA asserted to both courts that aid recipients should not be faced with knocks on doors from reporters, risk theft from people who would learn which households received money, and other consequences of the release. In split decisions, the Ft. Myers judge sided with FEMA, while the Ft. Lauderdale judge agreed with the newspaper there and ordered the address data released.

In a resounding 66-page decision in June (*The News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173), a three-judge panel of the U.S. Eleventh Circuit Court of Appeals in Atlanta ordered FEMA to make the address information public. Citing congressional and Executive Branch investigations of fraud in the delivery of aid in Florida, former Floridian Judge Stanley Marcus, joined by Judges Ed Carnes and Phyllis Kravitch, wrote that without the data, no one will ever know whether FEMA did well or poorly in Florida:

> Plainly, disclosure of the addresses will help the public answer this question by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars in the wake of several natural disasters across the county, and we cannot find any privacy interests here that even begin to outweigh this public interest.

The appeals court found that FEMA had utterly no support for the assertions of privacy invasions. And the judges strongly rejected FEMA's argument that the prospect of having reporters knock on recipients' doors was too intrusive to warrant disclosure of the addresses:

> [I]ndividuals are under no obligation to speak to reporters, and on balance, the modest annoyance of a 'no comment' is simply the price we pay for living in a society marked by freedom of information laws, freedom of the press, and publicly-funded disaster assistance.

FEMA announced on August 6 that it would not pursue further appeals from the Eleventh Circuit panel's ruling. The agency, however, immediately began a campaign of press releases and letters that:

> * Falsely told 1.2 million aid recipients that the Florida newspapers had asked for their social security numbers. The newspapers had not done so.
>
> * Misled aid recipients in California and North Carolina into believing that the Gannett newspapers had asked for information about them. The Gannett newspapers had not asked for any information outside of Florida. The Tribune Co. newspaper had made the broader request.
>
> * Blamed the Eleventh Circuit for finding that an aid recipient's address is a public record, and suggested it will not take the court's ruling into account in future FOIA requests: "[T]he agency will continue to protect the names and addresses of disaster

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FEMA must release data under FOIA...

victims in the future under both the Privacy Act and the personal privacy exemption to the Freedom of Information Act".

* Told the Gannett newspapers that they would have to wait to receive the info until the case went back for more proceedings in Ft. Myers, but that the Ft. Lauderdale newspaper would get the records sooner. FEMA rescinded that decision when the Gannett newspapers protested.

When FEMA failed to meet its first self-imposed deadline, the Gannett newspapers asked the Ft. Myers judge to enter a new judgment and force the agency's immediate compliance. After an hour-long argument on Friday, Aug. 24, he agreed. The judge ordered FEMA to begin the release of the data the following Monday, Aug. 27, and conclude the disclosures by Sept. 10.

The newspapers in both the Ft. Myers and Ft. Lauderdale actions have brought motions for attorney's appellate and district court-level attorney's fees.

Attorney Charles D. Tobin is chair of the National Media Practice Team at Holland & Knight LLP. He argued this case for the Gannett newspapers in the U.S. 11th Circuit Court of Appeals.

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Head Notes….

increased the visibility of law-related research even more.

Second, the D.C.-related panels. We co-sponsored a mini-plenary that included discussion from FCC Commissioners Michael Copps and Jonathan Adelstein, who answered questions on everything from indecency to ownership issues to the fairness doctrine. Another panel included six reporters from the Supreme Court beat, a highlight for Supreme Court junkies like me. Their insightful, and insider, stories have already added to my law class. Other panels brought together lawyers who have argued cases before the Supreme Court, offered discussion of minority media ownership, and examined the state of gay and lesbian college media.

Third, C-SPAN. As you may know, we had some adventures with C-SPAN at the conference. The network covered our pre-conference workshop on "The Future of Communication Law and Policy." We must be a division of insomniacs; I can't tell you how many people told me they were awake in the middle of the night watching C-SPAN and saw Tony Fargo or someone else in that workshop. I appreciate all the work Tony and the AEJMC staff did to make that happen.

We also had some difficulty with C-SPAN, which I would like to explain. The network wanted to cover the Supreme Court reporters panel mentioned above, but panel organizer Amy Gajda didn't find out until 5 p.m. on Wednesday, before the 10 a.m. Thursday panel. She immediately emailed all the participants, but unfortunately panelist Linda Greenhouse didn't get the message. When Greenhouse arrived Thursday morning, she let Amy know she was not pleased at the prospect of coverage. Amy, division head Jennifer Henderson, and I had three or four minutes to decide what to do. We quickly ran through our options, which we saw as (1) allowing C-SPAN and assuming Greenhouse would pull out or say very nearly nothing; (2) refusing C-SPAN and going on as planned; (3) allowing C-SPAN to cover the panel but not Greenhouse's comments; and (4) trying to find a compromise between Greenhouse and C-SPAN coverage. Amy had already tried the fourth option, so that was out. The C-SPAN team said the third option wouldn't work, so we were left with the first two. We treated the situation as an ethics dilemma, and focused on our loyalties. Ultimately we decided that our first loyalty was to the live audience in the room, who had come to see all of the participants, including Greenhouse. Our second loyalty was to the panelists, who had agreed to participate before any hint of television coverage was mentioned. We explained our decision to the C-SPAN crew, the panel went on without television coverage, and it was excellent.

The Law & Policy Division received some negative publicity from our decision, including what I saw as a rebuke from the rest of AEJMC (in the form of a resolution at the business meeting), as well as coverage on slate.com and other news outlets. While of course I wish the situation had not unfolded as it did, I am comfortable with our decision and grateful to Amy and Jennifer for their level-headedness under pressure.

That said, at our business meeting we voted to inform all panelists at future conferences that we are committed to openness, and that news media will always be welcome at Law & Policy sessions. That should keep the issue from arising again.

Needless to say, it was an eventful conference.

Finally, I want to encourage you to get involved with your Law & Policy Division this year. We have a great leadership team, including program chair Ed Carter, newsletter editor Charles Davis, research chair Amy Gajda, teaching chair Dave Cuillier, professional freedom and responsibility chair Michael Hoefges, and webmaster Kathy Olson (our web address is http://www.aejmc.net/law/). Please contact them or me with any ideas, suggestions, concerns….this is *your* Law & Policy Division.

Law Division Calls

Call for Panel Proposals

All AEJMC Law and Policy Division members are invited to submit panel proposals for the 2008 AEJMC conference in Chicago. We need your input to create another meaningful and enjoyable Law and Policy Division program lineup.

As the vice head and program chair for the AEJMC Law and Policy Division this year, I will be collecting all panel proposals and you may send them to me via email at ed_carter@byu.edu. I would like to get all proposals by **Oct. 15** or as soon thereafter as possible (my deadline to AEJMC is Nov. 1).

Panel proposals should consist of the following:

(1) A one-paragraph description of the panel, including its purpose and relevance to AEJMC members. This is important because we use it as a selling point to get other divisions to co-sponsor the panel. Ideally, panels could appeal to more AEJMC members than just those in the Law and Policy Division. (2) If relevant, a list of possible co-sponsoring divisions or interest groups. You should not contact any other divisions yet, but just brainstorm at this point. Ultimately, other divisions and interest groups will decide if they want to co-sponsor something with the Law and Policy Division.

(3) A list of possible speakers, either by name or type. You should not extend invitations to panelists at this point but rather wait until we inform you whether the proposal has been accepted.

(4) A list of any "equipment" the panel might need (like TV monitor, etc.). We discourage extra equipment because it costs a lot of money, and the division has to pay for it, but we should list it now if we know we need it.

(5) Anything else that might be useful to "sell" the panel.

I look forward to receiving your proposals and to another successful Law and Policy Division program in 2008.

Edward L. Carter, Division Program Chair
Brigham Young University
ed_carter@byu.edu

AEJMC Law Division members for a group photo during their tour of the United States Supreme Court during the annual conference.

Call for Law Division Paper Reviewers

The Law and Policy Division of AEJMC needs your help in reviewing papers both for the 2008 Southeast Colloquium at Auburn and for the 2008 AEJMC conference in Chicago. As the popularity of the Law and Policy Division continues to grow, so does the demand for paper reviewers. To ensure only the highest quality papers will be presented at the upcoming conferences and to keep the number of papers per reviewer at a manageable level, we need your help.

Reviews for the Southeast Colloquium will occur between December 15, 2007, and January 15, 2008. We need approximately 25 reviewers for Southeast. Reviews for the Chicago conference will occur between April 1 and May 1, 2008. We need approximately 75 reviewers for Chicago.

If you would be willing to serve as a reviewer for the 2008 submissions, please contact Amy Gajda, Research Chair, via e-mail at agajda@uiuc.edu or by phone at 217-333-5461. Please specify whether you would be able to help with the Southeast Colloquium, the AEJMC conference, or both. Please note that graduate students may not review papers.

To help coordinate paper topics with reviewers, please specify in your e-mail or voice mail message your legal interests. Please be aware that reviewers for the Law and Policy Division *will not* be allowed to submit papers *to this division*. Papers submitted to other AEJMC divisions, of course, are acceptable.

Thank you very much for your help with this very important work.

Amy Gajda, Division Research Chair
University of Illinois
agajda@uiuc.edu

High Schoolers and the First Amendment

Jeremy Harris Lipschultz
University of Nebraska at Omaha
jlipschultz@mail.unomaha.edu

Omaha was buzzing this spring about the *Benson Gazette,* which devoted its March issue to use of "The 'N' Word" in hallways of the Omaha high school.

Editor Sarah Swift, a senior, acknowledged that this was "a subject that is sensitive and may be considered offensive to some readers." While Sarah's advisor and principal approved the publication, the school board and some community leaders responded with outrage. To them, it did not seem to matter that the high school newspaper was dealing with a serious issue in a mostly straight-forward way.

One African-American student told the paper that he used the word as a matter of "habit." A Caucasian student, however, added: "I used it once, and I ended up getting jumped for it."

By the time 250 area high school students gathered at the University of Nebraska at Omaha for the annual journalism conference in late April, the advisor and principal had been cleared by the school board, but the issue was still red hot.

Associate Professor Sherrie Wilson introduced the conference by applauding the *Gazette* staff for its aggressive journalism on an important topic. "It's good to see local high school students addressing serious issues dealing with race and freedom of speech," Wilson said. "The topic is of concern to the audience in a racially mixed high school, and the students addressed the topic in a serious manner that explored differing viewpoints."

Guest speaker Jane Kirtley, Silha Professor of Media Ethics and Law at the University of Minnesota, reminded students about the post-*Hazelwood* environment and how it affects their work as student journalists in times of conflict.

Before the Benson paper published its controversial issue, editor Swift said she planned a career as a teacher. Instead, she's coming to the School of Communication to learn to be a journalist. "I never truly valued my First Amendment right to freedom of the press until this issue came up," she said. "Now, I study this right in my free time religiously."

Swift said the newspaper staff had researched the N word for weeks, but students did not expect a community reaction. "Then the news crews came, people were offended (although we only received one negative letter), and our lives were changed," Swift said.

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Legal Annotated Bibliography...

speech that would otherwise be protected. Rosenblat claims a major problem with the FCC rulings and Congress's will to increase fines comes partly from the complaint based actions the commission takes, punishing and fining some broadcasters and not others for broadcasting nearly identical content. He suggests that the vagueness and overbreadth of the indecency standard could best be address by: (1) adopting a rating system for radio as well as television; (2) requiring the commission to detail and inform broadcasters the reasoning behind their decisions to fine and not fine; and (3) monitoring programming content under commission supervision rather than a complaint-driven system. In acknowledging some drawbacks in each of the suggestions, Rosenblat contends such measures would help broadcasters determine when they are in violation and also prevent special interest groups who complain loudly from controlling content that otherwise would be protected.

Wang, E. (2006) ***Equal protection in the world of art and obscenity: The art photographer's latent struggle with obscenity standards in contemporary America,*** 9 **Vanderbilt Journal of Entertainment and Technology** 113. Commencing at the intersection of art and obscenity, the author contends that sexually explicit photographs must demonstrate artistic value under the *Miller* test that goes beyond what traditional art forms such as sculpture and paintings must establish in order to garner First Amendment protection. In copyright cases, she claims, courts and the art world historically were reticent to grant authorship because photographs were not viewed as products of creativity but as copies of reality and products of machines. Under privacy law, the newsworthiness exception gives deferential treatment to news photographs because of their ability to reflect an event or object realistically, and the release/consent protects the photographer generally, but neither provide defenses for the non-news or anonymous spontaneous works of the art photographer. The third area of legal overlap, Wang says, is that of child pornography in which a photograph is presumed to involve a child model while a computer simulation or painting is not. She concludes that until society overcomes the historical marginalization of photography as a serious art form, and is cognizant of the "myth of photographic realism," art photographers, especially those in post-modern defiance of classical and traditional standards, will likely suffer consequences under current obscenity standards.

Law Division Officers

HEAD
Beth Blanks Hindman
Washington State University
Tel: (509) 335-8758
E-mail: ehindman@wsu.edu

TEACHING CHAIR
David Cuillier
University of Arizona
Tel: (520) 626-9694
E-mail: cuillier@email.arizona.edu

PROGRAM CHAIR
Edward L. Carter
Brigham Young University
Tel: (801) 422-4340
E-mail: e_carter@byu.edu

RESEARCH CHAIR
Amy Gajda
University of Illinois
Tel: (217) 333-5461
E-mail: agajda@uiuc.edu

PF & R CHAIR
Michael Hoefges
University of North Carolina - Chapel Hill
Tel: (919) 843-0971
E-mail: mhoefges@email.unc.edu

NEWSLETTER EDITOR
Charles Davis
University of Missouri
Tel: (573) 882-5736
E-mail: daviscn@missouri.edu

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1. If you have Web resources or teaching exercises you find effective for teaching media law, send me an e-mail (cuillier@email.arizona.edu) and I will include them online to share for everyone.

2. In an upcoming issue of *Media Law Notes* I would like to provide effective ways of teaching freedom of information, so if you have thoughts or exercises in that area, please let me know.

3. Finally, if you are proud of your media law class or a specialty class, send the syllabus to me via e-mail and we can post it at the Web site for others to view and potentially adapt to their own teaching.

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Media Law Notes
234 Outlet Point Blvd., Suite A
Columbia, SC 29210-5667