Media Law Notes

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Head Notes

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As you know, teaching two sections of the undergraduate media law course each semester means learning a lot of new names.

I used to dread the chore, but then I began to apply two simple tips from a law school professor: a photograph seating chart and a get-to-know-you initial writing assignment titled "My Life As a Communicator."

Mention of the seating chart always draws a few groans, but with it I can usually learn the names of 48 students in a week. The initial writing assignment sounds simple enough—750 words, no other guidelines given or expectations made—but has yielded some surprising and even touching results.

One young man who uses a cane and sports a bald head wrote of the phone call when his doctor told him he had bone cancer. The student had just been married three weeks earlier, and the news obviously devastated the young couple. But the student came upon a quote by Stephen King that one can either "get busy living, or get busy dying." The student decided to get busy living, and thus enrolled in my class despite the chemotherapy, surgeries and fear.

Another young man wrote about spending the summer on long bus rides and in small minor-league stadiums as the radio broadcaster for a rookie-league baseball team. A young woman described experiences traveling her state as a beauty pageant winner. Several student athletes wrote about their exploits in intercollegiate golf, track, cross country or volleyball. Others wrote about their world travels.

Most, though, write about either their families or their own efforts to overcome feelings of inadequacy. I am impressed that so many of the students, at a time of life when I just focused on myself and having a good time, feel a strong desire to make a difference in the world by helping other people.

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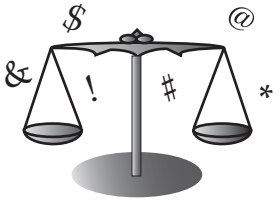
INSIDE THIS ISSUE

Issues in Indecency

Opposing sides sound-off on the controversial "fleeting expletive" and its implications for broadcast media



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On November 4th, the United States Supreme Court will hear opening arguments in *FCC v. Fox Television Stations* and deal directly with broadcast indecency for the first time since its 1978 decision in *FCC v. Pacifica Foundation*. The case has sparked interest from parties other than the direct litigants, resulting in the filing of 17 separate amicus briefs.

I recently interviewed authors of amicus briefs from each side to obtain their insight into the ramifications of this case. In support of the respondents (Fox Television Stations) I spoke with

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Southeast Colloquium Paper Call

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 19-21 at the University of Mississippi in Oxford.

Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, freedom of information, 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 convention 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 one original and three copies of each paper. Each copy should have a 250-word abstract attached behind the title page. 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 authors' status as faculty or student.

The originals and copies should be sent via first-class U.S. mail, postmarked on or before Dec. 5, 2008, to:

Chip Stewart
Assistant Professor, 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.

Minutes from Law Division meeting August 7, 2008, in Chicago, Illinois

Attendance: 26

Beth Hindman opened the meeting, thanking Ed Carter, for handling the programming, Charles Davis for the newsletter, Amy Gajda for serving as research chair, Dave Cuillier, teaching, Mike Hoefges, PF&R, and Kathy Olsen for the great web site.

Hindman then gave the financial report: We have $1100.00, which makes the leadership nervous, and then detailed the finances, which is essentially that we have about 1K annually for everything once we mail the newsletter. Hindman suggested that we discuss later the movement of the newsletter online.

Discussion then moved to discussion of the secession ladder, and making the research chair an elected position and then the person goes up the ladder.

State of the Field reports: each division of AEJ has been asked to compile a report, which Beth is doing.

Ed Carter gave the programming report: 19 proposals for panels, 8 sessions scheduled/co-sponsored with RTVJ, Minorities, Scholastic Journalism, two each with media management and economics, and one each with ethics and mass media & society.

Amy Gajda gave the research report: 71 papers total, 32 accepted for 45 percent acceptance rate, about half/half, 54 judges volunteered to read papers.

She recognized the top faculty and student papers.

The next issue was students who submitted to Colloquium and didn't edit and then just submitted straight to AEJ National without revision. After lengthy discussion, the division decided to take no action.

Wat Hopkins, the editor of CL&P, passed out a signup sheet for reviewers, and discussed CL&P's year…37 submissions, 4 more than last year, acceptance

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Head Notes...

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All of this has caused me to reflect on what I do in communications law classes. I wonder sometimes if future broadcasters, advertisers and public relations professionals will remember much of the course content. I am guessing they might eventually forget the nuances of the actual malice rule or the *Miller v. California* standard for obscenity regulation.

I do not think that means I should stop trying to help students understand those things. But I do believe students learn most from personal examples and experiences. So I decided to give students a copy of my own personal essay.

"I tell my students to call their parents and tell them there are professors who care about their children."

My story will not be as dramatic or powerful as some of their stories. Like them, I care for family; have fears of inadequacy; and desire to do good.

I tell students about attending parent-teacher conference for my sixth-grade son and fifth-grade daughter. When I go, I am less concerned about the specifics of their math or English work than I am about whether the teacher knows and cares for my children. So I tell my media law students (I know this is sappy, but I am sincere) to go home, call their parents and tell them there are professors at the university who care about their children.

I hope that perspective will help me and my students when we are struggling through intellectual property in November.

Annotated Bibliography

Privacy

Asbury, A. (2008). "Finding Rest in Peace and Not in Speech: The Government's Interest in Privacy Protection in and Around Funerals " 41 Indiana Law Review 383.

The Westboro Baptist Church is picketing and protesting outside the funerals of American soldiers killed during their military service in the Iraq and Afghanistan wars. The church's speech has created much controversy, not only for its content, but also because it arguably disrespects the funerals of the deceased and disregards the privacy of those mourning. For these reasons, such protests have induced both state and federal legislatures to pass laws restricting them. This article analyzes the role of privacy with respect to funerals and explores its relation to the constitutionality of legislation using a suit file in Kentucky as an vehicle.

First Amendment

Barnes, R. D. (2008). "How Civil Rights and Pro-Peace Demonstrations Transformed the Press Clause Through Surrogacy." 34 William Mitchell Law Review 1021.

This article explores the evolution of press rights in the United States by highlighting the context in which the Supreme Court gave its most expansive interpretations of the Press Clause. This expansion, similar to all clear articulations of freedom and liberty, is founded upon the need that arises in every generation to oppose abuse of governmental authority.

Jay, S. (2008). "The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century." 234 William Mitchell Law Review 773.

This article shines light on the values historically served by protecting various kinds of speech and one can at least understand why the chips fell where they did in First Amendment cases. The knowledge will show why governmental controls on speech deserve everlasting scrutiny. Giving government power over the content of what may be said

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Bibliography...

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grants censorial power to officials, and historically that authority has been abused in ways intolerable to the American people. Dissidents, who may be saintly or despicable, are the unintended beneficiaries of tolerance for all ideas. Reviewing the entire development of the First Amendment from its origin to the early 1970s, the striking fact is that almost everything about constitutional protections for free expression and association was fundamentally changed in this period.

Luberda, R. (2008). "The Fourth Branch of Government: Evaluating the Media's Role in Overseeing the Independent Judiciary." 22 Notre Dame Journal of Law, Ethics and Public Policy 507.

While much legal scholarship has been devoted to the media's impact on the executive and legislative branches, little attention has been given to the dynamic between the media and the judiciary. The scarcity of legal scholarship on this relationship is particularly troublesome given the Founding Fathers' intent to "establish a free and vigorous press as an essential part of our unique system of government." Indeed, some scholars have deemed the media the "fourth branch" of the government because of the necessary check the institution as a whole provides over the three constitutionally-named branches: the legislative, executive, and judicial. The media's power to choose the news and issues that it reports, coupled with its influence overpublic opinion, forms the basis of its check over the judiciary. Focusing, then, on the often-overlooked relationship between the "fourth branch" media and the judicial branch, this article examines the media's coverage of the judiciary and the implications of media coverage on American democracy and the public's perception of the courts.

Free Speech

Calvert, C. (2007-2008). "Bylines Behind Bars: Fame, Frustration & First Amendment Freedom." 28 Loyola of Los Angeles Entertainment Law Review 71.

In August 2007, Mark Jordan, an inmate at the Supermax prison in Florence, Colo. won a protracted federal court battle challenging the constitutionality of a federal regulation enforced by the Bureau of Prisons that states, in pertinent part, that an "inmate may not act as reporter or publish under a byline." During the same month, United States District Court Judge Marcia S. Krieger ruled in Jordan v. Pugh that the byline prohibition "violates the First Amendment rights of Mr. Jordan, other inmates in federal institutions, and the press." In reaching her conclusion, Judge Krieger cited the "chilling effect" the regulation has not only on Jordan's expression, but also on "the speech of the more than 198,000 other federal inmates" for whom the only way "to be certain to avoid punishment is to not submit an article to the news media for publication."

Antitrust

Brand, R. (2008). "All the News That's Fit to Split: Newspaper Mergers, Antitrust Laws and the First Amendment." 26 Cardozo Arts and Entertainment Law Journal.

At a time when newspapers are hemorrhaging readers to broadcast and online competitors, recent actions taken by the Department of Justice seeking to prohibit certain newspaper mergers may violate the First Amendment rights of newspaper owners who wish to speak to as large an audience as possible. This article argues that while the Supreme Court has rejected First Amendment claims brought by media companies subject to antitrust regulations in the past, such First Amendment arguments should be afforded greater weight and attention, and should often prevail in the context of newspaper mergers.

Broadcast Regulations

Calvert, C. (2008). "What is News?: The FCC and the Battle Over the Regulation of Video News Releases." 16 CommLaw Conspectus 361.

Government-compelled disclosure of the use of video news release-sourced information in newscasts raises complex issues. It concerns the nature of news, the scope of First Amendment freedom for broadcast journalists (including the reach of an unenumerated right not to speak), and the right of the public, via FCC fiat, to know and understand the sources from where news information is derived.

National Security

Johansen, K. L. (2008). "A Legion of Worries: National Security Reporting in the Age of the War on Terror." 34 William Mitchell Law Review 5107.

Since 9/11, national security reporters have been charged with covering the War on Terror in ways that both inform and protect the public to the greatest extents possible. Inside each national security story there exists a second story, a shadow story, a story of how the press navigates the legal obstacles inherent in national security coverage. In the end, national security reporting during the War on Terror is difficult for both government and journalists. Government officials are charged with keeping the public safe, which may require them to conceal information. The press is charged with monitoring government actions to keep the public free. Currently, a cautious citizenry seems more disposed to favor the former.

Kitrosser, H. (2008). "Classified Information Leaks and Free Speech." 2008 University of Illinois Law Review 881.

This article provides a timely response to the recent trend toward "cracking down" on classified information leaks and the absence of significant scholarship, theory, and doctrine on classified information leaks.

Thistle, C. (2008). "A First Amendment Breach: the National Security Agency's Electronic Surveillance Program." 38 Seton Hall Law Review 1197.

Under President Bush, the National Security Agency conducted a warrantless surveillance program citing the need to protect national security after the attacks of September 11th as justification. In response to increasing criticism of the program, President George W. Bush then relied on both executive authority in Article II of the Constitution and the 2001 Congressional Authorization for the Use of Military Force as authorization for these wartime measures. The courts are in tension as to whether the NSA program violates both the First and Fourth Amendments. This article seeks to unhinge the First Amendment analysis from the Fourth Amendment inquiry typically used to analyze government surveillance programs and argues that in order to protect First Amendment associational rights, a separate inquiry is required.

Minutes...

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rate of 21.6%. The journal published 503 pages or so…we have 632 available pages, so we are about where we have been. Only once have we hit 630.

Taylor & Francis bought the journal last year from Erlbaum, and Wat reported that the journal has had its bumps…billing gremlins, and publication dates, and asked for good ideas for a special issue.

New Business:

1. To move to primarily an online newsletter: Tony Fargo moved that we move to a PDF to members…via e-mail. Derrigan asked that we send an opt-out e-mail and then move paperless. With the money saved, we will get the 2/3 of our budget we send to mailing back. Motion approved by acclamation.

2. Amy then discussed the Southeast Colloquium and the re-submission issue. The statement in the call would be an encouragement to revise, and not an order. Discussion ensued around the language itself, and the language was tempered to include a suggestion that the authors review the papers and see if they have been updated…after much discussion, a motion was tabled after general agreement that we should leave the language out.

3. Moving the research chair in and taking the newsletter out, and creating an open call for the newsletter editor as a volunteer position…discussion ensued, with the suggestion that we explore how other divisions are handling their officers…

Derrian moved that we go to Research Chair/Vice…and David Cuillier suggested that we move it back two years so that Amy Gajda share the vice chair long enough to get everyone now in the officer pool through the progression… Motion approved.

Elections:

Amy Gajda elected unanimously as newsletter editor…

Ed Carter then took over as incoming head, and starts Oct.1

He acknowledged Beth Hindman as outgoing and then announced that David will be appointed as research chair, and Chip Stewart said he would serve as SE Colloquium research chair. PF&R chair is Victoria Smith Ekstrand of Bowling Green State University and the teaching chair is Dan Kozlowski of St. Louis U. The webmaster is Kathy Olson of Lehigh.

SPLC and Reporters Committee donations were then set at $250.00 (SPLC) and $150 to (RC)…motion passed.

Meeting adjourned.

Indecency...

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Marjorie Heins, author of the brief for the American Civil Liberties Union. In support of the petitioners (FCC) I spoke with Robert Peters, author of the brief for Morality in Media, a national not-for-profit organization which was initially founded to combat pornography and which has since expanded to work to "maintain standards of decency on TV and in other media," according to the organization's website.

Marjorie Heins made it clear that the ACLU was primarily concerned with the First Amendment aspects of the case.

"This case is important because this is the only instance in which a government agency (the FCC) is essentially allowed to ban and punish constitutionally protected speech (a "fleeting expletive" or whatever else the five commissioners of the FCC happen to consider "indecent"). It's hard to imagine a more blatant violation of the First Amendment," she wrote in an e-mail in response to my questions.

According to her brief, the ruling in *Pacifica* has been used for the last thirty years in a discretionary and inconsistent way by the FCC. Too often, she feels, this has a limiting factor on the diversity and quality of broadcast content.

"Free-speech and anti-censorship organizations have been appalled by the FCC's freewheeling censorship of what is often valuable broadcast programming," she told me. In addition, while high-profile networks like Fox tend to get the majority of the media attention from their controversial content, Ms. Heins fears that if the FCC is allowed to tighten its grip on content regulation, then "the nonprofit and community stations are most at risk."

An example would be a ruling from 2004 where the FCC fined a PBS-affiliated TV station in San Mateo, California, $15,000 for airing a segment of the documentary series *The Blues*. The episode featured utterances of both the f- and s-words. This threat to local broadcast media is the reason that parties such as Minnesota Public Radio joined in her brief, Ms. Heins said.

The self-censorship that would become predominant in broadcasting would have a 'chilling' effect on broadcast content, meaning it would threaten expression and diversity in media, according to Heins.

Robert Peters, president of Morality in Media, sees the case another way. His organization is concerned with "curbing traffic of obscene material

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Indecency...

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als," and "upholding standards of decency in the media," he told me.

For Mr. Peters, a decision upholding the FCC punishment for fleeting expletives would help protect youth in our country. In my interview with Mr. Peters, he cited a 1968 Supreme Court case, *Ginsberg v. New York*, as establishing the precedent that the government must protect minors from harmful material.

"This is the only instance in which a government agency (the FCC) is essentially allowed to ban and punish constitutionally protected speech. It's hard to imagine a more blatant violation of the First Amendment"
-- Marjorie Heins

Mr. Peters argues that *Ginsberg* established the "harmful to minors" standard, and held that it cannot be assumed that all parents protect their children from harmful material and that government must therefore play some role in doing so. In addition, Peters points out that "even parents who care for their children fear they are losing the battle when it comes to media."

Mr. Peters feels that the nature of the medium of broadcasting, where he thinks that strong language and sexual references have become commonplace, necessitates regulation from the government. Citing the *Ginsberg* case, he has attempted to persuade the court that government has a "supplementary role" of "standing in the gap" between broadcast media and children.

Although measures currently exist to aid parents in limiting the content that can be viewed by their children, such as the V-Chip which blocks certain kinds of programming based on rating, Mr. Peters feels that they are neither sufficient nor effective. The television rating system, he argued, is too vague, lumping the majority of programs into TV-14 or lower ratings.

"TV-14 implies that if your child is in eighth grade then virtually anything on television is appropriate for them to see…most parents would not agree with that assessment," Mr. Peters said.

Because measures like this do not allow parents or the government to adequately control exposure at the point of access, the FCC should be allowed to regulate content at the source, Mr. Peters reasons.

When I asked Ms. Heins to respond to Mr. Peters' arguments, she questioned whether broadcast content was truly harmful to minors. First, in her email response she clarified what she thinks the case is about.

"This case - and FCC censorship - isn't about 'obscenity,' which is not protected by the First Amendment. Instead, it's about 'indecency,' a much broader and vaguer category of CONSTITUTIONALLY PROTECTED speech," she wrote in her email.

Ms. Heins also believes that the *Ginsberg* case is not applicable:
"The *Ginsberg* standard - allowing states to punish the distribution to minors of material that would be obscene for them - has no application to the FCC's censorship of material that is constitutionally protected for everybody, that doesn't necessarily appeal to the 'prurient interest' of anybody, and that often has serious value."

Ms. Heins agrees with Mr. Peters that there is a lot of material in media that parents might find inappropriate for their children. What she does not agree with is the method for handling the matter.

"The answer is not government censorship, which imposes FCC commissioners' standards of propriety on the entire population, adult and child alike," she said.

Instead, Ms. Heins recommended things such as solid sex education, teaching of good sexual values, media literacy education, and teaching of ways to resolve disputes without violence as better alternatives.

Mr. Peters countered by saying that the First Amendment argument was misguided.

"I do not think our nation's founding fathers intended the First Amendment to provide citizens with an unlimited right to curse as much as they want, and wherever and whenever they want," he wrote in an e-mail response.

"Parents who care for their children fear they are losing the battle when it comes to media."
-- Robert Peters

He also emphasized that his organization is not hoping for an all-out ban on objectionable material, but rather a workable compromise.

"I wouldn't advocate that government attempt to ban all cursing 'in public;' nor would I advocate that the Supreme Court should now provide broadcasters with a new Court-created 'right' to curse as much as they want and whenever they want," he wrote.

Mr. Peters worries that without regulation broadcasting would become too objectionable for parents, who would then be unwilling to expose their children to any kind of broadcast media.

Peters claims that the harmful effects of these kinds of exposures are simply too great.

"There is evidence that harm can result when children utter four-letter words, and children do learn words from listening to them on TV," he said.

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Indecency...

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Court Ruling

While both individuals and the groups they represent hold different views on the appropriate outcome of the case, they share one thing in common: they agree that there is the potential for the Supreme Court to rule only on the issue of whether the FCC justified its actions in this case and avoid the First Amendment aspect all together.

"The court could issue a very narrow ruling. But we hope not," said Ms. Heins. Instead, she said, the ACLU is "hoping that the Supreme Court will clarify that *Pacifica* no longer justifies the FCC's censorship of indecency."

The Summary of Argument section of the ACLU's brief attempts to establish the First Amendment as an essential part of this case, stating that "deciding whether agency action is arbitrary and capricious in violation of the Administrative Procedure Act necessarily encompasses an inquiry into the constitutional implications of the agency's governing statute."

Mr. Peters, on the other hand, said that Morality in Media is not in favor of anything that would involve overturning *Pacifica*.

"I would be shocked if the court overturns *Pacifica,*" Mr. Peters said, "if the courts invalidate the law they would be very foolish."

Mr. Peters hopes for a three-part outcome in this case. He wants the Supreme Court to uphold broadcast indecency standards, to "hold from the constitutional perspective that the FCC can hold a broadcast licensee responsible even for an isolated expletive," and to find that the FCC sufficiently justified its change in policy.

Mr. Peters believes that the last of his three points is most likely where the case will be decided, however, leading to the potential for a narrow ruling that would dissatisfy both sides. But Mr. Peters, a self-professed critic of the Supreme Court, was far from issuing a prediction on the outcome, suggesting that "anything is possible in the Supreme Court."

For Further Information...

More information from Marjorie Heins...

ACLU's brief to the Supreme Court:
http://www.fepproject.org/courtbriefs/FCCvFoxSCtfinal.pdf

Links to other articles related to the case provided by Ms. Heins (look at bottom of page):
http://www.fepproject.org/courtbriefs/foxsctsummary.html

Press release for Marjorie Hein's book, Not In Front of the Children, about indecency laws and youth:
http://www.freeexpression.org/newswire/0510_2001.htm

More information from Robert Peters...

Morality in Media's brief to the Supreme Court:
http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-582_PetitionerAmCuMoralityinMedia.pdf

Article provided by Mr. Peters supporting his argument that children learn words by hearing them on television:
http://www.pbs.org/teachers/earlychildhood/articles/sesamestreet.html

Morality in Media's homepage:
http://www.moralityinmedia.org/

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