

MEDIA LAW NOTES

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LAW & POLICY DIVISION, AEJMC

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Head Notes



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Pretty soon we'll be 100 years old.

At times I feel like I'm that old, but not with this group. As AEJMC approaches its 100th anniversary, the Law and Policy Division exudes energy moving the organization forward.

Here is what you can expect in the coming year, thanks to the great team of officers working away:

Chips ahoy. Vice Head and Programming Chair Kathy Olson (Lehigh University) is putting together the nearly dozen panel proposals submitted by members for

the national conference. On Dec. 2-3, Kathy and I traveled to Louisville, Ky., to the winter meeting chip auction, where we dickered with other divisions to come up with joint sessions. Amy Kristin Sanders, Professional Freedom and Responsibility chair, has been working to develop some good sessions, as well as what's submitted by members.

Unfortunately, not all of the submitted proposals will be selected, since there are usually only five or six panel times available for the division. Also, panels that attract co-sponsorship with other divisions are often favored because it allows for more of our sessions to be offered. From what I've seen so far, it looks like a great submission pool!

Legal history, anyone? Research Chair Derigan Silver (University

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From the Research Chair

Derigan Silver
University of
Denver



As the call for submissions for original research papers for the 2012 AEJMC Conference in Chicago goes out, I'd like to draw the membership's attention to the following sentence in the call: "The Division welcomes a variety of theoretical orientations and any method appropriate to the research question." As research chair, I'd like to encourage papers that take this sentence to heart and remind submitters that the division welcomes non-traditional legal research. Although it would be impossible to highlight all the great, innovative research being conducted by our members, a quick scan of recent research provides some good examples I encourage members to review and think about as we enter the paper submission season.

One of the best examples of a scholar conducting non-traditional research is David Cuillier (Arizona), Law and Policy Division Chair. David uses survey research to examine public attitudes about citizen and press access to government information, freedom of information, the

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of Denver) is organizing a special call for papers in legal history for the national conference in Chicago. The top papers will be slotted for a specific panel at the conference and be considered for a special issue of Communication Law & Policy. Derigan will also be coordinating the annual conference research paper competition, so watch for the call for papers and the usual April 1 deadline.

Lecture links. Teaching Chair Cheryl Ann Bishop (Quinnipiac University) is planning on adding a section to the division's website teaching area that will provide links to classroom lecture audio/visuals for teaching media law. She will provide links to pictures, video, pdfs, websites, listservs, and other resources to help teachers spice up their PowerPoints and lectures. It should be a great centralized source of multimedia materials, from Hustler Falwell ads to Vanilla Ice songs, that would make even *The Paper Chase's* John Houseman seem like a dynamic speaker. If you have suggestions, make sure to contact Cheryl Ann at CherylAnn.Bishop@quinnipiac.edu.

Colloquium coming. Deadline for research paper submissions to the Southeast Colloquium is Dec. 5. The gathering is planned for March 8-10 in Blacksburg, Va., and is a great opportunity for students and faculty to test out papers before submission to journals or the national conference. The division's own Wat Hopkins (Virginia Tech) is coordinating the colloquium and Courtney Barclay (Syracuse) is the research chair for the division. See the full paper call on page 15 of the newsletter.

Survey Simian. I go ape over survey research, so I can't help myself but survey division members this year about what they would like to see the division pursue. I'll provide more information in the next issue of Media Law Notes with the link to the survey (provided by SurveyMonkey). I plan to ask members how they would like their dues spent, their thoughts about division structure and processes, conference programming preferences, and just about anything else someone wants queried. If you have an issue or question you think should be included in the survey, please let me know by Dec. 1, by e-mailing me at cuillier@email.arizona.edu.

The key to making all of this work is through communication. Newsletter editor Chip Stewart (Texas Christian University) will keep us up to date with the newsletter, and Webmaster Erin Coyle (Louisiana State) is updating the division website (<http://aejmc.net/law/index.html>). Joey Senat from Oklahoma State maintains the division listserv (contact him at joey.senat@okstate.edu to be added). And of course, feel free to contact me if you have suggestions, concerns or ideas that would help the division!

Law & Policy Division Call for Reviewers

The Law and Policy Division needs your help in reviewing papers for the 2012 AEJMC conference in Chicago. As the popularity of the division continues to grow, so does the demand for paper reviewers. To ensure that only the highest quality papers are presented at the upcoming conference and to keep the number of papers per reviewer at a manageable level, we need your help.

We will need about 75-80 reviewers for the Chicago conference. Reviews will occur between April 1 and May 1, 2012. Last year we had enough reviewers to keep the paper load to three papers per reviewer. We will make every effort to keep it that way this year.

If you would be willing to serve as a reviewer, please contact Derigan Silver, research chair, at Derigan.Silver@du.edu, (303) 871-2657.

Please note that graduate students may not review papers and you may not both review for and submit a paper to the Law & Policy Division. If you aren't sure if you will submit a paper, please volunteer to review and we can take you off the list when the time comes. If you submit a paper to other AEJMC divisions, you are still eligible to judge for Law & Policy.

Papers will be pre-screened for eligibility and will be eliminated if they exceed 50 pages or have information that identifies the author(s), including in the data properties.

To help best match reviewers to paper topics, please specify in your e-mail or voice mail message your legal interests and methodological specialty. Also, if you would like to serve as a discussant or moderator for the conference, let me know. Thank you for your help to make the conference a success.

state of access, and strategies for increasing transparency. In addition to using a non-traditional research method, David also works with theories most of us only remember from graduate school. For example, David's research has used terror management theory—the effect on decision making of thinking about death. David examined whether thinking about death decreased a subject's willingness to support access to government records; important research in a world where the threat of terrorism is used to rationalize government secrecy.

Ed Carter (Brigham Young), one of the division's most prolific scholars, has used both traditional and non-traditional methods and theories in his research. While Ed's work on copyright or the government speech doctrine might be considered traditional legal research, he has also used methodologies and theories more commonly associated with political scientists. For example, building on the work of political scientist Timothy Johnson, Ed and his co-author, James Phillips, employed a mixed methods approach to explore the importance of oral arguments at the U.S. Supreme Court. Examining oral argument transcripts qualitatively and quantitatively allowed the authors to develop a more robust picture of the information seeking behavior of Supreme Court justices during oral argument. Theoretically, this work was based on the attitudinal and strategic models of judicial decision making, theories typically associated with political scientists.

Minjeong Kim (Colorado State) is another scholar who has used quantitative methods to examine a variety of legal topics. Minjeong

also built on the research of political scientists in her study which relied upon a pre-existing data set to quantitatively examine the trends and effect of amicus curiae brief filings in free speech/press cases decided by the U.S. Supreme Court between 1953 and 1986. Minjeong also recently used non-traditional legal research when she quantitatively analyzed data collected from twenty-five federal agencies' annual FOIA reports to assess if the Obama administration's FOIA policy changes resulted in differences in the actual processing of FOIA requests.

At the other end of the spectrum, some scholars in the division have recently returned to the theoretical frameworks provided by Critical Legal Studies (CLS). For example, Victoria Ekstrand (Bowling Green State) and her coauthors recently contended that the free culture movement in intellectual property law has generated a second wave of CLS critique and activism, in an indirect and unintentional fashion. Tori concluded the practical effect of this was a “new kind of dialogue about IP law that is inclusionary, participatory, and capable of effecting change.” Other scholars have attempted to align themselves with the new legal realism movement, focus on communication theory and the law, or adopt approaches associated with Law and Society.

While it would be impossible to showcase the work of the many talented scholars in the Law and Policy Division who are using non-traditional methods and theories to advance our understanding of communication law in such a short article, these are just some examples of the non-traditional methods and

theories I hope to see more of at future AEJMC conferences.

In this spirit, as part of AEJMC's 100th Anniversary celebration in Chicago, the Law and Policy Division will be hosting a special call for papers dedicated to legal history. Research papers for the special call should focus on the study of the history of law in the field of communication, broadly defined. The special call should not be interpreted as giving any special advantage to legal history papers. It is only an effort to encourage historical methods and research that examines the development of law and society over time, and papers should be set in the wider context of social, cultural, and political history. Papers will be judged together with papers from the Law and Policy Division Paper Call.

I look forward to serving the division as Research Chair this year, and hope to see a large number of high quality traditional and non-traditional research papers submitted.

For more on the Law & Policy Division call for research papers for the annual conference, see page 4



Call for Papers: AEJMC Annual Conference

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2012 AEJMC Conference in Chicago. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, FCC issues, intellectual property, obscenity, freedom of information, and a myriad of other media law and policy topics. Papers outside the scope of communications law and policy will be rejected.

The Division welcomes a variety of theoretical orientations and any method appropriate to the research question. 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 conference to present accepted papers.

Paper authors should submit via the online submission process as described in the Uniform Paper Call. Please see submission criteria and instructions at www.aejmc.org.

Law and Policy Division papers must be no longer than 50-**double-spaced** pages with one-inch margins and 12-point font, including cover page, appendices, tables, footnotes and/or endnotes, and end-of-paper reference list, if applicable. (Footnotes and/or endnotes and reference list may be single-spaced.) Papers that exceed 50 total pages or are not double-spaced will be automatically rejected without review. Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities, including APA, Chicago, or MLA styles. Papers that include author-identifying information within the text, in headers, or within the embedded electronic file properties will be **automatically rejected** (review the instructions on the AEJMC Web site for stripping identifying information from the electronic file properties). There is no limit on the number of submissions authors may make to the Division.

Student authors of single-authored papers should clearly indicate their student status on the cover page. Student submissions will be considered for the \$100 Whitney and Shirley Mundt Award, given

to the top student paper. The Law and Policy Division will also cover conference registration fees for the top three student paper presenters.

Special call for legal history papers. As part of AEJMC's 100th Anniversary celebration in Chicago, the Law and Policy Division will be hosting a special call for papers dedicated to **legal history**. Research papers for the special call should focus on the study of the history of law in the field of communication, broadly defined. Legal history is closely connected to the development of society and papers should be set in the wider context of social, cultural, and political history. Papers should be uploaded via the special call link on the All-Academic submission site, and should conform to all requirements of the Law and Policy Division Paper Call and the AEJMC Uniform Paper Call. Papers will be judged together with papers from the Law and Policy Division Paper Call. Submitters who qualify for presentation at the AEJMC 2012 conference will present their research at a special research panel dedicated to legal history.

If you have questions, please contact: Derigan Silver, Law and Policy Division Research Chair, Department of Media, Film and Journalism Studies, University of Denver, 2490 S. Gaylord St., Denver, CO 80208-5000, Phone: (303) 871-2657; e-mail: derigan.silver@du.edu



Session examines courts coverage

By Gene Policinski
Vice President
The First Amendment Center



More than 30 journalism educators, federal judges and judicial and First Amendment experts gathered Oct. 26 to discuss ways that university-level communications and journalism programs might help prepare a new generation of journalists to report on the nation's courts.

Recommendations ranged from on-line college courses that also would be available to bloggers and other non-traditional reporters to design of course "modules" or even full-semester curricula aimed at student seeking full-time news media jobs.

The group intends to gather again early in 2012 to settle on specific tasks, with a goal of presenting by mid-summer a set of recommendations – if not "generic" programs – that any school or journalism program could adapt to its curricular needs and faculty experience. For their part, the judges expressed interest in what would be a landmark cooperative venture of judges nationwide regularly participating in journalism education about reporting on the courts and justice system.

The day-long session was co-sponsored by the First Amendment Center and the Judicial Branch Committee of the Judicial Conference, which represents federal judges. Representatives from 15 colleges and universities participated, including several members of the AEJMC Law & Policy Division, as did 10 federal judges, staff from the U.S. Administrative Office of the Courts, and others.

The meeting was the latest in a long-running series, "Justice and Journalism," that has convened

groups of journalists, educators and judges to discuss ways to improve the flow of information to the public about the ongoing cases, rulings and other business of both state and federal courts.

The series began in 1999 with a 10-year set of circuit-by-circuit meetings between local journalists and federal judges. In 2010, the program moved to national sessions on specific topics, ranging from citizen journalists to new newsgathering technology.

A number of participants took note that reduced staffing at news organizations generally means there is no experienced staffer to train others in court coverage, and that rarely will a news operation be able – at once done – to assign a reporter solely to court coverage.

The group also reviewed new initiatives by the courts to provide information and access to records, deemed part of a major shift in attitude and energy in informing the public even as newsroom coverage declined.

Val Hoeppe, director/education for the Diversity Institute, demonstrated new technology and Web sites that would offer courts and journalists ways to use social media, live/streaming video and blogs to supplement "mainstream" journalism

reports and court-maintained databases.

Several judges noted a civic education initiative by retired Supreme Court Justice Sandra Day O'Connor which, in part, uses "gaming" programs to attract and educate young people. O'Connor's *iCivics* program aims to enrich students' understanding of American history, laws and government.

The original series produced a number of programs benefiting the public, from initiating the process of courtroom accreditation of bloggers to the Administrative Office's creation of a journalist's guide to the federal courts to an American Bar Association-initiative in which law schools provide information and insight to journalists on high-profile cases. The original series also sparked a number of local, ongoing meetings between judges and journalists.



D. Brock Hornby (left), U.S. District Judge for the district of Maine, and James C. Duff, president of the Freedom Forum, at the Justice and Journalism session in October.

First Amendment and Media Law Bibliography

By Michael T. Martínez
University of Tennessee School of Journalism & Electronic Media



Public Forum

Barbas, S. (2011). "Creating the Public Forum." 44 Akron Law Review 809.

The public forum doctrine protects a right of access – "First Amendment easements" – to streets and parks and other traditional places for public expression. It is well known that the doctrine was articulated by the Supreme Court in a series of cases in the 1930s and 1940s. This article describes the development of the public forum doctrine in the context of a larger story about the nation's efforts in this period to come to terms with its first modern crisis of communication. This crisis was precipitated by dawning public awareness of the fundamental contradiction of mass communications: that the mass media had become indispensable to public discussion yet at the same time deeply threatened it. Without the mass media, a culturally diverse and geographically dispersed public could not communicate across social and spatial boundaries. At the same time, the mass media undermined the public's ability to communicate meaningfully. The street-corner preacher and soapbox orator could not compete with the mass media for a public audience. Poor and disfavored groups could

not use the media to express their views, and media owners skewed the news to suit their political interests.

Pratt, J. E. (2011). "An Open and Shut Case: Why (And How) The Eleventh Circuit Should Restrain the Government's Forum Closure Power." 63 Florida Law Review 1487.

The U.S. Supreme Court has made it clear that when the government opens a nontraditional public forum, it retains the power to shut down the forum subsequently. But the Court has not specifically addressed whether this forum closure power knows any constitutional limitations. Several circuits, including the U.S. Court of Appeals for the Eleventh Circuit, have suggested in dicta that this power is unlimited—that the government may shut down nontraditional public forums at any time and for any reason.

While the government certainly enjoys broad discretion as a property owner, it cannot wield its ownership powers in a manner that will infringe basic constitutional guarantees. This article argues that, at a minimum, the First Amendment's guarantees against retaliation and viewpoint discrimination should rein in the outer bounds of the government's forum closure power, and that the Eleventh Circuit should qualify its expansive dicta by recognizing a cause of action under 42 U.S.C. § 1983 for plaintiffs who allege that a forum was shut down in retaliation against their viewpoint. Such a rule would protect the fundamental guarantees of the First

Amendment, harmonize with existing First Amendment retaliation doctrine, vindicate the purposes of § 1983, and strike the correct balance between protecting constitutional rights on one hand and government discretion on the other.

Free Speech

Barnhart Driscoll, L. E. (2011). "Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment's Protection for Nonpolitical Advertisements." 19 George Mason Law Review 213.

The four-pronged test for permissible restrictions of commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* has endured for 30 years, despite harsh criticism. Courts use the *Central Hudson* test to decide whether a proposed governmental regulation of non-misleading advertisements for lawful activities violates the First Amendment. The *Central Hudson* standard has led to unpredictable and incompatible results. It comes as no surprise that judges and scholars have criticized the standard since its inception. The recent guidance from the Supreme Court in *Citizens United v. Federal Election Commission* is instructive in resolving the disagreements, since the Court discarded paternalistic rationales for permitting the government to shield the public from viewpoints and opinions it fears may be damaging. The *Citizens United* Court also advocated equal treatment for corporate and private

political speech and employed decisions about nonpolitical speech in reaching its holding. Because the Supreme Court has never elaborated a clear rationale for protecting political speech more stringently than nonpolitical speech, it should modify the *Central Hudson* test to require strict scrutiny, not intermediate scrutiny. The Court should also require a correspondingly stringent evidentiary standard, making it harder for the government to silence commercial speech.

Such a test would resolve disagreements about permissible restrictions on advertisements and would prevent legislatures from marginalizing speech on the basis of the speaker's profit motive. The Court should overturn *Central Hudson* and replace it with a test that places meaningful limits on the government's ability to silence economically valuable speech. Requiring the government to meet the highest evidentiary standard before



silencing truthful advertising would facilitate the informed economic decision-making invaluable to our society. Courts should not permit legislatures to use restrictions on commercial speech as a shortcut to discourage activities they do not see fit to outlaw or for which they cannot garner the support to do so. By requiring the government to demonstrate that a regulation on

advertisements is the least restrictive way to accomplish its ends, the Supreme Court would place responsibility for policy choices where it belongs--with the people's elected representatives.

Post, D. G. (2010-2011). "Sex, Lies, and Videogames: Brown v. Entertainment Merchants Association." 2010-11 Cato Supreme Court Review 27.

In *Brown v. Entertainment Merchants Association*, a decision that veteran Supreme Court reporter Linda Greenhouse, of *The New York Times*, called "the most surprising decision" of the term, the Supreme Court (7-2) struck down California's prohibition on the sale of violent videogames to minors on the grounds that it offended First Amendment protections for the freedom of speech. This case presents a fascinating snapshot of the state of First Amendment doctrine in the early years of the 21st century, and contains enough peculiarities and doctrinal oddities to keep law professors and their students busy for years to come. To place the decision in its correct context, *Post* begins with a brief review of "the somewhat tortured history of the Court's obscenity decisions;" though *Brown* is not explicitly about "obscenity," the decision rests entirely on, and is inexplicable without reference to, those decisions. Next, he examines each of the four opinions issued by the Court – Justice Antonin Scalia for the majority (joined by Justices Anthony Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan), Justice Samuel Alito (joined by Chief Justice John Roberts) concurring in the judgment,

and the two dissenting opinions by Justices Clarence Thomas and Stephen Breyer – in some detail, for they constitute a rather remarkable collection. In the final section *Post* discusses some of the potential implications of the Court's decision for First Amendment doctrine and for future battles about the regulation of speech.

Salamanca, P. E. (2010-2011). "Snyder v. Phelps: A Hard Case That Did Not Make Bad Law." 2010-11 Cato Supreme Court Review 57.

In *Snyder v. Phelps*, the U.S. Supreme Court stood by the First Amendment in hard times. A religious group conducted a protest some 1,000 feet from a fallen marine's funeral, holding such pickets as "God Hates the USA," "Thank God for Dead Soldiers," and "You're Going to Hell." Despite the empathy that virtually anyone would feel for the marine's grieving father, the Court held by a vote of 8-1 that his action for intentional infliction of emotional distress and intrusion upon seclusion could not survive, owing largely to the public nature of the issues the protesters had raised. As a doctrinal matter, *Snyder* may have involved little more than the application of settled law to difficult facts. The Court could have explained exactly why the protest did not fall into any recognized category of unprotected speech, such as fighting words. Instead, it took the incremental tack of reiterating the importance of speech on matters of public concern and putting the protest in that category. In doing this, the Court responded to arguments that the protesters had sought to exploit the

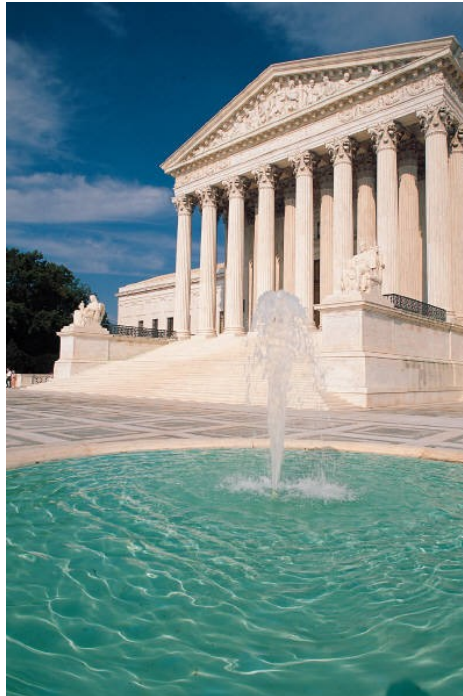
funeral for their own benefit and that Mr. Snyder was part of a "captive audience." In a potentially important development, the Court indicated that merely hitching speech on a matter of public concern to someone else's wagon, without more, does not exclude it from protection. With respect to captive audiences, the Court may have nudged this doctrine back toward its proper boundaries, where people in public places subjected to speech they find offensive are ordinarily expected to look or walk away.

Schaeffer, J. L. (2011). "The Incorporation of Democracy: Justice Kennedy's Philosophy of Political Participation in Citizens United." 91 Boston University Law Review 1783.

Citizens United v. Federal Election Commission invalidated several key provisions of the Bipartisan Campaign Reform Act (BCRA) and reinterpreted almost a century of First Amendment jurisprudence to rule that the political speech of corporations cannot be prohibited or regulated in a manner different from that of individual citizens. Though seemingly paradoxical, this article argues that Justice Anthony Kennedy, in the majority opinion, intended to protect the First Amendment rights of individuals who have organized to communicate their views more successfully by safeguarding the rights of the organizations they form.

Wood, J. K. (2011). "Truth, Lies and Stolen Valor: A Case For Protecting False Statements of Fact Under the First Amendment." 61 Duke Law Journal 469.

The Stolen Valor Act of 2005 makes it a crime to lie about having received a medal authorized by Congress for the military. In 2010, in *United States v. Alvarez*, the Ninth Circuit found the Act unconstitutional under the First Amendment, holding that false statements of fact, like other content-based restrictions on speech, are subject to strict scrutiny. The Act failed



this test because, according to the court, it was not narrowly tailored to serve a compelling government interest. The decision highlights the uncertainty of First Amendment protections for false speech. Though the Supreme Court has held that certain categories of false speech – such as fraud and defamation – are proscribable, it has not ruled directly on a case in which false speech had been barred without respect to context, intent, or harm. This article argues that false speech should be presumptively protected by the First Amendment, with exceptions for certain classes

of speech that result in concrete harm to individuals. Such protection would limit government control of speech, avoid chilling worthy speech, promote privacy and autonomy, and result in easier administration for courts.

FCC

Butler, J. (2011). "The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency." 39 Capital University Law Review 621.

The Federal Communications Commission (FCC) has existed for 76 years. Over that span, the FCC has grown in stature and has largely shaped what can and cannot be publicly broadcast. It is not so much what we see that the FCC has regulated, but what we have not seen. The struggle to define just what we cannot see and to determine whether the Commission has the authority to control such matters has not always been easy. The FCC existed for nearly 30 years before the U.S. Supreme Court addressed indecency and obscenity in *FCC v. Pacifica Foundation*. It took nearly 30 more years for indecency to encompass more than just George Carlin's seven filthy words. It was not until the early 2000s that the FCC finally definitively described what is indecent and what procedures determine whether something is indecent. It took eight years and numerous court cases just to establish an acceptable indecency safe harbor. This article explores the FCC's authority and growth. It also explores the evolution of the terms "indecent" and "obscene." Finally, this article discusses the future of the FCC and its drive to

regulate subscriptions services such as cable and satellite television and radio.

First Amendment

Hampton, C. (2011). "Confirmation of a Catch-22: Glik v. Cunniffe and the Paradox of Citizen Recording." 63 Florida Law Review 1549.

In 2007, Simon Glik observed several police officers arresting a young man on the Boston Common. Concerned that the officers were employing excessive force, Glik began to record the arrest with his cell phone. After successfully arresting the young man, an officer asked Glik whether the cell phone had recorded audio. When Glik replied in the affirmative, the officer arrested Glik for "unlawful audio recording in violation of Massachusetts's wiretap statute." A Boston municipal court dismissed the wiretap charge. In particular, the court "found no probable cause supporting the wiretap charge, because the law requires a secret recording and the officers admitted that Glik had used his cell phone openly and in plain view to obtain the video and audio recording." Following a fruitless filing of his complaint with the Boston Police Department, Glik filed an action against the arresting officers and the City of Boston in the U.S. District Court for the District of Massachusetts. Glik's complaint included, in relevant part, claims under 42 U.S.C. § 1983 for violation of Glik's First and Fourth Amendment rights. The officers moved to dismiss Glik's complaint based on qualified immunity, but the district court concluded that "in the First Circuit . . . th[e] First Amendment right publicly to rec-

ord the activities of police officers on public business is established." The district court consequently denied the officers' motion to dismiss, and the officers appealed. The essential holding of *Glik v. Cunniffe* establishes that the First Amendment of the U.S. Constitution protects a citizen's right to film law enforcement officers in a public space, and it further conveys that arresting a citizen for disobeying a state wiretap statute by recording a law enforcement officer in a public space violates that citizen's Fourth Amendment right to be free from unreasonable seizure. This article argues that, in situations involving citizen recording of law enforcement official conduct, the court's holding merely identifies an incongruity in the practical application of the First and Fourth Amendments and fails to offer any constructive guidance to citizens unsure of their right to record.



Government Speech

Norton, H. (2011). "Imaginary Threats to Government's Expressive Interests." 61 Case Western Reserve Law Review 1265.

As the Supreme Court has recognized, the government must speak in a wide variety of ways if it is to

function effectively. Government expression also serves valuable First Amendment interests in enabling members of the public to identify and assess their government's priorities, thus informing and facilitating the public's participation in democratic self-governance.

For these reasons, the Court's government speech doctrine exempts the government's own speech from free speech clause scrutiny. But what does this mean in practice? More specifically, how can government protect its legitimate – and, indeed, valuable – expressive interests from encroachment without running afoul of the First Amendment's free speech protections for private speakers? As the Court has held, the First Amendment permits the government to refuse to allow other parties to join, and thus change or distort, its own message – i.e., private speakers cannot compel the government to deliver their own views.

Too often, however, governmental bodies are asserting their own expressive interests to claim – and some courts are permitting them to exercise – the power to punish private parties' speech that does not threaten the government's ability to express its own views. For example, some federal courts have relied on government speech interests to justify the exclusion of peaceful dissenters from attendance at the government's public functions, and another has invoked government's expressive interests to justify the punishment of student expression in public schools. By identifying such troubling examples, this essay urges attention to, and concern for, this trend's potential spread.

Minutes of the AEJMC Law and Policy Annual Business Meeting

August 12, 2011
Derigan Silver
University of Denver

The meeting began at 7 p.m. with Division Head Amy Gajda calling the meeting to order with 40 people present.

Amy Gajda: Congratulations to those who worked on the preconference panels. I've heard from many people who raved about the panels. Thank you. Do I have a motion to pass the minutes from the 2010 meeting as amended by the spring 2011 edition of Media Law Notes? Courtney Barclay moves the minutes be accepted. Kate Blevins seconds the motion. The motion to approve the minutes passes unanimously.

State of the division, Amy Gajda

We are flush with cash because we are no longer mailing out media law notes. Dave Cuillier, incoming division head, will have a discussion of how to use this money later. Membership is about the same.

Council of divisions, David Cuillier

There were a record number of submissions to the conference. There was an association wide 58 percent acceptance rate. Sage is going to be the new publisher of AEJMC journals, but not *Communication Law and Policy*. Beginning next year, electronic submission for the conference will now make you check a box that says you are only submitting to one division. There were a number of problems this year with people submitting to more than one division. Tomorrow, there will be a vote on whether to keep the mini-plenaries. There are currently four mini-plenaries, which only have a few things scheduled against them, and one plenary, that has nothing scheduled against it.

There will also be a vote on where to hold the 2015 conference. The 2012 conference will be in Chicago, the 2013 conference will be in Washington, DC, and the 2014 conference will be in Montreal. The "Western" choices for 2015: Palm Springs, \$129/night, Las Vegas, \$119-139/night, San Diego, \$190/night, San Francisco, \$194/night.

Tori Ekstrand: The discussion in the research committee was that the Palm Springs hotel is isolated, and there

are issues about getting to the hotel. Clay Calvert: It will be hot in Palm Springs in August.

A straw poll is taken and the division overwhelmingly chooses San Diego.

Reports and award presentations

Communication Law and Policy, Wat Hopkins, editor

Submissions were about flat. A few more articles were accepted for publication this year. The acceptance rate was 25 percent. Members probably realized the special issue on privacy that was announced was never published. There were not enough articles accepted to publish an entire edition of the journal. There were five submissions, one of which was withdrawn. One submission was accepted upon revision, one was rejected without review, one was rejected after review, one received a recommendation of revise and resubmit, and the author chose not to do so. The journal currently has the invited article from Diane Zimmerman and the accepted article, but I'm not sure what to do with them. I'm waiting to decide if I will hold them to see if I receive more privacy articles so that we can still do a privacy edition or use them in regular editions. We don't have enough good articles to sit on good ones so I cannot wait forever. If any members have good privacy articles or any good articles on any topic, I would appreciate receiving them.

The journal has been receiving electronic submission for several years, however, with the winter 2012 issues the inside cover of each issue will state electronic submission is preferred.

Only the four association journals are going to Sage. Division journals, including *Communication Law and Policy*, are free to decide what they would like to do, and are currently doing the same thing. The journal has been approached by Sage. While I'm not unhappy with Taylor & Francis, I'm investigating the Sage offer, and will make a report next year.

The editorial board has undergone changes. Jon Dilts announced his retirement and let me know he would no longer be researching communication law. Thus, he wanted to retire from the board. I felt this was a good decision, and noted there were a number of board members who were retiring. I contacted them, letting them know I was retiring them from the board as well. The board serves at the pleasure of the editor. We have a good board, and always have. Retiring board members include Dorothy Bowles, Jon Dilts, Steve Helle, Robert O'Neil, Bob Trager, Bill Chamberlin and Diane Zimmerman. Two, Bill Chamberlin and Diane Zimmerman, said they planned to stay active and were left on the board. The new board members are Michael Hoefges, Andrew Kenyon, Robert Kerr, Lyrissa Lidsky and Andrew Scott. I'm happy to discuss how I made

selections.

When the journal applied for ISI data base, it was denied and I was not told why. However, when I pursued the matter, I was given hints as to why. The journal's mission statement states the journal has international law interests. That was not represented by the board or articles in the three issues of the journal I sent to ISI. This does not mean an "international person" working in the United States. It means a faculty member working outside of the United States. The Division has a lot of members who are qualified to be on the board, and would have made excellent board members. However, we are limited by the number of people who are on the board. Policy limits the editorial board to 35 members, two-thirds (24) of whom must be members of the division. The journal must consider diversity and diversity of interest. If a person steps down and I have a lot of people interested in the area that person was interested in, then I have to find someone who has another interest. For example, if a board member steps down who is interested in torts, and three other board members are interested in torts, I have to find someone who does something other than torts. In addition, I like to keep one slot open, just in case a high profile individual wants to be on the board. If Sandra Day O'Connor wants to serve on the board, I need to have a space available. Wat passed around a list for people to sign up to review manuscripts, and then took questions.

Tori Ekstrand: Is it your intention to reapply to ISI?

Wat Hopkins: Yes. Taylor & Francis will help put together a case. I have international articles in queue. That and the board changes will help.

I have asked Taylor and Francis about permission to submit to SSRN. Our editor had never heard of it. I explained how important it is to legal scholars and that it would help with the visibility of journal. Because the journal is competing against multiple submission journals, I explained having articles on SSRN would help the journal be more attractive even though we can't do multiple submissions. Our editor discovered other Taylor & Francis journals are being posted on SSRN, so *Communication Law and Policy* articles will be able to do it once Taylor & Francis fine tunes their policy.

Kyu Youm: I would like to note Wat Hopkins' serious commitment to the internationalization of the board. This is an important way to advance our scholarship. It is also very important to be on ISI and be in the index. I would like to thank Wat for his service very much.

Teaching chair, Minjeong Kim

The pre-conference teaching communication law panel was a great success, with 35 people attending. I've heard great things about it and received a great deal of positive

feedback. There were three panels. In the first session, communication law textbook authors shared their suggestions on how to best use their textbook for a class. The second session featured teachers sharing teaching methods and projects that have proved successful. The final session addressed various challenges related to teaching communication law. I would like to thank all the panelists. I'd also like to give special thanks to Dan Kozlowski and Amy Kristin Sanders for help organizing the panels.

This was the third teaching competition, and it had a special theme of diversity. Submissions were down; there were only eight submissions. All were excellent, but the six judges choose three winners. They were featured in the newsletter and you can see their submissions on our website. The winners were: Courtney Barclay of Syracuse (first place), Holly Hall of Arkansas State (second place), and Jeffrey Blevins of Iowa State (third place). Courtney, Holly and Jeffrey were in attendance and received hearty applause.

In addition, we had two teaching panels. Holly Hall proposed and moderated "Developing Social Media Law and Ethics Instructional Approaches." Josh Azriel proposed and moderated "Student Open Records Audit as a Teaching Tool."

Amy Gajda: I would like to thank Minjeong for her years of service. She is leaving division leadership this year for what I hope will be a very short time. The membership applauded Minjeong's service.

Research chair, Kathy Olson

There were 72 papers submitted and this year's acceptance rate was 43 percent, which is higher than last year but a little bit lower than 2008 and 2009. Fifty percent of the faculty papers were accepted and 37 percent of the student submissions were accepted. Online submission went fairly well. Author identification was a problem. Our conference would have been much the poorer unless the authors were notified before the deadline. I'm coming up with guidelines about how to "scrub" your paper. We had two papers disqualified even after repeated attempts to contact the authors. During reviewing, another was discovered with a self-citation. In addition to removing file names, self-citations must be avoided to avoid identification. We had 72 judges, which was enough. Unfortunately a note went out from AEJMC about volunteering to judge and some members who were interested in judging replied to that. Those were lost in the ether and I never received those. I like to thank those who did judge. I would also like to thank our moderators: Nancy Whitmore, Butler University, S.L. Alexander, Loyola University, John Watson, American University, Jennifer Henderson, Trinity University, and Carmen Manning-Miller, Savannah State University. I

would also like to thank our discussants: Dale Herbeck, Boston College, William Lee, University of Georgia, Sheree Martin, Samford University, Eric Easton, University of Baltimore School of Law, and Karla Gower, University of Alabama. For our high density session we had two reviewers, Laurie T. Lee, University of Nebraska-Lincoln and Justin Brown, University of South Florida. I think having two reviewers for that session worked out pretty well.

We now have our annual presentation for best poster. Our winners this year were Yong Tang and Martin Halstuk, Penn State University. We will mail them their award and check as we couldn't bring it with us since we didn't know who was going to win. Student award winners were: Roxanne Coche, North Carolina (third place). Roxanne was present to accept her award and was applauded by the division. Jack Karlis, South Carolina (second place). Jack was present to accept his award and was applauded by the division. Bill Hornaday, Indiana (first place). Bill was present to accept his award and was applauded by the division. Faculty award winners were: Robert Richards, Penn State (third place). Robert was present to accept his award and was applauded by the division. Clay Calvert, Florida (second place). Clay was present to accept his award and was applauded by the division. Chip Stewart, Texas Christian (first place). Chip was present to accept his award and was applauded by the division.

Southeast Colloquium Chair, Daxton "Chip" Stewart

We had another great year. This was my third year serving. There were 35 papers submitted and we accepted 19 for a 54 percent acceptance rate. Thankfully there were many volunteers so we only had to assign three papers per judge. Judging went very well. AEJMC's incoming president attended every law session and told me how great all the presentations were. It was in Columbia, South Carolina this year. It will be at Virginia Tech next year. I will be stepping down this year, as it was always my intention to serve three years. I would like to thank everyone who participated in Southeast the last three years. Amy Gajda thanked Chip for his years of service.

Business, Amy Gajda

Election of editor of Communication Law & Policy

A call this year went out for editor of Communication Law and Policy. We put out a call in the journal and by email. We received two applications, including Wat's. Wat was the unanimous choice of the publications committee. When the other applicant heard, he withdrew from consideration and also endorsed Wat. We choose Wat for many reasons, including his years of service, his dedication and his great skill as an editor.

Wat: If you got your copy of Communication Law and Policy, you'll have seen that the edition of the journal was

delayed when the call came out. That was the only issues since I've been editor that has been late, and I was not late. And I don't know why the edition was late. Our editor did not know why. I contacted Amy and she sent out a second call via email.

Amy Gajda: Are there any nominations from the floor? There were no nominations from the floor.

Tori Ekstrand moves to accept committee's recommendation and appoint Wat by acclamation. Chip Stewart seconds the motion. The motion passes unanimously.

Amy Gajda: Congratulations, Wat.

Discussion of "Big Ideas" for AEJMC anniversary

They are holding a "Big Ideas" competition for the 2012 conference which will mark the 100th anniversary of AEJMC. You can get the description from me. AEJMC is asking for our division to come up with a couple of ideas. They will list those ideas, send them to all members and members will choose the top 10. They will be put on mug which will go to all members in 2012. Thoughts?

Courtney Barclay: Marketplace of ideas.

Chip Stewart: The right to know.

Law & policy division annual donations

Amy Gajda: Every year we donate to SPLC and RCFP. Last year we did \$250 to each entity. Do I have a motion to donate money to either organization? Wat Hopkins moves to donate to \$500 to SPLC. Dan Kozlowski seconds the motion. Question from the floor: How much money do we have in our account? Dave: We have \$5,722 in bank account. Motion passes. Courtney Barclay moves to donate \$500 to RCFP. Chip Stewart seconds the motion. The motion passes unanimously. Ben Cramer: Have there been any other organizations we have donated to in the past? Amy Gajda: Any other entities from the floor? There are none. New business from the floor? There is none.

Ascension, appointment, and election of new officers, Amy Gajda

According to our bylaws, the chair, vice chair and research chair are by ascension. Therefore, next year Dave Cuillier will be head, Kathy Olson will be vice head, and Derigan Silver will be research chair. The division applauds for the new officers. The Southeast chair is by appointment. Courtney Barclay has been appointed chair of Southeast Colloquium. Thank you, Courtney, for agreeing to serve. The division applauds Courtney. The nominee for Clerk/Newsletter editor is Chip Stewart. Are there any nominations from the floor? There are no nominations from the floor. Wat Hopkins moves for Chip's appointment by acclamation. Eric Easton seconds the nomination. The division votes unanimously for Chip's appointment.

Amy Kristin Sanders is the nominee for PFR chair. There are no nominations from the floor. Eric Easton

moves for Amy's appointment by acclamation. Clay Calvert seconds the motion. The division unanimously elects Amy PFR chair. Cheryl Ann Bishop, who has been webmaster the past few years, is the nominee for teaching chair. There are no nominations from the floor? Chip Stewart moves for Cheryl Ann's appointment by acclamation. Minjeong Kin seconds the motion. The division unanimously elects Cheryl Ann teaching chair. Erin Coyle is the nominee for webmaster. There are no nominations from the floor. Courtney Barclay moves to elect Erin webmaster by acclamation. Tori Ekstrand seconds the motion. The division unanimously elects Erin webmaster.

Amy Gajda: I have been very impressed with the scholarship of the division. It "blows away" the other divisions. Thanks for letting me serve.

New business, Dave Cuillier

Dave presents Amy with a plaque and thanks her for her service. The division applauds Amy.

We need to decide what to do with our money. I would like to take ideas from the floor, which I will then put in Survey Monkey and put it to membership for a vote. Next year we can start to implement our plans.

Ed Carter: I am the faculty adviser of the student newspaper and we have had lots of money and little money. The division is the same way. We should keep a cushion. We should consider using money for panels and bringing in speakers when AEJMC doesn't have the money.

Dave Cuillier: We had that situation this year, and we felt we should have permission from the members before we did that.

Kyu Youm: Non-members speakers don't need money, but it is a symbolic gesture. An honorarium.

Clay Calvert: Allocate money to filing amicus briefs. It's about \$1400 to file a brief. It would help to have money to do that.

Kathy Olson: This issue comes up every five years, and we have the discussion over whether we are neutral scholars or advocates. In the past the division has not wanted to file amicus briefs in order to remain impartial.

Justin Brown: Higher cash awards for students.

Chip Stewart: Cash awards for colloquium winners. Where do we keep that money anyway?

Amy Gajda: AEJMC keeps the money.

Dave Cuillier: Thank you for these ideas. We are growing it at about \$1000-1500 a year so it's good to have ideas of what to do with the money. For the 100 year be thinking about fun panels and be ready to submit those. For next year, are we interested in high density session? We need to know before we go to the chip session on Dec. 1. Any thoughts?

Amy Gajda: It's 10-12 people in the room. Each person speaks for 5 minutes about the paper. People from the floor ask questions.

Chip Stewart: I presented the same paper six times in one hour.

Ed Carter: It only makes sense if we are trying to get in more papers.

SL Alexander: I was the time keeper and it seemed to me there already wasn't enough time. I think we need more time not less. We need fewer papers.

Dave Cuillier: It would make more time for discussion and less time for presentation.

Kathy Olson: I've heard many people don't show up for the sessions.

Eric Easton: History did one, and they broke off into two separate discussion groups.

Dave Cuillier asked for a vote. Only two division members expressed interest.

Derigan Silver: As incoming research chair, let me explain why we are exploring new ideas. There is a feeling that presenters aren't getting the serious, critical feedback they need to take their scholarship to the next level. Not just to get published, but to write articles that advance the scholarly corpus and are cited widely by others in the field. For those of you who have worked in law schools, we are trying to think of ways to create a "workshop type" environment where an author can get serious feedback from other experts.

Tori Ekstrand: It would be great to group us together by research area because they would know exactly what they wanted to see in our research.

Dave Cuillier: Should we get rid of discussants?

Kate Blevins: Why don't we just get better discussants?

Kathy Olson: We have a wide variety of discussants. I tried to keep presentations short, make time for those attending to ask questions. The goal is to have the attendees get something out of the presentations too. I'd like to make sure the papers are also available before the conference. That way audience member will have the opportunity to read the papers before the presentations in order to ask more critical questions.

Dave: Thanks for the discussion. Are there any announcements from the floor?

Tori Ekstrand: I would like to recognize Andy Sellar from the Berkman Center at Harvard University, and would like to welcome him to the division.

Dave asks for new business from the floor. There is none. Dave adjourns the meeting.

Minnesota hosts Liberty Tree Initiative

By Amy Kristin Sanders
University of Minnesota
Professional Responsibility and Freedom Chair



If you feed them, they will come. That was the motto for the University of Minnesota School of Journalism and Mass Communication’s Fall 2011 week of First Amendment events funded by the Liberty Tree Initiative’s grant program.

The program offers colleges and universities \$5,000 grants to support campus efforts to educate the university community about First Amendment issues through any number of activities.

Minnesota boasts a rich history of landmark U.S. Supreme Court decisions, and the week’s theme “They All Began Here” reflected the 80th anniversary of *Near v. Minnesota* and the 20th anniversary of *Cohen v. Cowles Media Co.* as well as events highlighting *RAV v. City of St. Paul*.

The weeklong endeavor kicked off with an interactive keynote event where First Amendment scholar and Furman University President Rodney A. Smolla christened the audience as Supreme Court justices and

then argued a case involving the “Amerileaks” organization’s attempt to publish classified national security documents, taking questions on the fly from the justices.

Three panels over the lunch hour provided audience members with the rare opportunity to hear from attorneys who had participated in the cases as well as legal, political science, history and journalism scholars from the Twin Cities.

Two afternoon Q&A sessions gave students the opportunity to grill local professionals in strategic communication and journalism about the legal and ethical issues they face in their daily work.



Finally, the week also offered one lucky Minnesota student the opportunity to have his essay on hate speech published by the *Star Tribune*. In addition to being featured in the newspaper, journalism major Scott Berman received a \$500 scholarship to assist with his studies.

Overall, the week provided a great opportunity to engage the university and professional communities to raise awareness about important First Amendment issues – and don’t forget the 270 sub sandwiches, 15 lbs of chips, 600 cookies and 15 cases of drinks that were served!



One of the University of Minnesota’s Liberty Tree events was a panel on the Supreme Court’s 1931 decision in *Near v. Minnesota*. Professor Jane Kirtley (first from left) moderated the panel, which featured (from left) history professor Thomas Wolfe, law professor Heidi Kitrosser, and First Amendment attorney John P. Borger. Journalism professor Amy Kristin Sanders (right) was one of the event’s organizers.

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 8 - 10 at Virginia Tech, in Blacksburg, Virginia. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, freedom of information, commercial speech, Federal Communications Commission issues, copyright, obscenity and other issues regarding freedom of speech and press. A panel of judges will blind referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the colloquium to present accepted papers.

Law and Policy Division papers must be no longer than 50 double-spaced pages (including appendices, tables, notes and bibliography). Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities. There is no limit on the number of submissions authors may make to the Division. The top three faculty papers and top three student papers in the Law and Policy Division will be recognized. Student authors of single-authored papers should clearly indicate their student status to be considered for the student paper

awards.

Authors should submit each paper as an email attachment (documents may be submitted in the following formats: Word, Pages, PDF). In the body of the email, please provide the title of the paper, and the name, affiliation, address, office phone, home phone, fax and e-mail address for each author. This is where students and faculty should indicate their status for consideration of the faculty and student top paper awards. Do not include any author identifying information on any page of the attached paper submission. Authors also should redact identifying information from the document properties. On the cover page of the attached paper, only the title of the paper should appear. Following the cover page, include a 250-word abstract.

Submissions must be emailed to Dr. Courtney A. Barclay at aejsoutheast.law@gmail.com. The deadline for paper submissions is Monday, December 5, 2011, at 5 p.m. Central Standard Time.

If you have any questions about the submission process or the paper contest, please contact Courtney Barclay by phone at (315) 443-3489 or via e-mail at cobarcla@syr.edu.

Southeast Colloquium Call for Reviewers

Courtney Barclay
Southeast Colloquium Research
Chair



The AEJMC Law and Policy Division has a proud tradition of hosting an engaging research paper competition at the Southeast Colloquium each year, and we anticipate that the 2012 competition will be no different. Last year, we had 36 paper submissions, with a good mix of faculty and student articles.

With our growing number of papers comes a need for an equally vigorous team of reviewers. For us to

limit reviewers to reviewing three papers each, we'll need approximately 40 reviewers. If you are not submitting a paper to the colloquium this year, the division would like to invite you to help with the competition. For those who have served as reviewers in recent years, we thank you for your time and effort, and hope you will join us again this year.

Reviewers will receive a package of papers in mid-December, with a mid-January deadline for returning reviews.

For more information, please contact Dr. Courtney A. Barclay at cobarcla@syr.edu.

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