Media Law Notes

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Head Notes

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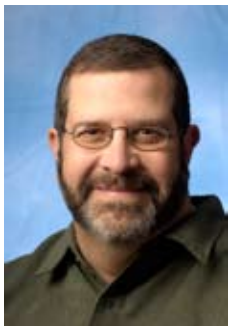
In my dotage, I've grown dreadfully afraid of becoming the professor of my college nightmares. You know the one: the faculty member who is quite sure that in his/her day, the students were brighter, better prepared, more respectful and any number of other positive adjectives when compared with the sloth of today. Dismissive of today's college students as an inferior product wrecked by their lenient parents, Professor Nightmare wars with students and dispenses generational stereotypes at faculty meetings with the zeal of a convert.


Charles Davis

Yet I catch myself from time to time, after a particularly depressing conversation with another undergraduate unconcerned about not only their own prospects but also about the prospects of the world at large, wondering whether I am becoming just that professor. Or perhaps it's not me — it's them!

I've been thinking about that a lot as I read "Generation Me: Why Today's Young Americans Are More Confident, Assertive, Entitled — and More Miserable Than Ever," a thoughtful, even troubling book by Jean M. Twenge, an associate professor of psychology at San Diego State University, who along with colleagues has found that narcissism is much more prevalent among people born in the 1980s than in earlier generations.

It might also have something to do with having judged the Teaching Ideas competition of the Law Division, which seems to turn all of Twenge's arguments on their head.

Twenge's book — a look at the gauzy self-affirmation of the Baby Boomer parents and the college-aged children created by their devil-may-care ethos — is a paean to an earlier age of denial and restraint, a call to arms to quit coddling Junior and treat him like the adult-in-training he is. It's well documented, readable and oh so tempting, as its central thesis defends Professor Nightmare straight down the line.

Twenge's research includes comparing studies on the self-esteem of more than 60,000 college students across the country from 1968 to 1994. As a result of all this, and the feedback of a couple hundred of her own students, Twenge concludes that she has a good fix on young people today — what they're like, what they value, how they got this way and what that means for the rest of us. It

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Winning teaching ideas stress hands-on learning

By Minjeong Kim
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Experiential learning turned out to be the biggest theme of our second-year teaching ideas competition. Several entries — including two of the winning ideas — were based on the idea that students learn better from direct experience beyond the classroom. A total of 11 ideas were submitted, and a committee of five judges reviewed them anonymously. It was extremely difficult to choose three winning ideas, for the score differences were fairly small and some commonalities existed among entries. Nevertheless, the three winning entries — summarized below — were selected. The winning ideas will be posted in their entirety on our division's Web site at http://aejmc.net/law/teaching.html.

I would like to thank everyone who submitted a teaching idea and the judges who reviewed the

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Legal Annotated Bibliography

By Michael T. Martinez
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First Amendment

Berger, H. (2009). "Hot Pursuit: The Media's Liability For Intentional Infliction of Emotional Distress Through Newsgathering?" 27 *Cardozo Arts and Entertainment Law Journal* 459.

Recently, courts have begun acknowledging claims of intentional infliction of emotional distress ("IIED") against the media, a shift that could place serious checks on the newsgathering techniques of investigatory journalists. Unlike its historical role, viewed as little more than a procedural "gap-filler" in litigation, the tort of IIED could potentially transform into a form of civic duty for journalists to avoid causing extreme emotional distress in its subjects. And unlike the dissemination of news itself, whether printed or broadcast, the gathering of this news may resound in conduct, not speech, making the veil of First Amendment protection more difficult to hide behind.

Nagy, T. (2009). "Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation." 94 *Minnesota Law Review* 140.

Angry investors who were among the victims of the subprime mortgage collapse are taking aim at the rating agencies for their role in the crisis, suing the three major U.S. credit rating agencies — Moody's Investment Service, Standard & Poor's and Fitch Ratings — for giving inflated evaluations to subprime residential mortgage-backed securities. In short, these agencies' ratings greatly underestimated the risks associated with subprime securities. Since millions of investors relied on these purportedly "independent, objective assessments," they lost billions of dollars when the market collapsed. Despite harboring enormous influence in all areas of the financial market, rating agencies have deflected liability for their inaccurate ratings by claiming that their core function is journalism — that they serve to gather and analyze newsworthy financial information and then disseminate opinions about this information to the public. Therefore, the rating agencies claim protection under the First Amendment as a matter of free speech and freedom of the press. A number of courts have agreed with this position and applied the Supreme Court's actual malice standard for journalistic liability in determining the agencies' liability for the accuracy of their credit ratings.

Solove, D. J. and N. M. Richards (2009). "Rethinking Free Speech and Civil Liability." 109 *Columbia Law Review* 1650.

Current First Amendment law and theory has failed to articulate in a systematic and compelling way why the First Amendment should apply to certain kinds of civil liability but not to others. To remedy this confusion, this article offers a new theory of the First Amendment and civil liability: one focusing on the First Amendment dangers of government power to prescribe liability rules. The authors think that this approach makes two significant contributions — one theoretical and one practical.

Zick, T. (2009). "'Duty Defining Power' and the First Amendment's Civil Domain." 109 *Columbia Law Review* Sidebar 116.

Zick writes, in response to "Rethinking Free Speech and Civil Liability" (see above), that Daniel Solove and Neil Richards attempt something truly ambitious. The authors seek to map coherent boundaries for the First Amendment's vast civil domain. Their project merits serious atten-

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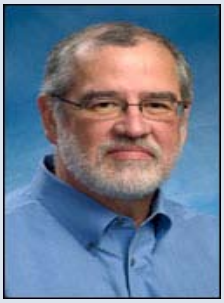
Meet the bibliographer


Mike Martinez

Mike Martinez returned to the University of Missouri School of Journalism to study for a Ph.D. after working for 26 years as a photojournalist and Internet editor. He has worked at The Associated Press in New York, The [Louisville] Courier-Journal, The Detroit News, The Cincinnati Enquirer and the Fort Worth Star-Telegram.

His research interest is media law, specifically media and the courts. His dissertation, under the direction of Charles Davis, focuses on how local television stations fulfill a democratic function through their coverage of criminal trials. He expects to graduate in December.

— Kathy Olson

Legal Bibliography (Cont'd from page 2)

tion. Currently, different rules apply to civil liability for speech depending on whether the liability arises in tort, contract, or property. Solove and Richards claim that these boundaries are unworkable, undertheorized and in some cases destined to collide. They develop a framework for mapping the First Amendment's civil domain that is based upon a distinction regarding the type of power the state exercises in various civil liability contexts. This response critically examines the choice and meaning of power, and the boundaries that a power-defining approach would draw.

Copyright

Band, J. (2010). "The Long and Winding Road to the Google Books Settlement." 9 *John Marshall Review of Intellectual Property Law* 227.

Google scanned millions of books from the world's leading research libraries without the copyright owners' authorization to include in its search database, precipitating two copyright infringement lawsuits in federal court. This article reviews the original Library Project and the ensuing litigation, focusing on the fair use arguments made by each side. The article summarizes the complex settlement proposed by the parties, discusses some of the criticisms raised against it and describes the settlement agreement.

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

The U.S. Constitution contains within its four corners both the First Amendment and the Copyright Clause. Both remain critical for the operation of modern American society. In 1998, Congress passed the Digital Millennium Copyright Act ("DMCA"), which contains an anti-circumvention provision in Section 1201 that violates the modern First Amendment doctrine. Furthermore, Section 1201 constitutes an impermissible extension of copyright law beyond its constitutional boundaries. This Article addresses the interaction between modern First Amendment doctrine and copyright law.

Riccard, K. E. (2009). "Product Placement or Pure Entertainment? Critiquing a Copyright-Preemption Proposal." 59 *American University Law Review* 427.

Our modern media environment blurs the line between commercial advertisements and entertainment works. Technological advancements in media and the rise of product placement advertising make it nearly impossible to determine whether media producers are feeding us information for advertising purposes or creative expression for our thoughtful consideration. Despite this difficulty, the ability to separate entertainment from commercial advertising is a critical element in a recently proposed solution to a long-standing dilemma in copyright law.

Pornography

Corbett, D. (2009). "Let's Talk About Sext: The Challenge of Finding the Right Legal Response to the Teenage Practice of 'Sexting.'" 13 No. 6 *Journal of Internet Law* 3.

"Sexting," a play on the verb "texting," describes the practice of exchanging messages via cellular phone with another party that involves transmitting pictures, or in some cases video, of individuals in various states of undress to another party. In at least 10 states, local law enforcement offices have responded to the sexting craze by filing criminal charges against teenagers who have sent these types of text messages to one another. Because of the potential harm involved on a number of levels, these cases seem to merit punishment or legal intervention of some sort. The key challenge is finding a punitive measure that fits this particular act. With teenagers and young people, it is always a challenge to find the correct symmetry between disciplining them and allowing them enough latitude to learn from their mistakes and develop into responsible adults. The current sexting practices among teens make that already delicate task more complicated.

Libel

McDonald, S. (2010). "Defamation in the Internet Age: Why *Roommates.com* Isn't Enough to Change the Rules for Anonymous Gossip Websites." 62 *Florida Law Review* 259.

In 1996, Congress passed the Communications Decency Act, which immunized websites from liability for what third parties post. A year later, the Fourth Circuit interpreted this statute to give broad immunity to Internet Service Providers. However, in 2008, the Ninth Circuit, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, scaled back this immunity for a website that it said was an active developer, along with its users, of illegal content. In light of the *Roommates.com* decision, it is unclear whether gossip sites that promise their users anonymity and seem to encourage illegal posts should enjoy CDA immunity.

Segal, J. (2009). "Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment." 26 *Cardozo Arts and Entertainment Law Journal* 639.

Two students from the University of South Carolina sued the producers of the film "Borat!" claiming that they

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Keynote speaker Miriam Nisbet told conference participants about the Office of Government Information Services (OGIS), a new federal office she heads. OGIS serves as an ombudsman to resolve disputes between FOIA requesters and administrative agencies.

Law and Policy division takes the spotlight at Southeast Colloquium

Everything from hot news to campaign finance reform was covered at the 2010 Southeast Colloquium, held in March in Chapel Hill, N.C. The division put on so many research panels — seven, more than any other division — that conference-goers sometimes had to choose between competing sessions. Law and policy issues were also the focus of the conference's keynote speech by Miriam Nisbet of the Office of Government Information Services and a panel on intellectual property and the future of journalism.

Kayla Gutierrez, Karla Kennedy and Kara Carnley Murrhee of the University of Florida won the first-place student paper award for their work on anonymous online speakers, while former division head Ed Carter won first place among faculty for his paper on moral rights and online news.

Special thanks go to division member Michael Hoefges of the University of North Carolina, who organized the Colloquium, and Chip Stewart of Texas Christian University, the division's Colloquium chair.

Communication Law and Policy editor Wat Hopkins of Virginia Tech presents his research on the "F word" and emotive speech at a panel on FCC issues. He spent the spring semester as the Roy H. Park Distinguished Visiting Professor at UNC.

Legal Bibliography (Cont'd from page 3)

tricked them into participating in the film, thereby damaging the students' reputations. The scene exposes the two students as bigots. One wistfully states that he wishes that slavery was still legal in America, while another complains that only minorities can get ahead, presumably by exploiting the fruits of affirmative action, political correctness or some such other liberal plot. It was surprising when a California Superior Court judge struck down the suit *John Doe 1 v. One America Productions* in its preliminary phase, using a law designed to protect citizens' basic rights of political participation: an anti-SLAPP statute.

Thomas, L. and R. Newman (2010). "Social Networking and Blogging: The New Legal Frontier." 9 *John Marshall Review of Intellectual Property Law* 500.

Blogs and social networking websites are the new marketing frontier. As consumers have adopted these forums and integrated them into their daily routines, advertisers have been quick to follow. Doing so, however, is not without risk. Not only do social networking websites need to worry about liability for third-party posts, but advertisers in those media also need to think about liability issues unique to them.

Free Speech

Humbach, J. A. (2010). "'Sexting' and the First Amendment." 37 *Hastings Constitutional Law Quarterly* 433.

"Sexting" and other teen autopornography are becoming widespread phenomena that are beginning to result in criminal prosecutions. Given the reality of changing social practices, mores and technology utilization, today's pornography laws are a trap for unwary teens and operate, in effect, to criminalize a large fraction of America's young people. As such, these laws and prosecutions under them represent a stark example of the contradictions that can occur when governmental policies and initiatives built on past truths and values collide with new and unanticipated social phenomena.

Moy, J. (2010). "Beyond 'The Schoolhouse Gates' and Into the Virtual Playgound: Moderating Student Cyberbullying and Cyberharrassment After *Morse v. Frederick*." 37 *Hastings Constitutional Law Quarterly* 565.

A recent survey concluded that "[n]early a third of online teens say they have been harassed on the internet," including being sent "threatening or aggressive messages." These newly minted "cyberbullies" use the Internet to send or post hurtful messages or images and exploit technology to control and intimidate others on school campuses. While schools must not become "enclaves of totalitarianism," they must not be powerless to confront harassers either. Ever-increasing evidence reveals the negative effects of peer harassment on the school community and the resulting disruption. "Because the internet offers a far more powerful vehicle for harassment than traditional methods of speech, the invasion of the rights of the targeted individual is more potent." The Constitution guarantees freedom of speech, but it should not be a license for students to personally attack school administrators and fellow students. The unpredictability and splintering of lower court decisions indicates the need for a more clearly defined uniform standard to apply to student Internet speech if courts continue to uphold that cyberbullying is speech that should be afforded First Amendment protection.

Developments in the Law — State Action and the Public/Private Distinction (2010). "Public Space, Private Deed: The State Action Doctrine and Freedom of Speech on Private Property." 123 *Harvard Law Review* 1303.

One of the hallmarks of free speech jurisprudence is that public expression is most carefully guarded within locations traditionally understood as public, even if they are not publicly owned. As the doctrine of the state action requirement in privately owned space continues to develop, courts must wrestle with the changing realities of what defines "public" space. One approach is the Supreme Court's refusal to extend speech rights into private shopping malls by setting government ownership as the standard for state action. California's alternate approach to state action makes a location's openness to the public sufficient to sustain a state constitutional challenge. As each embodies different aspects of what it means to protect speech in "public" spaces, a theory of state action that reconciles the increasing privatization of public fora with the rights of property owners cannot ignore the arguments from either side — especially as California's jurisprudence partially draws from federal constitutional norms.

Have you checked out the division's new media law blog digest?

News and updates from the ACLU, Student Press Law Center, Reporters Committee for Freedom of the Press, FOI Advocate, Citizen Media Law Project and a variety of professional and academic law blogs

Find it linked from the division Web site or at http://media-law.alltop.com

Teaching ideas (Cont'd from page 1)

submissions. We will award the winners their certificates and prize money during our convention business meeting. See you in the Mile High City!

Here are the winners of the 2010 Teaching Ideas competition:

First place:

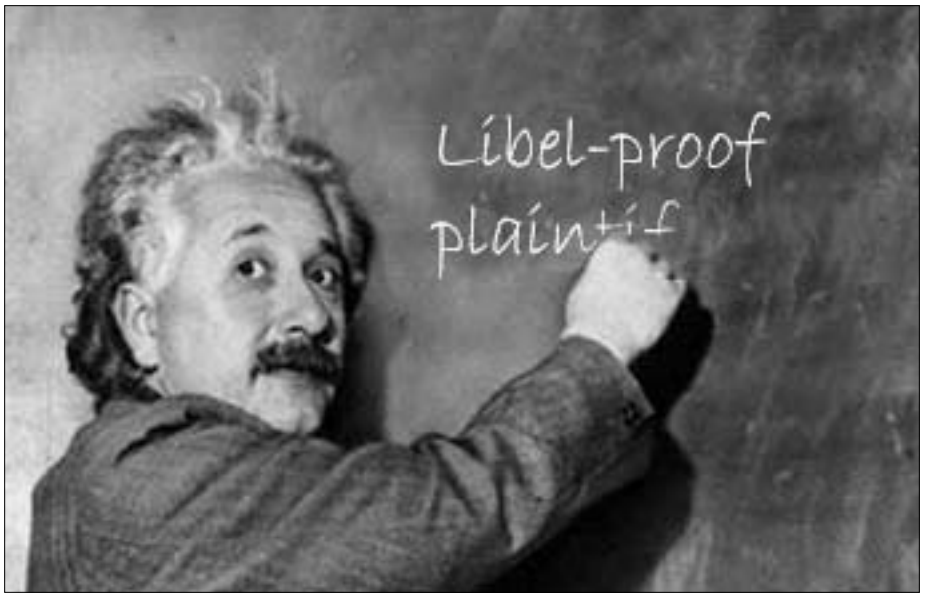
First Amendment Project

by Jim Sernoe
Associate Professor and
Department Chair
Midwestern State University

One of Sernoe's former students inspired him to create the First Amendment Project assignment. The student was interested in finding out what would happen if she and her friend passed out information on birth control to high school students on the street, but they felt they were not courageous enough to try. That was when Sernoe decided to motivate his prospective students.

The goal of the First Amendment Project is "for students to apply the concepts discussed in class to a real-life situation," Sernoe says. He allows students to choose freely how they design and implement the project. A few suggestions are given in terms of possible approaches (e.g., "creating a forum of public ex-pression" or "arranging a situation that tests tolerance/limits"), but the sky is the limit.

Once students submit a general proposal, Sernoe meets with them to discuss specifics. After completing their projects, students present their results to the class and submit a summary essay and an evaluation report. Sernoe reports that the project allowed students to experience their First Amendment rights firsthand and "come away with further appreciation for the First Amendment."



Second place:

Creative Finals: Something to Chew On

by Dinah Zeiger
Assistant Professor
University of Idaho

Zeiger's Creative Finals is an alternative approach that recognizes students learn in different ways and retain knowledge better when they "chew on" it. Zeiger asks students to design a project that explains a legal issue to an ordinary citizen. In doing so, students (all of them are seniors) are encouraged to employ skills they have acquired in their respective sequence areas: broadcasting and digital media, public relations, advertising and journalism. A topic is randomly assigned to students (via drawing from a hat) two weeks prior to the end of the semester. Zeiger grades finished projects based upon clarity of message, comprehension and accuracy of message and creativity of approach.

Zeiger has been employing Creative Finals for several semesters and has received a radio drama (script and recording), a "South Park" story board, a board game called "Tort Court" (with game pieces, cards and instructions), to name a few.

Third place:

You Be the Judge: Teaching Privacy Law Through Classroom Participation

by Susan Keith
Assistant Professor
Rutgers, the State University of New Jersey

Keith taught New Media and the Law as a special topics offering. She found that her students' knowledge of basic media law principles varied, because some were non-majors and some had not taken the Communication Law class.

As the title of her exercise ("You Be the Judge") suggests, this in-class exercise asked students to play judge and rule on the privacy claims in two real cases. The first case was a 2007 district court case that involved a story and video posted to an animal rights group's Web site. The second case concerned a sex tape of Pamela Anderson Lee and her ex-boyfriend that was distributed online. These two cases not only draw students' attention but also covered the full range of privacy torts. After being "the judge" in these two cases, her students became better acquainted with privacy torts.

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doesn't hurt that she's one of the tribe herself, born in 1971.

It allows Twenge to use the collective "we," as in "GenMe is not self-absorbed; we're self important. We take it for granted that we're independent, special individuals, so we don't really need to think about it."

In Twenge's view, this generation is basically the byproduct of the boomers who trademarked "self-love." In reading the book, I couldn't help but think about how often, as a classroom teacher, I witness behaviors that parallel the book's assertions, and now I am even thinking of the book as I teach.

I'd suggest that any university professor get a copy and read it, discuss it with your colleagues and maybe even assign a reading from it to students. That said, I disagree with much of the book's assertions and worry that the dismissive generational treatment it presents can obscure our own shortcomings as teachers.

It's tempting to blame my own students for being disinterested, until I consider the fact that it might be me who is not interesting, in other words.

As teachers of media law, we have a great advantage other courses lack: the opportunity to engage students in passionate argument. Media law should never be dull! It's too much fun to be.

Embrace the great fact patterns of First Amendment cases, bring in lots of timely examples and then let students think critically about them. Worry less about whether students are multi-tasking on their laptops and more about whether they are leaning forward and engaging with classmates. That's the great lesson of this year's teaching competition. And to Dr. Twenge I say: It might have something to do with "kids today," but it has something to do with the way we teach them, too.

LIBERTY TREE INITIATIVE

Campus Liberty Tree grant Initiative applications for 2010-2011 are available. Contact Prof. Sandra Chance (schance@jou.ufl.edu) for more information and a copy of the application. Deadline is June 1.

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