

MEDIA LAW NOTES

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LAW AND POLICY DIVISION, AEJMC

SUMMER 2011

Head Notes

Amy Gajda
Division Head
Tulane Law School

In this edition of Media Law Notes we present the complete list of Law & Policy panels and paper sessions we'll offer at the annual meeting in August.

If you're interested in learning how sausage is made, here's a teaser of the ritual: programmers intone, toss a bunch of poker chips into and



Amy Gajda

around a brass urn, and, in the end, a meeting schedule appears.

The planning starts many weeks before, in a more normal way.

First, like all divisions, Law & Policy solicits ideas for panels from division members. Once those come in, we format them and send them on to AEJMC. Our proposals are then bound with those from other

AEJMC divisions and the bundle is sent via email to division heads, programming chairs, and others who have some role in programming the meeting.

Once we get those 200-plus forms, our job is to go through them to see which Law & Policy proposals we think might interest other divisions and which proposals from other divisions might be of interest to Law & Policy members. The more panel ideas that have cross-appeal, the more co-sponsorships are possible, and the more panels Law & Policy will be able to schedule. Division leaders wheel and deal by email or by phone; it's a tricky process because each time we agree to sponsor one proposed panel, it means that another will not find a slot. In the end, we're left with many more great panel ideas than we're able to program.

At this point, arguably, things turn less normal.

AEJMC, as progressive as it may be, does not program the annual meeting itself and it does not program it virtually. Instead, two representatives from each division or interest group arrive in some exotic location (Jacksonville and Albuquerque=exotic enough for me) in early December to hash matters out in person.

I suppose that I'm speaking for my somewhat neurotic side here, but going into the process, especially the first time, it's stressful. First, you've spent at least a week in advance pitching your own division's panel ideas while fielding calls and emails from other divisions regarding their panel proposals. The night before the actual programming session, the division representatives meet in person to confirm what we've talked about by phone or email.

But the real stressor comes the next morning when we're all suddenly transported back to 1980, B.C. (Before Computers).

At the start of the meeting in Jacksonville or Albuquerque or wherever, each of the divisions gets its own little envelope filled with a handful of poker chips. Each chip represents half of a programming slot. If a division wishes to sponsor a panel alone, that panel costs the division two of its chips. The goal, then is to find a co-sponsor for (Continued on page 2)

Supreme Court
decides *Brown v.
Entertainment
Merchants Association*
By Clay Calvert
University of Florida

Tom Petty famously sang that the waiting is the hardest part.

That musical maxim proved prophetic in the violent video game case of *Brown v. Entertainment Merchants Association*. Oral argument occurred in early November 2010, back when the case was called *Schwarzenegger v. Entertainment Merchants Association* after a certain erstwhile, philandering California governor.

The high court took more than seven months to render its fractured decision on June 27, 2011 – the last day the court issued opinions before recessing for the summer.

Fortunately for free speech advocates, the majority opinion in *Brown* was not a heart-breaker and did not send First Amendment jurisprudence free falling into censorship.

Justice Antonin Scalia, joined by Justice Anthony Kennedy and all three female justices (Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan), authored the opinion of the Court striking down a California statute that prohibited the sale or rental of "violent video games" to minors and required their packages to carry an "18" warning label.

Although the majority opinion broke little new ground, it reinforced the tall wall of lower-court precedent that was erected during the previous decade against similar statutes across the country.

From a big picture perspective, *Brown* marks the third time in the past two terms the high court has protected content that many would consider offensive or repulsive.

In particular, it follows on the judicial heels of *Snyder v. Phelps*, protecting the hate speech of the Westboro Baptist Church and *United States v. Stevens*, striking down (Continued on page 3)

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(Head Notes, continued from page 1)

each panel because a co-sponsored panel costs only one chip. You have no co-sponsors? Your division can program, say, only four panels. You have all panels co-sponsored? You get eight.

At the start of the meeting we gather our chips and we all sit at a table shaped in a giant O, just like you'd see in a seminar room (if schools allowed 50 or more students in seminars). The person leading the programming session uses an overhead projector and transparencies to project up days and time slots. One division is chosen to start and then we move around the table alphabetically, each division programming its sessions in turn in a way that won't conflict with its other sessions or with sessions that its co-sponsoring division has programmed.

It becomes a drone as pleasing as the local forecast on the Weather Channel: the lead division calls out the day and time, the number of the proposed panel, and the name of the co-sponsoring division. The person leading the meeting echoes back all the information, and someone writes it on the transparency which is projected via the overhead. Everyone around the table then scribbles on their own smaller versions of the transparencies to mark that that time slot is taken.

The break in the monotony comes next. Once a session is programmed, each co-sponsoring division attempts to toss a chip into the brass urn on the floor in the middle of the "O." Other division representatives generally look on with great anticipation as each chip is being tossed. The chips usually land on the carpet far away from the urn. Sometimes they hit the brass urn's side and make a delightful yet inherently disappointing ding.

But occasionally – and this gives you an idea of the level of tedium in the room – cheers and vigorous applause erupt when a chip makes it in. Dave Cuillier, our Vice Head/Program Chair, made Law & Policy proud in 2010 by tossing, if memory serves, TWO directly into the urn. This would certainly be some sort of record if anyone had time to document such things, but we're all too worried about what time slots are left and whether a co-sponsoring division will conflict us out for the next best available time. We-must-get-back-to-programming.

In the end, a few hours later, the annual meeting is very nearly complete. This is how St. Louis and, apparently, every AEJMC meeting since the dawn of time has been programmed.

At both programming sessions I attended, we talked about how this all might be put online and how time and energy in all its meanings would be saved by doing so. But there is a wonderful sort of bond between those who experience sitting in a room for hours trying to stay alert so that all little schedules on the table parallel the master schedule on the overhead. By the time the programming ritual is over, we've made both a meeting program and some fast friends. I'm sure that this in-person programming will end at some point within the next few years, but a certain AEJMC camaraderie will be lost when it does.

I hope you enjoy your time – and the sausage – in St. Louis.



The alluring brass urn. If you look closely, you'll see a sorry number of poker chips on the floor, each representing an unsuccessful toss.



AEJMC programming necessities: Law & Policy name tent, poker chips, scheduling materials.



Dave Cuillier, representing Law & Policy, demonstrates his successful chip-tossing technique.

(*Brown*, continued from page 1)

a law targeting crush videos. The pro-speech results in this trio of cases buttress Justice Scalia's observation in *Brown* that "disgust is not a valid basis for restricting expression."

Brown, *Snyder* and *Stevens* also demonstrate that when it comes to First Amendment speech issues, one cannot predict how a justice will rule simply because of the political stripes of the president that nominated him or her. Witness Scalia and Kennedy (appointees of Republican President Ronald Reagan) collaborating in *Brown* with Justices Ginsburg (an appointee of Democratic President Bill Clinton) and Sotomayor and Kagan (Obama appointees).

Perhaps the only surprise in *Brown* was the Justice Samuel Alito, the lone dissenter in both *Snyder* and *Stevens*, concurred with the judgment. Joined by Chief Justice John Roberts, Alito would have struck down the law on grounds of vagueness and gone no further.

In *Brown*, Scalia and the majority deemed California's effort to create a new category of content-based regulation that is permissible only for speech directed at children "unprecedented and mistaken." In the process, Scalia refused to extend the Court's variable obscenity (obscenity as to minors) jurisprudence of *Ginsberg v. New York*, beyond the confines of sexually explicit speech.

Applying the strict scrutiny standard used to evaluate content-based laws, Scalia determined that the social science offered by California was insufficient to prove a compelling interest necessary to support the statute.

Pointing out the critical difference between causation and correlation, Scalia observed that the studies offered by California "show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game."

Scalia also focused on the underinclusive nature of the statute in terms of serving California's interest in protecting minors from the supposed deleterious effects of violent media content.

"California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it," Scalia wrote.

Furthermore, Scalia lauded the video game industry's voluntary ratings system, noting that it "does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home."

Not surprisingly, Justice Clarence Thomas dissented and expressed his belief that the First Amendment "does not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians." He reasoned that "historical evidence shows that the founding generation believed parents had absolute authority over their minor children and expected parents to use that authority to direct the proper development of their children."

That Thomas would express this view was telegraphed back

in 2007 in *Morse v. Federick*, the so-called "Bong Hits 4 Jesus" case. In *Morse*, Thomas wrote that if given the opportunity, he would overrule the Supreme Court's seminal student free-speech case of *Tinker v. Des Moines Independent Community School District*.

Justice Stephen Breyer issued a separate dissent that is perhaps most notable for its embracement of the social science evidence as supporting California's statute.

The organization I direct, the Marion B. Brechner First Amendment Project, along with the Pennsylvania Center for the First Amendment, led one of the more than two-dozen friend-of-the-court briefs in the case. We took up the case because, as argued, "the Court should have faith in several matters – faith in the wisdom of parents and guardians to know what video games are and are not appropriate for their children to rent, purchase and play; faith in a voluntary, rigorous Entertainment Software Rating Board ("ESRB") rating system designed to help those parents and that assigns independent age ratings and content descriptors for video games; and faith in technological advances in game consoles that easily allow parents to block games carrying ESRB ratings to which parents object."

Our brief concluded by asserting that "it is important to remember that the gaming generation is growing up. As its members begin to take the tools of power in this country – as they become lawmakers, law clerks, judges and policy makers – they may have a greater comfort level with the media they grew up with than do older generations who may fear new technologies. Until that time, however, the Court must hold the line on allowing such fears to trump First Amendment rights."

Fortunately, a solid majority of justices held that line in *Brown*.

Whether the Supreme Court continues to hold the line in protecting offensive speech will soon receive another high-profile test, as the high court granted certiorari in *FCC v. Fox Television Stations, Inc.* on the same day that it decided *Brown*. In *Fox Television Stations*, the Court will consider the narrow question of whether the FCC's "current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution." The Fifth Amendment issue relates to due process – whether the FCC's indecency regime provides sufficient notice to over-the-air broadcasters about what is and is not indecent, while the First Amendment issue taps into whether a content-based regulation on indecent expression can pass constitutional muster under the strict scrutiny standard of judicial review. The Supreme Court dodged the First Amendment issue the first time this case reached the Court two years ago, but now will hit the issue head on.

Clay Calvert is Brechner Eminent Scholar in Mass Communication and founding director of the Marion B. Brechner First Amendment Project at the University of Florida. The Project, which was organized in 2010, is a non-profit, non-partisan organization dedicated to current and contemporary issues affecting the First Amendment freedoms of speech, press, thought, assembly and petition. The core values of the project are: 1) protecting a robust, uninhibited marketplace of ideas; 2) defending the right to engage in controversial expression; and 3) and educating the public about First Amendment freedoms. Visit its website at <http://rstamendment.jou.ufl.edu>.

Tradition of high quality continues with 2011 research competition

By Kathy Olson
Research chair
Lehigh University

Libel tourism. *Snyder v. Phelps*. Wikileaks. Freedom of information in China. The range of topics in this year's paper competition is remarkable, and the St. Louis conference promises to provide some stimulating research sessions.

Law and Policy continues to rank among the most selective divisions in AEJMC. 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. The top three papers in both categories are noted by an asterisk in the research session schedule (See pages 6-10 for a complete schedule of Law and Policy sessions). Awards will be presented to the authors at the business meeting Friday evening.

The research session immediately preceding the business meeting will feature the top three faculty papers, which all focus on how legal rules change (or don't) when applied to online content. The scholar-to-scholar session on Friday will include some of our top papers as well. Other sessions focus on public safety and national security issues, commercial and corporate speech, and general free speech issues. Saturday morning brings a different kind of panel that will feature historical analyses of a number of media law issues. We have a great lineup of moderators and discussants, too, so I hope you will join us for some lively discussions.

The research competition went fairly smoothly, although a good number of papers included author-identifying information, usually in the digital properties of the document itself. According to AEJMC rules, these papers must be disqualified. I was able to alert all but one of the authors in time for them to remove this information and remain in the competition. One other paper was disqualified for including author identification in the body of the paper. I have drafted a handout for paper submitters describing how to check for author-identifying information before AND after a paper is uploaded to the All-Academic site for use in next year's competition, which may help alleviate the problem.

Another glitch occurred when AEJMC sent out via e-mail a general call for paper reviewers, to which some division members replied to volunteer their services. Unfortunately, any replies that were sent could not be forwarded to division research chairs, so if you wondered why you never got any papers to review, that may be why. Next year, please remember that to volunteer to review you will need to contact the research chair directly.

A list of the reviewers will be included in the conference program and were given preference for moderator and discussant assignments. Great thanks to the reviewers and to those who agreed to lead the research sessions, and congratulations to those whose papers were accepted.

See you in St. Louis!

By Dan Kozlowski
St. Louis University
2011 AEJMC Conference Host City Committee

The St. Louis Convention & Visitors Commission website proudly highlights "25 Things to Do in St. Louis." I've lived in the area for much of my life, and the site features things I still haven't done. I don't imagine you'll get very far on the list either in your conference-lled days here, but, in case you make time to venture out of the hotel, here are five things you might enjoy doing – all within walking distance or just a short MetroLink (our light rail system) ride away.

(1) Catch a Cardinals game

As I type in late June, the Cardinals are in a swoon and have fallen into second place. I'm hopeful they can turn things around. Pennant race or not, though, Busch Stadium offers great ambiance, and the Cards are a tradition-rich franchise with passionate fans. AEJMC has actually purchased a block of \$20 tickets for the Friday night game against the Colorado Rockies (tickets are usually \$39).

(2) Visit Forest Park

St. Louis has more free attractions than any city outside of Washington, D.C. Forest Park is the site of several of them. The park itself is larger than Central Park in New York and offers lakes and a more than seven-mile path for biking, jogging, or walking. It is also home to the Art Museum, Science Center, Missouri History Museum, and Saint Louis Zoo, all of which are free.

(3) Ride to the top of the Arch

The landmark for which St. Louis is best known, the Gateway Arch is the tallest man-made monument in the United States. Take a crammed tram ride to the top for a great view of the surrounding area. The Museum of Westward Expansion at the base of the Arch is also worth a visit.

(4) Enjoy Citygarden

Citygarden, dubbed "an artistic oasis in the heart of downtown," opened to rave reviews in July 2009. The two-block area offers a delightful blend of urban greenspace, renowned sculptures, and fountains.

(5) Tour the Old Courthouse

The Old Courthouse, which is listed in the National Park Service's National Underground Railroad Network to Freedom, was the site of the first two trials of the Dred Scott case. Virginia Minor's case for a woman's right to vote came to trial here too in the 1870s. You can tour the building, visit the restored courtrooms, and explore the exhibit "Legacy of Courage: Dred Scott & the Quest for Freedom."

Two quick things I'll add:

* If you like live music, you'll enjoy BB's Jazz, Blues & Soups, which is located less than a mile from the conference hotel.

* AEJMC has set up a discounted rate for shuttles traveling from the airport to the hotel, at a cost much less expensive than cab fare. And even cheaper option, though, is to take MetroLink. For just \$3.75 you can get from the airport to a stop just two blocks from the hotel.

Law & Policy Division

2011 AEJMC Conference schedule

Overview:

Tuesday, August 9: Pre-conference sessions

- 8 a.m.-12 p.m. Access to Information in Latin America, with International Communications Division
- 1-5 p.m. Teaching Media Law

Wednesday, August 10

- 10-11:30 a.m. The Law and Ethics of Social Media, with the Media Ethics Division
- 11:45 a.m.-1:15 p.m. Effects of *Citizens United*, with the Political Communication Interest Group
- 1:30-3 p.m. Should Government Save Journalism? With Media Management Division

Thursday, August 11

- 8:15-9:45 a.m. Refereed research paper session: Public Safety, National Security
- 11:45 a.m.-1:15 p.m. *Hazelwood* and Student Press Rights panel, with Scholastic Division
- 1:30-3 p.m. AEJMC Council of Affiliates, Teaching Panel Session: How Do We Teach Young Journalist about First Amendment Law in a Rapidly Evolving Media World
- 3:15-4:45 p.m. Refereed research paper session: Free Speech

Friday, August 12

- 8:15-9:45 a.m. Refereed research paper session: Corporate Interests, Commercial Speech
- 12:15-1:30 p.m. Scholar-to-Scholar poster session
- 1:45-3:15 p.m. *New York Times v. U.S.* panel, with History Division
- 5:15-6:45 p.m. Refereed research paper session: What's Different Online?
- 7-8:30 p.m. Law & Policy members meeting

Saturday, August 13

- 8:15-9:45 a.m. Refereed research paper session: Back to the Future
- 10-11:30 a.m. Student Open Records Audits as a Teaching Tool panel, with Newspaper Division



Law and Policy research paper competition by the numbers:

Submitted papers:	71
Disqualifications:	2
Accepted for presentation:	30
Reviewers:	72
Papers per reviewer:	3

Abstracts available online at:

<http://www.aejmc.com/home/2011/06/law-2011-abstracts/>

Law & Policy Division

2011 AEJMC Conference schedule

Tuesday, August 9: Pre-conference

9 a.m. to 12 p.m.

Freedom of Information Around the World

The workshop will feature three 50-minute sessions, led by experts in international FOI law and include panelists who can speak to developments in this growing area of law. The workshop is co-sponsored by the Law and Policy Division and International Division. See page 11 for more information.

1 to 5 p.m.

Everything You Need to Know about Teaching Communication Law

The workshop will consist of three 50-minute sessions. Featured panelists, ranging from authors of communication law textbooks to experienced communication law teachers, will share their experience and suggestions. Each panelist will present for 10-12 minutes, leaving time for questions and discussion with the audience. The details of each session are listed below. See page 12 for more information.

Wednesday, August 10

10-11:30 a.m.

Teaching Panel Session: **New Territory: Developing Social Media Law and Ethics Instructional Approaches**

Moderating/Presiding: **Holly Kathleen Hall**, Arkansas State University

Panelists:

Patrick Plaisance, Colorado State University
Chip Stewart, Texas Christian University
Mac McKerral, Western Kentucky University
Shannon Martin, Indiana University

11:45 a.m.-1:15 p.m.

PF&R Panel Session: **How Much Influence Should Corporations Have on Political Campaigns?: The Effects of the Supreme Court's Ruling in the *Citizens United v. Federal Election Commission* Case**

Moderating/Presiding: **Courtney Barclay**, Syracuse University

Panelists:

Sandra Chance, University of Florida
Robert Kerr, University of Oklahoma
Jason M. Shepard, California State University, Fullerton
Ed Carter, Brigham Young University
Kevin Horrigan, deputy editorial page editor, *St. Louis Post-Dispatch*

Law & Policy Conference Schedule (cont'd)

Wednesday, August 10 (cont'd)

1:30-3 p.m.

PF&R Panel Session: **Should the Government Save Journalism?**

Moderating/Presiding: **Derigan Silver**, University of Denver

Panelists:

Riyad Omar, associate general counsel, Associated Press
Robert Picard, Oxford University
Penny Abernathy, University of North Carolina at Chapel Hill
Josh Stearns, associate program director, Free Press
Victoria Smith Ekstrand, Bowling Green State University

Thursday, August 11

8:15 a.m. to 9:45 a.m.

Refereed paper Research Session: **Public Safety, National Security**

Moderating: **Nancy Whitmore**, Butler University

Tweeting the Police Scanner: The Rediscovered Liabilities

Bill Hornaday, Indiana University*

Poker and Prostitution: *Craig v. Henry* and the Dilemma of Hypothetical Online Prostitution

Jack Karlis, University of South Carolina**

Unknown Knowns: Judicial Review and Mosaic Theory in the Years of the George W. Bush Administration

Kelly Davis, University of North Carolina at Chapel Hill

The Ellsberg Act of 2011: Proposing a Better Policy on the Free Flow of Information in the Era of WikiLeaks, Whistleblowers and War

Jason Zenor, SUNY Oswego

Discussant: **Dale Herbeck**, Boston College

* First Place Student Paper ** Second Place Student Paper

11:45 a.m. to 1:15 p.m.

PF&R Panel Session: **Shifting Away from Courts: A Conversation about Sound Educational Policy and Training for Scholastic Journalism**

Moderating/Presiding: **Dan Kozlowski**, St. Louis University

Panelists:

Gerard Fowler, Saint Louis University
Frank LoMonte, executive director, Student Press Law Center
Aaron Manfull, adviser, Francis Howell North High School paper, St. Charles, Mo.
Charles McCormick, JEA's 2010 Administrator of the Year
Nikki McGee, former editor-in-chief, *The Wolf's Howl*, Wentzville, Mo.

Law & Policy Conference Schedule (cont'd)

Thursday, August 11(cont'd)

1:30-3 p.m.

AEJMC Council of Affiliates, Teaching Panel Session: **How Do We Teach Young Journalist about First Amendment Law in a Rapidly Evolving Media World?**

Moderating/Presiding: **Lucy Dalglish**, executive director, Reporters Committee for Freedom of the Press

Panelists:

Ken Paulson, president, American Society of News Editors and president, First Amendment Center
Charles Davis, University of Missouri-Columbia

3:15 p.m. to 4:45 p.m.

Refereed Paper Research Session: **Free Speech**

Moderating: **S.L. Alexander**, Loyola University

Snyder v. Phelps and the Death of Intentional Infliction of Emotional Distress as a Speech-based Tort

Wat Hopkins, Virginia Tech University

Transparency as Talisman: The Shifting Rationales for Campaign Finance Regulation

Justin Wolfgang, University of Missouri-Columbia

Libel Capital No More? Reforming British Defamation Law

Stephen Bates, University of Nevada, Las Vegas

SLAPPING e-Publius: Protecting Anonymous Expression and Reputation in a Digital Age

Brian Carroll, Berry College

State Action, Public Forum and the NCAA: First Amendment Rights of the Credentialed Media

Michael Martinez, University of Tennessee Knoxville

Discussant: **William Lee**, University of Georgia

Friday, August 12

8:15 a.m. to 9:45 a.m.

Refereed Paper Research Session: **Corporate Interests, Commercial Speech**

Moderating: **John Watson**, American University

Opting-in to Privacy: A Comparison of Proposed Online Privacy Protections

Courtney Barclay, Syracuse University

“Blurring” and “Tarnishment”: How Federal Courts Have Applied the 2006 Trademark Dilution Revision Act Standards

Roxane Coche, University of North Carolina at Chapel Hill*

Corporate Underwriting on PBS and the Funding of Children’s Educational Television

Joelle Gilmore, University of Pennsylvania

Tobacco Advertising Regulations, Counter-marketing Campaigns and the Compelling Interest in Protecting Children’s Health

Derigan Silver, University of Denver; **Kelly Fenson-Hood**, University of Denver

Space to Breathe Falsely: Reexamining the Balance between Commercial Speech and Defamation 20 years after *U.S.*

Healthcare v. Blue Cross

Matthew Telleen, University of South Carolina

Discussant: **Sheree Martin**, Samford University

* Third Place Student Paper

Law & Policy Conference Schedule (cont'd)

Friday, August 12 (cont'd)

12:15 p.m. to 1:30 p.m.

Refereed Paper Research Session: **Scholar-to-Scholar session**

An Extinction of Transparency: The Opaque Endangered Species List

Benjamin W. Cramer, Penn State University

What the Numbers Tell Us: FOIA Implementation under the Obama Administration

Minjeong Kim, Colorado State University

Might This "Legal Attack Dog" Have Much Bite? *Righthaven*, Fair Use and the Unauthorized Reproduction of News Content Online

Scott Parrott, University of North Carolina at Chapel Hill

Two Dominant Industries, One Regulatory Agency: Lobbying Strategies to Attain Regulatory Capture

Amy Sindik, University of Georgia

Vox Hawkeye: A Study in the Intellectual Call for Open Government (and How One State Heeded It)

Steve Stepanek, Georgia Southern University

Flying Dragon Seeking Freedom of Information: A Critique of Chinese OGI Regulations

Yong Tang, Penn State University; **Martin Halstuk**, Penn State University

Discussants: **Laurie T. Lee**, University of Nebraska-Lincoln

Justin Brown, University of South Florida

1:45-3:15 p.m.

New York Times v. United States: The Pentagon Papers Case 40 Years After

Moderating/Presiding: **Tim Gleason**, University of Oregon

Panelists:

Jeffery Smith, University of Wisconsin-Milwaukee

Christina Wells, University of Missouri-Columbia

Arnie Robbins, editor, *St. Louis Post-Dispatch*

Chuck Tobin, media law attorney, Holland & Knight.

5:15 p.m. to 6:45 p.m.

Refereed Paper Research Session: **What's Different Online?**

Moderating: Jennifer Henderson, Trinity University

Can I Use This Photo I Found on Facebook? Fair Use and Social Media Images

Daxton Stewart, Texas Christian University*

The Texting and E-mailing of Fighting Words

Clay Calvert, University of Florida**

A SLAPP in the Facebook: Assessing the Impact of Strategic Lawsuits against Public Participation on Social Networks

Robert Richards, Penn State University***

A Textual Analysis of the Influence of *McIntyre v. Ohio Elections Commission* in Cases Involving Anonymous Online Commenters

Jasmine McNealy, Syracuse University

New Technology, Old Obstacles: FOI Advocates Share Their Struggles for Access in the Digital Age

Sandra Chance, University of Florida; **Christina Locke**, University of Florida

Discussant: **Eric Easton**, University of Baltimore School of Law

* First Place Faculty Paper ** Second Place Faculty Paper *** Third Place Faculty Paper

Law & Policy Conference Schedule (cont'd)

Friday, August 12 (cont'd)

7-8:30 p.m.

Law and Policy Division Members meeting

Moderating/Presiding: **Amy Gajda**, Tulane University Law School

Preliminary Agenda

Introductions

Budget Overview

Council of Divisions Report

Reports from Officers/Award Presentations

Election of New Officers

Business Matters

Membership vote on editorship of *Communication Law and Policy*

Discussion on Law & Policy Division financial resources and use of funds

Suggestions for AEJMC Anniversary "Big Idea"

New Business

Saturday, August 13

8:15 a.m. to 9:45 a.m.

Refereed Paper Research Session: **Back to the Future**

Moderating: **Carmen Manning-Miller**, Savannah State University

Donaldson v. Beckett and the Common Law of Literary Property: A Century of American Scholarly Perceptions and Misperceptions

Edward Carter, Brigham Young University; **Jessica Danowski**; **Jena Green**, Brigham Young University;

Karina Shamaileh-Marcella, Brigham Young University

Journalist Privilege in 1929: The Quest for a Federal Shield Law Begins

Dean Smith, University of North Carolina at Chapel Hill

Revisiting the Right to Offend Forty Years after *Cohen v. California*

Clay Calvert, University of Florida

Retransmission Consent: An Exploration of its Past, Present and Future

Gillian Wheat, University of North Carolina at Chapel Hill

Good Intentions, Bad Results: Learning from Failed Media Policies to Avoid Future Mistakes

Tom Vizcarrondo, Louisiana State University

Discussant: **Karla Gower**, University of Alabama

10-11:30 a.m.

Student Open Records Audit as a Teaching Tool

Moderating/Presiding: **Joshua Azriel**, Kennesaw State University

Panelists:

Carolyn Carlson, Kennesaw State University

Charles Davis, University of Missouri-Columbia

Jason M. Shepard, California State University, Fullerton

Steve Stepanek, Georgia Southern University

Pre-conference workshop on freedom of information around the world

What: Freedom of Information Around the World

When: 9 a.m. to noon on Tuesday, August 9, 2011

Overview

Freedom of information laws are spreading around the world with about 90 countries protecting the rights of citizens to access their government information. But laws differ and the way they are applied even more so.

The workshop, from 9 a.m. to noon on Tuesday, August 9, 2011, will feature three 50-minute sessions, led by experts in international FOI law and include panelists who can speak to developments in this growing area of law. The workshop is co-sponsored by the Law and Policy Division and International Division.

Session 1: Freedom of information as a human right

In the first session, experts will discuss the growing body of work making the case that freedom of information is a human right necessary for individuals to live and govern. This is the basis for many countries' choices to adopt access laws.

Moderator: **Charles Davis**, Missouri

Panelists:

Cheryl Ann Bishop, Quinnipiac University

Gregory Magarian, Washington University in St. Louis

Kyu Youm, University of Oregon

Session 2: Comparative/foreign law approach to freedom of information

This session will look at the growing body of legal research that compares freedom of information laws from around the world. Panelists have examined, for example, South Korea's freedom of information law in relation to the United States.

Moderator: **Jeannine Relly**, Arizona

Panelists:

Jane Kirtley, University of Minnesota, Europe and Eurasia FOI law

Nikhil Moro, University of North Texas, India FOI law

Sundeep Muppidi, University of Hartford, India and Singapore FOI law

Kyu Youm, University of Oregon, South Korea FOI law

Session 3: The diffusion of freedom of information legislation in Latin America

Freedom of information laws are taking off in Latin America - El Salvador, for example, just passed its FOI law. This session will focus on FOI law in Mexico and other countries that could affect government transparency in the Western Hemisphere.

Moderator: **Celeste Gonzalez de Bustamante**, University of Arizona

Panelists:

Rosental Alves, University of Texas at Austin

Manuel Chavez, Michigan State University

Sallie Hughes, University of Miami

Jeannine Relly, University of Arizona

Juliet Pinto, Florida International University

Maria Flores, Texas A&M

Pre-conference workshop on teaching communication law

What: **Everything You Need to Know about Teaching Communication Law**

When: 1 to 4 p.m. on Tuesday, August 9, 2011

Overview

Teaching communication law is challenging especially when law is not your research area. Whether you are a first-timer or seasoned teacher of communication law, you will benefit from participating in this pre-conference workshop on teaching communication law.

The workshop, to be held from 1 to 4 p.m. on Tuesday, August 9, 2011, will consist of three 50-minute sessions. Featured panelists, ranging from authors of communication law textbooks to experienced communication law teachers, will share their experience and suggestions. Each panelist will present for 10-12 minutes, leaving time for questions and discussion with the audience. The details of each session are listed below.

Session 1: Conversations with textbook authors

In the first session, communication law textbook authors will share their suggestions on how to best use their textbook for a class. The authors will also address issues including the strengths of their book, the challenges of writing a textbook in a field that constantly changes, and if there are certain chapters they feel must be covered in classroom.

Moderator: Minjeong Kim, Colorado State University

Panelists:

Ganelle Belmas, California State Fullerton, co-author, *Major Principles of Media Law*; **Clay Calvert**, Florida, co-author, *Mass Media Law*; **Barton Carter**, Boston, co-author, *First Amendment and the Fourth Estate*; **Kent Middleton** and **Bill Lee**, Georgia, co-authors, *The Law of Public Communication*; **Roy Moore**, Middle Tennessee State, and **Michael Murray**, Missouri-St. Louis, co-authors, *Media Law and Ethics*; **Joseph Russomanno**, Arizona State, co-author, *The Law of Journalism and Mass Communication*; **Paul Siegel**, Hartford, author, *Communication Law in America*

Session 2: Tips on teaching methods and projects

This session will feature experienced communication law teachers sharing teaching methods and projects that have proved successful for them in the classroom.

Moderator: **Dan Kozlowski**, Saint Louis University

Panelists:

Dave Cuillier, University of Arizona
Steven Helle, University of Illinois
Courtney Barclay, Syracuse University

Session 3: Challenging Issues Related to Teaching Communication Law

The last session will address various challenges related to teaching communication law including teaching communication law as a large lecture (100+ students) course, teaching media law to non-journalism majors (Ad, PR, Telecom students), and teaching law and ethics in a combined class.

Moderator: **Amy Sanders**, University of Minnesota

Panelists:

Jasmine McNealy, Syracuse University
Bob Richards, Penn State University
Karon Speckman, University of Missouri

Legal annotated bibliography

By Michael T. Martínez

University of Tennessee Knoxville

Hate Speech

Edger, R. (2011). "Are Hate Speech Provisions Anti-Democratic?: An International Perspective." *26 American University International Law Review* 119.

The current Canadian discussion on the legitimacy of government action to restrict hate speech is being dominated by a group arguing that hate speech restrictions are anti democratic. In an effort to investigate this argument, this article examines international law and standards on hate speech provisions, as well as domestic law from some Western democracies. In doing so, it uncovers wide acceptance of hate speech restrictions both in international law and in every Western democracy other than the United States.

Corporate Speech

Gardner, J. A. (2011). "Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope." *20 Cornell Journal of Law and Public Policy* 673.

In the field of campaign speech, and in the closely allied area of campaign spending, the Supreme Court has construed the Constitution to permit essentially no government regulation at all. For more than thirty years, the Court has aggressively defended a constitutional policy creating a zone of virtually complete freedom from government-imposed limitations of either speech or spending undertaken with the aim of influencing elections. In *Citizens United v. FEC*, decided last term, the Court went even further, revoking one of the very few forms of government authority to regulate campaign spending that the Court had previously held permissible. What is striking about the Court's approach is that it has staked out the most extreme position available to it by adopting a kind of anti-regulatory absolutism that bars any and all regulation - not just presumptively, as is common in the case of many individual rights, but in actual practice. Why this approach? Why not something even a little bit more moderate? On what set of assumptions might it seem appropriate to the Court to permit not even the slightest legislative restriction of campaign spending?

Prior Restraint

Hester, J. L. (2011). "The Espionage Act and Today's "High-Tech Terrorist." *12 North Carolina Journal of Law & Technology, Online Edition* 177.

Throughout the twentieth century courts interpreted the Espionage Act of 1917 to criminalize leaking classified information, but consciously refused to extend the Act to prohibit press institutions from subsequently publishing leaked information. The proliferation of digital media, highlighted by the recent exposure of WikiLeaks founder Julian Assange, presents an additional challenge to re-ne characteristics of press institutions to determine if online news organizations will qualify for the same

First Amendment protections. Beyond the potential prosecution of Assange in American courts, both Houses of Congress are considering the SHIELD Act, a bill that would broaden the statutory language of the Espionage Act and facilitate targeting of publishers of classified information.

Free Speech

Hyde, R. (2011). "Preserving Access to Tattoos: First Amendment Trumps Municipal Ban in *Anderson v. City of Hermosa Beach*." *2011 Brigham Young Law Review* 131.

Anderson v. City of Hermosa Beach is a landmark decision in several respects. Finally, after more than thirty years, tattoo parlors are recognized as a protected medium of pure speech, not conduct. The Ninth Circuit's articulation of tattooing as a protected form of communication effectively closed the door to years of dispute. However, the Ninth Circuit failed to consider Hermosa Beach's specific circumstances in concluding that the restriction was an invalid time, place, or manner restriction. Indeed, it appeared that the court was so concerned with making a statement about the impropriety of such tattoo prohibitions that it failed to analyze the realities of Hermosa Beach. While tattoo parlors should be protected under the First Amendment, they should still be capable of being regulated under proper time, place, or manner restrictions.

Sacks, D. P., B. J. Bushman, et al. (2011). "Do Violent Video Games Harm Children? Comparing the Scientific Amicus Curiae "Experts" in *Brown v. Entertainment Merchants Association*." *106 Northwestern University Law Review Colloquy* 1.

In *Brown v. Entertainment Merchants Ass'n*, video game merchants present a First Amendment challenge to a California law regulating sales of certain violent video games to children less than eighteen years of age. A primary issue presented to the Supreme Court is whether California's interest in protecting children from serious psychological or neurological harm is sufficiently compelling to overcome First Amendment scrutiny. This essay compares amicus curiae scientific experts on both sides of the case and presents an original quantitative analysis of the experts' relevant expertise in the psychological effects of violence and media effects based on the briefs' authors' and signatories' published scholarship.

Shulman, J. (2011). "Epic Considerations: The Speech that the Supreme Court Would Not Hear in *Snyder v. Phelps*." *2011 Cardozo Law Review De Novo* 35.

A few weeks after Matthew Snyder's funeral, one of the Westboro Baptist Church picketers posted a message on its website discussing the picketing and containing religiously oriented denunciations of the Snyders, interspersed among lengthy Bible quotations. Albert Snyder discovered the posting, referred to by the parties as the "epic," during an Internet search for his son's name. In declining to consider the "epic" posted by the Westboro Baptist Church on its website, the Supreme Court took most (but not quite all) of the good constitutional stuff out of *Snyder v. Phelps*. In deciding whether speech is on a matter of public or private concern, the Court is required "to examine the 'content, form, and context' of that speech, 'as revealed by

(Continued on page 14)

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the whole record.” Having determined the “content, form, and context” of Westboro’s speech without reference to half of the record, Justice Roberts was able to describe the church’s speech as “fairly characterized as constituting speech on a matter of public concern” -- speech, that is, worthy of special protection under the First Amendment. *Snyder v. Phelps* was not an easy case. When personal invective is delivered in the milieu of public discourse, it is no simple task to balance competing constitutional and common-law interests. No doubt, there is a point where speech purportedly on a matter of public concern is so personal in content and form that it loses public import, and if the personal attacks in Westboro’s epic, which addressed the Snyder family directly, do not reach this point, it is hard to imagine what would. Like many important legal boundary lines, this one is more often than not going to be difficult to draw. Nor is it clear what constitutional rule would apply to speech that crosses the line.

Right of Publicity

Jung, A. M. (2011). “Twittering Away the Right of Publicity: Personality Rights and Celebrity Impersonation on Social Networking Websites.” 86 *Chicago-Kent Law Review* 381.

Within the past couple of years, social networking websites have become an immensely popular destination for people from all walks of life. Eventually, users realized that social networking websites lent themselves to the quick and easy impersonation of celebrities through the creation of fake social networking accounts, often as a form of parody. One subject of such impersonation was professional baseball manager Tony La Russa, who took the then-unprecedented step of suing his impersonators and Twitter over the incident. While La Russa’s case was ultimately dismissed before a judge could rule on any claims, the suit did raise a couple of interesting -- and largely unresolved -- issues. This article examines one such issue -- namely how the right of publicity interfaces with social networking sites.

Academic Speech

Lester, J. C. (2011). “Inculcation into Indoctrination Predicting Justice Sotomayor’s Impact on Teachers’ Speech in the Public School Classroom.” 62 *Alabama Law Review* 663.

The issue of teachers’ speech in the classroom has received significant attention by both courts and commentators. To the dismay of most commentators, the current trend is moving away from protecting this speech. Moreover, the decision in *Garcetti v. Ceballos* is predicted by some to signal the end of any First Amendment protection for teachers’ classroom speech. Justice Sotomayor replaced a Justice who disfavored this categorical dismantling of protections for public employees’ official speech. However, Justice Sotomayor’s First Amendment jurisprudence potentially signals an acceptance of these absolute restrictions. If the Court decides to voice an opinion on the proper standard for teachers’ in-class speech, it should carefully consider the potential destruction of the marketplace of ideas in the public classroom.

Willard, N. (2011). “School Response to Cyberbullying and Sexting: The Legal Challenges.” 2011 *Brigham Young University Education & Law Journal* 75.

The wonderful new interactive communication technologies are immersing and benefiting our society while causing some major headaches for school leaders. Young people are engaging in what is commonly called “cyberbullying,” the use of electronic communication technologies to intentionally engage in repeated or widely disseminated cruel acts towards another that results in emotional harm. The newly emerging issue of sexting, sending nude images via cell phone texting, presents ever more challenging concerns. School officials who respond formally to sexting and cyberbullying by imposing a disciplinary consequence put their authority into question and raise questions about student free speech, yet there is limited case law in this area. This article will explore these issues, setting forth recommendations supported by a reasonable analysis of existing case law.

Anonymous Speech

McGeveran, W. (2011). “Mrs. McIntyre’s Persona: Bringing Privacy Theory to Election Law.” 19 *William & Mary Bill of Rights Journal* 859.

In 1995, the Supreme Court reversed the imposition of a one hundred dollar fine for violating disclosure requirements in Ohio election law. The case involved the late Mrs. Margaret McIntyre, who had distributed homemade leaflets arguing against a proposed local school tax levy, some of which were signed only by “Concerned Parents and Tax Payers.” The rationale for the Court’s decision was a robust understanding of privacy rights for political speech and association. Today’s narrow view of privacy interests recognizes only imminent harm from “threats, harassment, or reprisals” as valid reasons to limit political disclosure. The resulting doctrine ignores other meaningful harms, it relies on an artificial and unjustified categorical division between private and public spheres, and it denies realistic opportunities for exceptions to the general rule of massive disclosure. This article argues that contemporary privacy theory can contribute a great deal to thinking about the role and scope of disclosure in election law.

Last edition...

This is the last issue of the newsletter I will edit as the division will elect a new Clerk/Newsletter Editor this summer, so I’d like to continue the tradition of thanking everyone - both oficers and others - who have helped fill these pages by contributing content. I’d like to thank Amy Gajda, Jim Sernoe, Kathy Olson, Chip Stewart, Minjeong Kim, Clay Calvert, Stacey Bowers, Dave Cuillier, Benjamin W. Cramer, Matt Bunker and Dan Kozlowski. I’d especially like to thank Mike Martínez, now of the University of Tennessee Knoxville, for compiling the legal bibliography for each issue. His compilations of recent legal research add a great deal to each issue of *Media Law Notes*.

-Derigan Silver, editor

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