Media Law Notes

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Head Notes

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1973: the Watergate hearings and the oil embargo, Roe v. Wade and Billy Jean King vs. Bobby Riggs. The World Trade Center was completed, Skylab was launched and the law division was born. Be sure to read Dwight Teeter's history of the early days of the division elsewhere in this issue. (And let the record note that he names the late Don Gillmor, not himself, as our first division head.)

Kathy Olson

We'll be celebrating our 40th birthday in Washington this year in a number of ways. First, we have some great programming planned, from Amy Sanders' pre-conference panel on social media to the outstanding research papers being presented on Sunday. Many thanks to vice head Derigan Silver and research chair Chip Stewart for putting it all together, as well as to the panelists, paper authors and reviewers – timely reviews allowed Chip to send out acceptance and rejection notices some 10 days earlier than some of the other divisions.

This year we're especially lucky to have past division head Kyu Ho Youm as AEJMC's president – it's like we got extra chips! The keynote speaker, Lord Anthony Lester, will compare U.S. and British law in a speech titled "Two Cheers for the First Amendment." And Kyu's presidential panel, scheduled for Friday, will focus on the role of media law in journalism and mass comm education. See the conference schedule for details on that and the other great panels and events scheduled for D.C.

Also be on the lookout for the special commemorative ribbons we've ordered for your conference nametags. Boldly proclaiming "40 YEARS OF LAW," they will be available from division officers or at the registration desk when you pick up your packet. We'll continue our birthday celebration at the (first annual?) off-site law and policy division social immediately following the division's business meeting Friday evening. In the name of fiscal responsibility, it will be a cash bar, but I for one pledge to buy a birthday beer for an impecunious grad student or two.

All in all, it looks to be one of our best conferences yet – I hope to see you there!

Research Chair Summarizes Paper Competition

By Chip Stewart
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We had a new twist in the research paper competition for the Law and Policy Division in 2013, offering a special competition to attract new submitters to the division through our Top Debut Faculty Paper Award. This turned out well, as we received six submissions for the competition; two of those papers were accepted for presentation, and one was so strong it also earned Top Faculty Paper honors.

Chip Stewart

Kearston Wesner, a professor at the University of Minnesota – Duluth, captured both awards for her paper, "A Reputation Held Hostage? Commercial Mugshot Websites and the Trade in Digital Shame." It will be presented in the last of our seven research sessions – six traditional presentations of four papers each and one scholar-to-scholar poster session – at the AEJMC annual conference in Washington, D.C.

As usual, we had a robust and competitive research paper contest, one in which it generally took three strong reviews for a paper to earn a spot on the program. Sixty papers were submitted to the Law and Policy Division. Five were disqualified or voluntarily withdrawn for various reasons, leaving a pool of 55 papers to be reviewed. Thankfully, we had no shortage of volunteers to review this year, meaning each reviewer only had to judge two or three papers.

Ultimately, 28 papers were accepted for presentation, for an acceptance rate of 46.7 percent. That rate is close to our acceptance rate in recent years – 45.1 percent last year, 42 percent in 2011, and 38.5 percent in 2010.

The papers were ranked by z-score to determine top paper awards. As mentioned, Dr. Wesner claimed both the Top Faculty Paper and the Top Debut Faculty Paper awards. Second place in the faculty paper competition went to Clay Calvert from the University of Florida and Matt Bunker from the University of Alabama for their paper, "An 'Actual Problem' in First Amendment Jurisprudence? Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine." Third place went to Rob Frieden of Penn State for his

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INSIDE THIS ISSUE:

Courts as Copy Editors and the Rash of Recycled Legislation

By Clay Calvert
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In April 2013, U.S. District Judge Sim Lake held unconstitutional in *United States v. Richards*, 2013 U.S. Dist. LEXIS 55383 (S.D. Tex. Apr. 17, 2013), a federal law criminalizing crush videos. Specifically, Lake determined that 18 U.S.C. § 48 couldn't survive strict scrutiny.

Richards marked the first prosecution under the Animal Crush Video Prohibition Act of 2010, and the underlying facts aren't pretty. According to a press release from the U.S. Attorney's Office for the Southern District of Texas, the defendants were indicted in November 2012 for creating and distributing "eight videos which allegedly involve puppies, chickens and kittens being tortured and killed." Although aptly characterizing crush videos as "disturbing and horrid," Judge Lake made it equally clear that the First Amendment protects offensive speech unless the government demonstrates a compelling interest served by the least speech-restrictive means.

At this point, just two paragraphs deep, you rightfully are asking yourself, "But didn't we already see this just a few years ago?"

The answer, of course, is yes. In *United States v. Stevens,* 559 U.S. 460 (2010), Chief Justice John Roberts declared an earlier version of 18 U.S.C. § 48 unconstitutional. Writing for an eight-justice majority that left behind only the easily offended Samuel Alito, Roberts refused to carve out a new category of unprotected speech for images depicting animal cruelty and, in turn, determined that 18 U.S.C. § 48 was fatally overbroad.

Roberts, however, threw lawmakers a bone upon which they pounced. He wrote that the justices "need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional." The chief justice added that saving the statute "as the Government desires requires rewriting, not just reinterpretation."

As the April 2013 decision in *Richards* indicates, Congress did go back to rewrite the statute. Yet, lawmakers failed again to constitutionally craft it. Taxpayers foot the bill defending such shoddy "if at first you don't succeed, try, try again" statutes.

Given that more than 20 percent of the members of Congress are attorneys by training, it seems reasonable to ask for better-written laws when First Amendment speech interests lie in the balance. Congress shouldn't rely on courts to provide narrowing or limiting constructions for vague and overbroad laws. Not only does such reliance jeopardize the separation of powers between the legislative and judicial branches, but it places judges in the role of copy editors.

Of course, there is very little incentive for Congress to craft better laws or to avoid legislative recycling. Why? Because lawmakers get to: 1) draft constituent-pleasing, feel-good measures; 2) then blame a bunch of unelected judges for striking them down; and 3) finally pick up some drafting tips for how to revise them.

Consider *United States v. Alvarez*, 132 S. Ct. 2537 (2012). With the Stolen Valor Act of 2005, Congress got to draft a law that made us all feel good about punishing the tools and fools who lie about winning military medals. Never mind that the law was so overbroad that it applied, as Justice Anthony Kennedy wrote for the plurality in striking it down, to lies "made at any time, in any place, to any person."

Copy editor Kennedy pointed out to Congress that the law applied "without regard to whether the lie was made for the purpose of material gain." The word "purpose," of course, suggests penciling in an intent element during the rewrite. Concurring, Stephen Breyer chimed in with several useful drafting tips, such as requiring "a showing that the false statement caused specific harm or at least was material." He noted that fraud statutes could provide a way forward.

Unsurprisingly, when Rep. Joseph Heck of Nevada introduced the Stolen Valor Act of 2013 this January, the old language about "False Claims About Receipt of Military Decorations or Medals" was edited to "Fraudulent Representations About Receipt of Military Decorations or Medals." Furthermore, House Bill 258 is limited to lies about medals made with the "intent to obtain money, property, or other tangible benefit." Too bad it took the Supreme Court to highlight principles about fraud that first-year law students memorize.

But back to crush videos and the post-*Stevens*, recycled version of 18 U.S.C. § 48. It defines an illegal "animal crush video" as an image that both: 1) depicts crushing, burning, drowning, suffocating, impaling or otherwise subjecting to serious bodily injury; and 2) is obscene.

If something is obscene, of course, it already is not protected by the First Amendment. As the University of Chicago's Geoffrey Stone told Politico's Tal Kopan, the new version "does not add anything to the scope of what is criminal. So as long as we stipulate that the material has to be obscene to be prosecuted under the statute, then why don't you just prosecute you under the obscenity statute?"

The answer, of course, is simple: Congress scores points with voters and animal rights groups.

What's next? Shortly after the school shooting in Newtown, Conn., Senator Jay Rockefeller introduced the Violent Content Research Act to study the effects of violent video games on children. Perhaps, in turn, federal lawmakers will take up where California politicians foundered in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011).

Maybe the larger lesson for Congress is that it should avoid First Amendment fights when the underlying conduct – be it animal cruelty, fraudulently wearing military medals (an overlooked part of the Stolen Valor Act upheld by courts) or murder – already is illegal. Remembering the speech-conduct dichotomy might prevent the spilling of much unconstitutional ink.

Clay Calvert is professor and director of the Marion B. Brechner First Amendment Project at the University of Florida in Gainesville.

Legal Annotated Bibliography

By David Wolfgang, J.D.
Doctoral Student
University of Missouri

STUDENT SPEECH

Osborne, A.G., & Russo, C.J. (2012). "Can Students be Disciplined for Off-campus Cyberspeech?: The Reach of the First Amendment in the Age of Technology." 2012 Brigham Young University Education & Law Journal 331.


David Wolfgang

The widespread use of technology in today's schools has ushered in a host of legal issues that educators and parents could not have contemplated just a few years ago. Even when students engage in such speech-related activity off campus using their personal computers, their actions and posts on such social networking sites as MySpace and Facebook can have carryover effects into school and classroom environments. The question of whether educational administrators can discipline students for Internet postings made off campus has been controversial, as evidenced by four recent decisions: a pair from the Third Circuit and single cases from the Fourth and Eighth Circuits. The issue in these cases, which reached different outcomes, revolved around the reach of such postings into the school setting and how they affected the safe and efficient operation of the schools. Given the nature of the Internet, this is no easy question and presents school administrators with First Amendment issues never before contemplated.

Litigation has arisen when school officials have disciplined students for derogatory, defamatory, lewd, and threatening items students have posted about teachers, administrators, and classmates on social networking sites such as MySpace and Facebook. In challenging the disciplinary sanctions imposed on them, students have alleged that punishments amount to unconstitutional censorship and have questioned the rights of administrators to impose discipline for off-campus activities.

This article begins by exploring the First Amendment free speech protections afforded to students, along with earlier cases dealing with issues concerning their being disciplined for online postings and cyber threats. The article next reviews the facts, judicial history, and latest opinions in the four most recent circuit court cases involving online postings targeted at both school administrators and students. Finally, the article examines the abilities of school administrators to discipline students for making derogatory and false statements about school personnel or other students via the Internet or other technology, concluding with a discussion about the wisdom of these decisions and recommendations for school administrators.

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(Research Chair, continued from page 1)

paper, "The Impact of Next Generation Television on Consumers and the First Amendment."

Emily Garnett, a master's student at the University of Missouri, won the Top Student Paper award for her paper, "'Ag-Recording' Laws Disassembled." Second place went to three students from the University of Florida – Kara Carnley, Brittany Link and Linda Riedemann – for their paper, "Sexual Conversion Therapy and Freedom of Speech." Cassandra Batchelder, a joint master's/J.D. candidate at the University of Minnesota, earned third-place student paper honors for her paper, "The FTC Enters The Blogosphere: The Marketplace of Ideas and The FTC'S Regulation of Blogger Speech."

These and the other accepted papers were organized into sessions by theme. We have a session on newsgathering and access at 11:45 a.m. Thursday, Aug. 8; a session on First Amendment theory and interpretation at 5 p.m. Thursday; a session on issues facing the Federal Communications Commission at 8:15 a.m. Saturday, Aug. 10; a session contemplating the boundaries of free speech and expression at 1:45 p.m. Saturday; a session on international and comparative media law issues at 11 a.m. Sunday, Aug. 11; and a session on privacy in the digital context at 12:45 p.m. Sunday. The four papers that could not find a home in any of the themed sessions – including two on intellectual property matters – will be presented in the scholar-to-scholar poster session at 12:15 p.m. Saturday.

Another issue that arose was papers that – despite my repeated admonitions and the clear requirements of the AEJMC paper call – included author information in the electronic properties of the document. I was able to review any submission made before noon on deadline day to make sure it was clean, and these were all able to be resubmitted cleanly. However, a handful of papers that came in after that time were in line to be disqualified under AEJMC rules. Thankfully, we received a reprieve – the AEJMC office was, upon our request, able to remove the author identifications from the electronic files, allowing these papers to be clean and reviewable without jeopardizing the blind review process.

This was a big issue across the divisions and interest groups this year, and I had conversations with several equally concerned research chairs to see how they were handling things. In short, there was no consensus or consistency in the approach of the different divisions. Our concerns were raised to the research committee, which was discussing possible solutions for this issue to be applied in the years ahead. Regardless, I think it is worth discussing this topic at our division meeting in Washington to come up with a plan in case AEJMC does not have a workable fix in place for 2014. I owe a debt of gratitude to our leaders, Derigan Silver and Kathy Olson, for their guidance and patience with me as I worked through these issues, and to Tori Ekstrand, our liaison on the Research Committee, who continues to push for positive change and reasonable policy regarding the research competition.

Looking forward, one item we should perhaps discuss is the overall downward trend in paper submissions to the division. In 2010, we received 83 papers, and 71 papers were submitted in both 2011 and 2012. That number was down to 60 this year. While the debut faculty paper competition is a start, other ideas to boost our numbers and participation are welcome.

Division Schedule and Other Panels of Interest at the 2013 Conference

Wednesday, August 7
Pre-conference sessions

10:00 a.m.-1:30 p.m. **Social Media Law Update**
Moderator: Amy Sanders, Minnesota
10:00-11:00 a.m. Panel #1: Getting to Know Social Media: Who's Using What Tools and How
Reid Epstein, Politico
Kate Myers, National Public Radio
Jen Reeves, AARP
Chip Stewart, Texas Christian
11:15-12:15 Panel #2: Legal Issues in Social Media
Rosemary Harold, Wilkinson Barker Knauer
Ashley Messenger, National Public Radio
Robert D. Richards, Pennsylvania State
Charles Tobin, Holland & Knight
12:30-1:30 Panel #3: Ethical Issues in Social Media
David Craig, Oklahoma
Mark Stencel, National Public Radio

2:30 p.m.-6:30 p.m. **Freedom of the Press in the Twenty-First Century: An Agenda for Thought and Action**
Moderator: Ted Glasser, Stanford
This panel will present the report generated by AEJMC's Summit on the Future of Freedom of the Press. For information on the summit see: http://journalism.uoregon.edu/pressfreedom

Thursday, August 8

10:00 -11:30 a.m. **Tour of United States Supreme Court Building**
Moderator: Derigan Silver, Denver
Note: This is a private tour of the building, limited to the first 15 Law and Policy Division members who signed up. The tour is now closed.

11:45 am – 1:15 p.m. **Refereed research paper session: Enabling a "Vigilant and Courageous Press"**
Cameras in the Courtroom 2.0: How Technology is Changing the Way Journalists Cover the Courts
Christina Locke Faubel, Florida
"Ag-Recording" Laws Disassembled
Emily Garnett, Missouri*
Drone Journalism: Using Unmanned Aircraft to Gather News and When Such Use Might Invade Privacy
Karen McIntyre, North Carolina at Chapel Hill
The Press, the Public, and Capital Punishment: California First Amendment Coalition and the Development of a First Amendment Right to Witness Executions
Elizabeth Woolery, North Carolina at Chapel Hill

* Top Student Paper Award

Moderator: Josh Azriel, Kennesaw State University
Discussant: Jason Martin, DePaul University

1:30-3:00 p.m. **25 Years After Hustler: The Current State of Intentional Infliction of Emotional Distress**
Panelists:
Alan Isaacman, Isaacman, Kaufman and Painter
Amy Gajda, Tulane University Law School
Kate Bolger, Levine Sullivan Koch & Schultz
W. Wat Hopkins, Virginia Tech
Moderator: Joseph Russomanno, Arizona State

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3:15-4:45 p.m. **Covering the U.S. Supreme Court in the Digital Age**
Panelists:
Adam Liptak, New York Times
Robert Barnes, Washington Post
Pete Williams, NBC News
Tony Mauro, National Law Journal
Terri Towner, Oakland University
Moderator: Richard Davis, Brigham Young

5:00-6:30 p.m. **Refereed research paper session: Applying and Interpreting the First Amendment**
The FTC Enters The Blogosphere: The Marketplace of Ideas and The FTC'S Regulation of Blogger Speech
Cassandra Batchelder, Minnesota*
An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine
Clay Calvert, Florida**
Matthew Bunker, Alabama**
Check Your Rights at the Schoolhouse Door: Thomas and the Narrowest View of Student Speech
William Nevin, Alabama
When (News)Gathering Isn't Enough: The Right to Gather Information in Public Places
Elizabeth Woolery, North Carolina at Chapel Hill

* Third Place Student Paper
** Second Place Faculty Paper

Moderator: Karla Gower, Alabama
Discussant: Paul Siegel, Hartford

Friday, August 9

7:00-7:30 a.m. **Law and Policy Division Executive Committee Meeting**

7:30-8:00 a.m. **Communication Law and Policy Publication Committee Meeting**

8:15-9:45 a.m. **Freedom of Speech and the Press Around the World: Approaches to Reconciling Diverse Values**
Panelists:
Mark Fackler, Calvin College
Sahar Khamis, Maryland
Greg Lisby, Georgia State
Michael G. Kozak, Acting Special Envoy to Monitor and Control Anti-Semitism, U.S. Department of State
Moderator: Jane Kirtley, Minnesota

9:50 -11:30 a.m. **Tour of United States Supreme Court Building**
Moderator: Joseph Russomanno, Arizona State
Note: This is a private tour of the building, limited to the first 15 Law and Policy Division members who signed up. The tour is now closed.

11:45 a.m.-1:15 p.m. **Current Issues at the Federal Communications Commission: What's Likely to Change after the 2012 Election?**
Panelists:
Sherrese Smith, former chief counsel, office of Chairman Julius Genachowski, FCC
S. Jenell Trigg, Lerman Senter
Rosemary Harold, Wilkinson Barker Knauer
Moderator: Jane Kirtley, Minnesota

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(Conference Schedule, continued from page 5)

1:30-3:00 p.m. **Mass Communication Law in Teaching, Research, and Public Service: Its Past, Present and Future in JMC Education in the U.S. and Abroad**
Panelists:
Everette E. Dennis, Northwestern at Qatar
Tim Gleason, Oregon
Dwight Teeter, Tennessee
Angela Campbell, Georgetown Law School
Moderator: Kyu Ho Youm, Oregon

3:15-4:45 p.m. **Life After 25 Years of Hazelwood**
Panelists:
Edwin Darden, Education Law and Policy Director for Appleseed
Cathy Kuhlmeier Frey, lead plaintiff from *Hazelwood School District v. Kuhlmeier*
Mark Goodman, Kent State
Frank LoMonte, Student Press Law Center
Moderator: Dan Kozlowski, Saint Louis

5:00-6:30 p.m. **Student Media, J-School Newsrooms and Class Publications: Can They Coexist?**
Panelists:
Jane Kirtley, Minnesota
Frank LoMonte, Student Press Law Center
Brant Houston, Illinois
Kristin Gilger, Arizona State
Moderator: Peter Bobkowski, Kansas

6:45-8:15 p.m. **Division Membership Meeting**

8:30-10:00 p.m. **Off-site Law and Policy Division 40th Anniversary Social**
The division will host a cash bar social at a local establishment to celebrate the 40th anniversary of the division and give members a chance to interact in a casual environment.
Capital City Brewing
1100 New York Ave. Northwest
http://www.capcitybrew.com

Saturday, August 10

8:15-9:45 a.m. **Refereed research paper session: Digital and Decency Challenges for the FCC**
The State of Indecency Law: A Positive and Normative Evaluation of the *Fox* Cases
Kevin Delaney, North Carolina at Chapel Hill
The Impact of Next Generation Television on Consumers and the First Amendment
Rob Frieden, Pennsylvania State*
Newspapers, Cross-Ownership, and Antitrust in the Digital Era
Frank Russell, Missouri
* Third Place Faculty Paper
Moderator: Michael Murray, Missouri – St. Louis
Discussant: Justin Brown, South Florida

12:15-1:30 p.m. **Scholar-to-Scholar session**
Documenting Fair Use
Jesse Abdenour, North Carolina at Chapel Hill
Transfer of Collective Journalistic Works from Real Space to Cyberspace Under French and American Intellectual Property Law
Lyombe Eko, Iowa
Physicians, Firearms and Free Expression
Justin Hayes, Florida; Daniel Axelrod, Florida; Minch Minchin, Florida
New Media, New Guideline?
Hyosun Kim, North Carolina at Chapel Hill
Discussant: Tori Ekstrand, North Carolina at Chapel Hill

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(Conference Schedule, continued from page 6)

1:45-3:15 p.m. **Refereed research paper session: Independence Limited: Freedom of Speech, or Exception?**

Sexual Conversion Therapy and Freedom of Speech
Kara Carnley, Florida; Brittany Link, Florida; Linda Riedemann, Florida*

Fights From the First Amendment Fringes: Debating the Meaning of "Speech" Amid Shifting Cultural Mores & Changing Technologies
Clay Calvert, Florida

The Right to Bear Cannons: Reevaluating DDoS Actions as Civic Protest
Vyshali Manivannan, Rutgers

(Virtual) Crime & (Real) Punishment: The PROTECT Act's Punishment of Erotic Cartoons as Child Pornography
Jason Zenor, SUNY Oswego

* Second Place Student Paper Award

Moderator: Nancy Whitmore, Butler
Discussant: Eric Easton, Baltimore School of Law

Sunday, August 11

11:00 a.m.-12:30 p.m. **Refereed research paper session: Global Media Law Perspectives**

The "First Amendment" in Nepal: How Madison's America Informs Press Freedom Efforts Globally
Joseph Russomanno, Arizona State

The Arrival of Real Malicia: Actual Malice in Inter-American Court of Human Rights
Edward Carter, Brigham Young

Arab Media Regulations: Identifying Restraints on Freedom of the Press in Laws of Six Arabian Peninsula Countries
Matt Duffy, Georgia State

American Hemispheric Exceptionalisms: A Comparative Analysis of U.S. and Brazilian Laws of Defamation and Racist Speech
Brett Johnson, Minnesota

Moderator: Mike Martinez, University of Tennessee
Discussant: Courtney Barclay, Syracuse

12:45 p.m.-2:15 p.m. **Refereed research paper session: Privacy Rights in an Open Society**

Forcing the Web to Forget: The "Right to Be Forgotten," Free Expression, and Access to Information
Cheryl Ann Bishop

Lost in Translation: Reviewing the Stored Communications Act in Practice
Robyn Caplan, Rutgers

Participatory Democratic Governance and Judicial Balancing of Privacy and Expression in the United Kingdom
Bryce Newell, Washington

A Reputation Held Hostage? Commercial Mugshot Websites and the Trade in Digital Shame
Kearston Wesner, Minnesota Duluth * ^

* Top Faculty Paper Award
^ Top Debut Faculty Paper Award

Moderator: Dean Smith, Highpoint
Discussant: Jasmine McNealy, Kentucky

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PRIVACY

Larson, R.G. (2013). "Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to be Forgotten are Incompatible with Free Speech." 18 Communication Law & Policy 91.

In January 2012, the European Commission issued a draft regulation for the processing and handling of personal data. It contained a right to be forgotten and to erasure, providing that "[a] data subject shall have the right to obtain from the controller [of such data] the erasure of personal data relating to them and the abstention from further dissemination of such data."

One month later, the White House released its own proposal, referred to as the "Consumer Privacy Bill of Rights." Although not as extensive as the privacy protections in the European Commission's proposal, the policies and legislation recommended by the White House built on the Fair Information Practice Principles, and aimed to give consumers more access to and control over the data about themselves that is collected, processed, and maintained by both second- and third-parties. And a month after that, the Federal Trade Commission published a report calling for legislation and regulation that protects consumers from the privacy risks posed when businesses collect, use and store personal data.

Each of these proposals is an attempted legislative response to the issues of information privacy posed by the Internet. Such initiatives reflect the notion that people retain a privacy interest in information about themselves, even when that information has been exposed to the public, often voluntarily and by the user. Each of them is built on the proposition that there is a need for a right to control the flow of information about oneself, thereby enabling one to artificially restore obscurity to information exposed to the public. However, the concept of obscurity as a foundation for a bona fide privacy right is fundamentally incompatible with the theoretical foundations of the First Amendment.

This article attempts to demonstrate that the European Union's proposed right to be forgotten – and the obscurity model, generally – is impermissibly antithetical to the American right of free speech and established First Amendment theories.

INDECENCY

Richards, R.D. & Weinert, D.J. (2013). "Punting in the First Amendment's Red Zone: The Supreme Court's 'Indecision' on the FCC's Indecency Regulations Leaves Broadcasters Still Searching for Answers." 76 Albany Law Review 631.

In June 2012, the U.S. Supreme Court sidestepped the longstanding question of whether the First Amendment, given today's multifaceted media landscape, no longer permits the Federal Communications Commission to regulate broadcast indecency on the nation's airwaves. The Court's narrow ruling in *FCC v. Fox Television Stations, Inc.* ("Fox II") let broadcasters off the hook for the specific on-air transgressions that brought the case to the Court's docket – twice – but did little to resolve the larger looming issue of whether such content regulations have become obsolete.

Justice Anthony Kennedy, writing for a unanimous Court, instead concluded that "the Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent." As a result of this lack of notice, "the Commission's standards as applied to these broadcasts were vague, and the Commission's orders must be set aside." The Court specifically declined to rule on the constitutionality of the Commission's indecency regulations, noting that "because the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy."

The Supreme Court has invited the FCC to "modify its current indecency policy in light of its determination of the public interest and applicable legal requirements." But the Court also recognized that the issue will not end there, for the opinion "leaves the courts free to review the current policy or any modified policy in light of its content and application."

This article provides an in-depth analysis of the legal hurdles the Federal Communications Commission will face in attempting to construct any modified policy governing broadcast indecency. It describes the history of broadcast indecency regulations and how the current policy fell short in attempting to sanction broadcasters for fleeting expletives on live television. It examines the judicial path of Fox I and II and demonstrates how the Supreme Court's decision-making in both cases failed to provide any guidance to either broadcasters or the Commission. It discusses the insurmountable First Amendment considerations that will plague the FCC's attempt to reconstruct broadcast indecency regulations, including the current exceptions that swallow the rationale for the regulations, and the dramatically changed media landscape that render them futile. Finally, the article concludes that indecency regulations simply do not make sense in today's multi-platform media environment.

FREE SPEECH

Witteman, C. (2013). "Information Freedom, a Constitutional Value for the 21st Century." 36 Hastings International Comparative Law Review 145.

In the United States, the debate over communications issues like network neutrality, copyright law, and public broadcasting often seems to be carried out in a constitutional vacuum. The First Amendment, while understood as a "free speech" protection, is not infrequently just the opposite - either missing in action, or applied in a way to lessen the amount and variety of speech, information, and opinion available to the public. One reason for this is that the First Amendment is framed linguistically as a negative - "government shall make no law ... abridging the freedom of speech" - and the Courts have generally focused on the "no law" rather than the "freedom of speech" part of this command.

This paper compares First Amendment jurisprudence on this point to a system built on a constitution phrased in the affirmative, guaranteeing freedom of the press and broadcasting as institutions, and protecting speech and information flows as dynamic processes. Article 5 of the Basic Law (the German Constitution) provides for freedoms of speech, information, broadcasting, and the press; these freedoms are intertwined and subsumed under

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the rubric of "communications freedom." This paper headlines information freedom as particularly salient in an Information Age, and particularly evocative of the differences in constitutional approach between the two countries.

The analysis begins with a discussion of communications and constitutions generally and then turns to speculation about why architectural decisions about that network have not yet been constitutionalized, and why they should be. The article goes on to trace the rise and fall of information freedom in U.S. law, as well as the eventual dominance of the "negative freedom" model of the First Amendment. Finally, the article offers criticism of the affirmative speech model, specific suggestions as to how a useful and adequate domestic free speech regime might incorporate the principles of information freedom, and what the road forward might entail.

RIGHT OF PUBLICITY

Blanke, J.M. (2013). "No Doubt About it – You've Got to Have Hart: Simulation Video Games may Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law." 19 Boston University Journal of Science & Technology Law 26.

Several recent cases test the boundaries of, and the tensions among, several important rights, specifically First Amendment freedoms of speech and press, the rights of privacy and publicity, and copyrights. The cases are similar – all involve simulation video games. In separate actions, Sam Keller and Ryan Hart alleged that NCAA Football, a computer and video game made by Electronic Arts ("EA"), violated their respective rights of publicity. In the other suit, the musical group "No Doubt" contended the use of its images and songs in Band Hero, a video game made by Activision, exceeded the scope of the license, thereby violating the rights of publicity of the individual band members. Courts rendered contradictory decisions in these actions, granting a motion for summary judgment for EA in the Hart case, but denying EA's motion to dismiss in the Keller case and affirming denial of a motion to strike a right of publicity claim in the "No Doubt" case.

As is often the case, technology drives the law. These cases present new twists for courts to navigate regarding the balances and tensions between and among these rights. They also present new questions that can be anticipated by further technological advancements in gaming.

The author presents three scenarios that introduce different factors that create tension between and among First Amendment rights, copyright law, and the rights of privacy and publicity. The article then discusses these video game cases in greater detail and explores the history of these tensions. Finally, the author revisits the scenarios and discusses possible ramifications for the future.

ANONYMITY

Kaminski, M. (2013). "Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech." 23 Fordham Intellectual Property, Media & Entertainment Law Journal 815.

Anonymity can be a shield against the tyranny of the majority, or a mask used to protect the perpetrator of a crime. The Supreme Court has held that the First Amendment protects anonymous speech. In recent years, however, lower courts have recognized how challenging it is to protect an unqualified right to anonymous expression when anonymity is used by the perpetrators of legal harms. Courts have converged on a standard for a more qualified right to anonymity online. Most scholarly discussion of anonymity focuses on this recently developed John Doe subpoena standard. But courts addressed the puzzle of anonymity's relationship to speech prior to the Doe standard. States enacted anti-mask statutes as early as 1845, and various courts have evaluated those statutes under the First Amendment since the 1960s. The article examines how courts have treated anti-mask statutes, and compares that treatment to the Doe standard and Supreme Court jurisprudence on anonymity.

Can the government impose a blanket ban on anonymity to thwart the masked and uncatchable bank robber, at the expense of the mask-wearing protester? The answer to this question has consequences in both the real world and the world online. The proliferation of both online trolls and offline revolutionaries has led governments around the world to adopt online real-name policies, where individuals are required to register their real identity with their Internet Service Provider or Online Service Provider, or receive a state-assigned identity number. Scholars have called for a similar registration regime in the United States, and legislation requiring online identification was recently proposed in New York. This Article addresses whether such a regime would be constitutional under the First Amendment. The author concludes, based on anti-mask case law, that it would not be constitutional, due to the overbreadth of such a statute and the chilling of a great deal of protected speech. A blanket real-world ban on anonymity similarly chills protected expression; and physical anonymity is becoming increasingly important in today's surveillance society.

Update on Law and Policy Division Teaching Ideas Competition

By Michael T. Martinez
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There was only one entrant in this year's Teaching Ideas Competition. After sharing the entry with the division officers for a blind evaluation, the consensus was that while the idea was a good one, it is something that has been seen in several of the past competitions we have run and it was not particularly new or innovative. We decided not to make any awards this year. This is the fifth year of the competition, and after consultation among the Law and Policy officers, we decided to open a discussion at our division business meeting for input and suggestions on the future of the Teaching Ideas Competition.

The Early History of the "Law Division"

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As the English proverb goes, success has many parents. In the early 1970s, the Law Division of the Association of Education in Journalism was an idea that occurred to many teachers around the nation of what were originally called "journalism law" courses. Many teachers of journalism law or mass communication law were members of AEJ's History Division.

Conversations along the lines of "we ought to have a Law Division" were frequent at AEJ conventions, or in taverns (or over bottles smuggled into college dormitories, since the AEJ met on campuses until the mid-1980s). Like the American revolution, the spirit behind the Law Division may have been about 80 proof. One seed may well have been planted in the summer of 1969 at a Media Law and Ethics institute at Stanford University, which featured Marc A. Franklin of the university's law school as the lead lecturer. The institute brought together some 29 academics and journalists (most of them early in their careers) for three weeks of intensive study of both legal process and First Amendment issues, with some discussion of ethics as well. It produced an informal network of journalism law teachers who were either advocates for an AEJ division or strong supporters of the idea.

In 1972, I volunteered to gather the 50 or so signatures needed to request Division status of the AEJ, and worked with, among others, John B. Adams (North Carolina), Del Brinkman (Kansas), Bill F. Chamberlin (Washington), AEJ President R. Neale Copple (Nebraska), Everette E. Dennis (Kansas State), Kenneth S. Devol (California State-Northridge), J. Edward Gerald and Donald M. Gillmor (Minnesota), Ronald T. Farrar (Southern Methodist), A. David Gordon (Northwestern), David L. Grey (Stanford), William A. Hachten and Harold L. Nelson (Wisconsin), Paul Jess (Kansas); Don R. Pember (Washington); Michael J. Petrick (Maryland), Ivan L. Preston (Wisconsin), George Ridge (Arizona), Jo Anne Smith (Florida), Dale Spencer (Missouri), Harry W. Stonecipher (Southern Illinois), George Ridge (Arizona), John D. Stevens (Michigan), Herbert Terry (Minnesota), Robert Trager, (Southern Illinois), and Mary Ann P. Yodelis (Indiana). (Brinkman, Dennis, Devol, Farrar, Gordon, Jess, Petrick, Ridge, Smith, and Stevens had attended the 1969 Stanford institute and Grey had coordinated it. Other notable attendees of the Stanford institute included Dick Lee, Ralph Izard, Max McCombs, and Jim Richstad.)

As the Official Report of the 1973 AEJ Convention at Colorado State University says, "Dwight Teeter proposed a new Law Division to the Executive Committee . . . Bruce Westley [Kentucky] moved . . . that the Executive Committee accept the petition for a new Law Division. The motion passed, making possible later voting on the new Division by the AEJ membership at the general business session August 22." An organization meeting elected Don Gillmor as Head for the division's first year, and I was Clerk. My raffish side showed when I named the division's newsletter "The Tortfeasor." Division colleagues didn't object, but law school librarians did, saying they did not want to shelve a publication with a title meaning "doer of wrongs." So, the newsletter's name became a more a prosaic "Media Law Notes" when David Gordon was Clerk.

The Law Division's first two open paper sessions—back in 1974—offered papers with titles that seem at home in the 21st Century: With Ken Devol (CSU, Northridge) presiding, Sam G. Riley and Jack Shandle (Temple), "Commercial Use Without

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Teaching Students About Presumed Prejudice in Pre-Trial Publicity

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A week or so before Prof. Kevin Qualls teaches his Media Law students the First versus Sixth Amendment principles of a free press and a fair trial, he shows them six to eight television news clips of the kidnapping, rape and murder of a 4-year-old child in Louisville, Ky. Included among the clips are an alleged confession by the suspect, his prior convictions and whether the state is going to seek the death penalty.


Michael Martinez

Then, when the class discusses pretrial publicity and whether it is prejudicial or not, his students have a local point of reference from which to draw. He asks them the threshold question of all potential jurors during voir-dire: "Can you set aside anything you have learned or believe about this case, and make a determination of innocence or guilt based solely upon the evidence presented at trial?"

To date, Qualls has used this exercise six times. The first few times, students said they believed the suspect was guilty, but said "yes," they were willing to set aside their opinions and consider the evidence that was presented. More recently he has asked the same question, but instead of the yes/no answer, he is using a semantic differential scale and is finding that the "yes" may not be so definite. "It's just off center on a seven-point scale," Qualls said.

Qualls has found that when students start discussing a local case that they can relate to, they often realize that the concepts relate directly back to the case briefs of Supreme Court decisions involving prejudicial publicity they had to write. It's wonderful to see their "faces light up" when they make the connection, he said.

The students readily understand the issues of prejudicial pre-trail

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Consent: Privacy or Property?"; Ivan L. Preston (Wisconsin), "The Questionable Rationale for Advertising Puffery as Revealed in Early English and American Precedents"; Herbert A. Terry (Minnesota), "Personal Data and the Press: A Developing Dimension of Privacy Law"; Robert Trager (Southern Illinois University), "The College President is Not Eugene C. Pulliam: Student Publications in a New Light"; and Everette E. Dennis (Minnesota), "Another Look at Supreme Court Reporting and Reporters." Harold L. Nelson (Wisconsin) presided at the invited paper session, "In Retrospect," featuring the major professor for Nelson's dissertation, J. Edward Gerald (Minnesota), author of "The Press and the Constitution."

In Ottawa, Canada, in 1975, at the AEJ's first international convention, David Grey (San Jose State) was named Head; Michael Petrick (Maryland), Vice-Head; and David Gordon (Northwestern), Clerk. The Division recommended establishing committees, Research, Teaching Standards, and Public Service, drafting a Division constitution and bylaws, and continuation of a Media Law Information Exchange in the Division's newsletter plus expanded bibliographical work in the newsletter and in the Journalism Quarterly bibliography section.

The 1977 convention in Madison, Wis., put the new Law Division on the AEJ programming map, thanks to planning and coordination by David Gordon. An all-day pre-conference session featuring Elmer Gertz (of Gertz v. Welch, decided just three years earlier), plus a luncheon where Congressman Robert Kastenmeier (D-Wisconsin) discussed his pivotal efforts to reform federal copyright laws.

In 1978 Iowa State University Press published a book edited and with 10 of its 12 chapters written by Law Division members, "Justice Hugo Black and the First Amendment: 'No Law Means No Law.'" The editors – who also contributed chapters – were Everette E. Dennis, Donald M. Gillmor, and David L. Grey.

When Wat Hopkins (Virginia Tech) was clerk in 1987, he wrote a column in the Law Division's newsletter calling for the establishment of a scholarly journal. In 1989, as head of the Division, he appointed a committee to study the feasibility of establishing such a journal. The committee's report was favorable. As a result, when Kyu Ho Youm (then Arizona State) headed the division, he appointed Hopkins chair of a committee to select the journal's first editor. Robert Trager (Colorado) was named founding editor of "Communication Law and Policy." After editing the journal from 1996 through 1999, Trager was succeeded as editor by Thomas Schwartz (Ohio State), who served until 2002. Wat Hopkins then was chosen editor. Through its history "Communication Law and Policy" has published important and well-crafted articles. In 2000, the Law Division's name was changed to Law and Policy, and its scholarly journal continues as a signal achievement for the division and for the Association for Education in Journalism and Mass Communication.

(Pre-Trial Publicity, continued from page 10)

publicity. They are old enough to have seen the coverage of the Casey Anthony trial and question "what the responsibility of the journalist is." They learn about the traditional remedies of voir-dire, change of venue, sequestration and continuance, but question whether these remedies provide a "neat and tidy answer" to the current media environment in which news stories have an indefinite life on the Internet. So far no one has come up with a solution to that problem.

Kevin Qualls

This class exercise was born after Qualls served as an expert witness in support of a change of venue motion in the murder trial in the summer of 2010. The court refused to allow a survey of potential jurors that could prove prejudice, so he was charged with attempting to determine whether the extensive media coverage was prejudicial. He gathered three years, totaling 69 hours, of television news coverage from the murder to the start of the trial. Out of that came this exercise.

Qualls is an assistant professor of Journalism and Mass Communications in the Bauernfeind School of Business at Murray State University in Kentucky. He won second place in the 2012 Law and Policy Division teaching ideas competition for this entry in experiential learning.

(http://www.aejmc.net/law/lawnotes/SecondPlace2012.pdf)

Law and Policy Division Speakers Bureau

Make yourself available for media interviews or speaking engagements in your area of expertise. Go to the division website at http://www.aejmc.net/law and click on "Speakers Bureau" to find out more information.

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