

MEDIA LAW NOTES

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Head Notes

Tabloid Teaching

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Maybe you've read about it? Jennifer Aniston and Vince Vaughn have split. And, the catalyst for this real life break-up? A 22 year-old student on a study abroad program from my university.

The story made front page news in the tabloid magazine *The Star*, and even made the "real news," Section A of our local newspaper, the *San Antonio Express-News*. The *Express-News* and *The Star* stories included a yearbook photo of the young woman and quoted an e-mail sent by her to 22 of her sorority sisters which included details (not salacious, but personal) about her one-night stand with Vince.

Shock Waves Across Campus

Not surprisingly, this public revelation has sent shock waves across our campus, not as much for the student-Vince interaction as for the public nature in which it was presented to the world. As my students so nicely put it, "the story is big on drama."

Like you, I spend a great deal of time cautioning students about privacy (or, more accurately, the lack thereof) on the Internet. My first warnings several years ago targeted access to personal exchanges using employer resources (ex: sending e-mail

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Legal Currents

News, Romance & Media Ethics

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The sky is falling.

I've been establishing myself as the division's scaremonger for a while now, telling everyone who would listen that there's major trouble brewing in privacy law. Remember the good old days when we could lawfully report that the man who rescued President Ford from an assassination attempt was gay (even if ethics might well have counseled otherwise)?

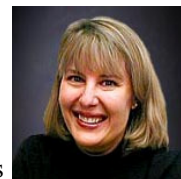
Those days are gone. Privacy is back.

The latest evidence for my claim of the tort's phoenix-like rebirth is *Benz v. Washington Newspaper Company*, a decision by the federal district court in Washington, D.C., from September 29, 2006 (the same day the movie *Dracula* started filming in 1930, for those who enjoy poetic coincidence).

The case is especially striking because the plaintiff, Kathleen Benz, is herself an assignment editor for CNN. The *Washington Observer* column to which she objects named men whom Ms. Benz was said to have dated, including some high-profile Washington types. In addition to a defamation claim based on the newspaper's inclusion of some men she had never dated, she demanded recovery for publication of private facts for the newspaper's accurate listing of other men, arguing that the public has no legitimate interest in her dates.

You'll surely recall that the Restatement definition of the publication of private facts tort absolves the

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Amy Gajda

Re-examining American Exceptionalism In Free Speech

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Kyu Ho Youm

This year we marked the 40th anniversary of our Freedom of Information Act. But our precipitously shrinking access to government information leaves us less to celebrate than in the past. In our country, more information is classified now than ever. Informational secrecy is becoming the rule, not the exception.

Next year will be the 35th year since the U.S. Supreme Court held in *Branzburg v. Hayes* that news reporters cannot protect their sources as a First Amendment right. Its unwavering judicial rebuff of the reporter's privilege seems out of character, given that more and more countries accept the privilege as a right of a free press.

Looking at Press Freedom Abroad

The narrowing of free speech at home stands in sharp contrast with what has happened abroad recently. Last October, the Japanese Supreme Court ruled that news sources as "professional secrets" should not be subject to forcible disclosure. The journalistic privilege to protect sources should be "fully" recognized in law, Japan's highest court stated, because it serves the public's right to know.

Equally significant is the Inter-American Court of Human Rights' landmark ruling, also last October: Access to government records is a fundamental human right. The court said freedom of information promotes participation in public governance in a democracy.

These decisions challenge us to re-examine our often hallowed American exceptionalism in freedom of speech. We are no longer the leader in setting the freedom agenda.

Freedom of information has yet to be considered a constitutional right in our country. Similarly, the reporter's right to confidential sources is not read into

Further, our media-friendly libel law is not necessarily as unique as it once was. On the same day the Inter-American Court recognized informational access as a right, Great Britain's House of Lords held unanimously that English libel law should encourage "serious journalism," not discourage it. Investigative journalism in the British news media needs the breathing space to publish false statements if it is in the public interest, the highest English court stated. Lord Scott declared that the press has no obligation to help any government hide from the people information of public interest when disclosure poses no threat to national interests.

The War Against the Press

These recent decisions force us to ask ourselves seriously amid the ongoing war against the press in our country: Do we remain vigilant against our false sense of exceptionalism in freedom of speech and press?

What we are doing—or more importantly, what we're not doing—on the free speech front should not be an expendable agenda for the polarizing liberal-vs.-conservative debate among ourselves. Without doubt the First Amendment entails a heavy responsibility. But the government's blithe indifference to freedom of expression at home carries far-reaching ramifications for the rest of the world.

For more than 60 years, we have contributed considerably to expanding freedom of the press as a human right abroad. It takes a lot of hubris to cavalierly dismiss our liberalizing impact on international law regarding free speech.

Indeed, it's not so presumptuous to argue that the House of Lords, the Japanese Supreme Court and the Inter-American Court have relied on our law of experience for their reasoning.

On the other hand, our First Amendment record since the Sept. 11, 2001, terrorist attacks indicates that we move back a little too charily while others forge ahead confidently.

Sanctimonious Preaching

Now our one-way preaching to other countries on freedom of the press more likely sounds sanctimonious. It should change to a two-way dialogue for us in learning from others overseas.

To many of us, the recent judgments on freedom of information and the reporter's privilege are profoundly instructive, as we leave behind our 40th FOIA anniversary while awaiting the 35th year that the reporter's privilege has been denied in our country.

Kyu Ho Youm is the Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication. This article originally appeared in the Register-Guard newspaper in Eugene, Oregon.



Making Choices

The Challenges of Teaching Media Law In One Semester

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A new semester of teaching media law invariably raises the old question: Will I actually teach all the units I say I'm going to teach?

The answer, of course, is always no. And if you're like me, you adjust. You reshuffle. You take the personal completion pledge:

"This is THE semester I will really teach broadcast regulation."

"Well, this is the semester I WILL get to trademark."

Or whatever.

While journalism professors choose what will or won't get covered in a course, there's something particularly daunting about making these kinds of selections in media law – selections that might just have a significant impact on a student's future financial security if he is sued because he didn't know the law.

The Answer: That Depends

Miss libel? Never. Broadcast Regulation? Maybe. Student Expression? Well, that depends on who's in the class.

Somehow glossing over the unit on writing backgrounders in my public relations writing course just doesn't feel as problematic.

And then, there are our own research biases. I hate to ignore the significance of expanding copyright regulation, and yet, if my classroom is full of students from the School of Education, I have to. Score one for Student Expression.

That making these choices feels uncomfortable, at best, and arbitrary, at worst, made me wonder about how others of you tackle the problem. The consensus, based on my **very** preliminary data, is that this is a growing problem (and most of you agreed it IS a growing problem) and is due to three main factors:

(1) Students are specializing within their own studies in ways that we previously experienced, but not quite at this level of "niche needs."

(2) The corresponding amount of media law

material continues to grow. Remember teaching libel before the Internet? Or copyright? And the litany of expanding regulations by the FCC, FTC and FDA are all having a significant impact on what some of our students need and want to know.

(3) The trend away from lecture and toward more experiential learning. Using law exercises in the classroom takes time away from imparting the material, but in the long term, may be more useful to students.

At least two institutions, Syracuse University and the University of North Carolina – Chapel Hill, have offered one possibility to addressing the problem of tackling course content by offering different media law sections tailored to different majors. Syracuse has been offering the different sections for well over 10 years, and UNC for the past two years.

At UNC, there's a media law section for news editorial and broadcast journalism majors and another section for advertising and public relations majors. At Syracuse, there's a section for print and broadcast journalism students, a section for advertising and public relations students and a section for television and film production students.

The Core of Media Law Courses

Both Jay Wright at Syracuse and Michael Hoefges at UNC are quick to point out that the core of all their media law courses remains the same. They cover constitutional law and the torts as in most media law courses. The basics of the First Amendment and what students need to know remains intact, they said. What changes in the different sections, though, are the examples and level of detail given, the emphasis given and the overall time given to the material.

In terms of case examples and the law in action, Wright said one difference among classes may be to analyze the case from a different perspective – the advertising executive's perspective rather than the traditional journalist's perspective. In covering reporter's privilege for advertising and PR students, for example, Hoefges said he might use the same case he always discusses, but "I talk about those topics from the perspective of a corporation involved in undercover reporting."

For example, rather than spend most of the time on the ABC producer's perspective in the *Food Lion* case, spend more time on Food Lion's response publicly and legally, he said.

Sometimes different case examples are helpful for teaching libel or privacy, ones that are more attuned to the needs of advertising and public relations practitioners. "Where I've always used this one journalism case" for print journalism majors, said Wright, "I'd have to ask myself is there any advertising or public relations case that would work just as well."

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Law & Policy Division

Publications Board Minutes from S.F.

Aug. 3, 2006

Attendance: Bill Chamberlin, Tony Fargo, Kyu Youm, Kathy Olson, Beth Blanks Hindman. Ex officio: Wat Hopkins, Linda Bathgate. Excused: Susan Ross, Jennifer Henderson.

Committee Chair Chamberlin brought the meeting to order. Hopkins and Bathgate reported that *Communication Law and Policy* is stable, with submissions down slightly, a low acceptance rate and page limits filled. Publisher Erlbaum is marketing the electronic version of the journal, including packaging it with other journals for libraries.

Hopkins reported that the journal will not be included in the National Research Council's list of academic journals. He said he thinks it is because NRC wants a more visible international focus, both in editorial board and articles.

Hopkins' second three-year term is nearly up, so the committee excused him to discuss whether to recommend another term. Discussion of Hopkins was uniformly positive, and the committee will recommend a third term to the Division at large. Hopkins returned to the meeting.

The board will meet tomorrow morning, following this evening's Law & Policy Division members' meeting. Chamberlin adjourned the meeting.

Aug. 4, 2006

Attendance: Bill Chamberlain, Tony Fargo,

Jennifer Henderson, Wat Hopkins, Kathy Olson, Martin Halstuk, Kyu Youm, Beth Blanks Hindman

Chamberlin brought the meeting to order. He asked Hopkins about the National Research Council issue. Hopkins said he thinks the journal's relative lack of international presence hurts it. Chamberlin suggested ensuring that the journal is visible with the International Communication Association. The group discussed whether to change the journal's purpose statement to decrease emphasis on international issues.

The board then discussed formalizing its leadership. Chamberlin has been its only chair; he's now stepping down. He suggested that the Law Division Head appoint the publications committee chair (as well as its at-large members); this change needs to be reflected in Division and journal documents.

Continuing discussion from the Aug. 3 meeting, the committee agreed that if an editor is nearing the end of a third term, the position will be opened for applications, with the incumbent welcome to apply. This would allow the committee to continue a good editor for a fourth three-year term, but would also open the process to others who might be interested. Specifically, during an editor's eighth year the publications board would invite anyone interested to send their vitae to the chair. The board would then have a year to choose from among viable candidates.

Hopkins reported that he will set up policy and style manuals for the journal. He would like to replace editorial board members who refuse several times to review manuscripts.

Respectfully submitted,
Beth Blanks Hindman, Clerk 2005-06
Washington State University
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Midwinter Meeting

Help Needed to Collect Law Division History

At the Council of Divisions meeting New Orleans, a meeting of the heads and vice-heads of every AEJMC division and interest group, it was suggested that we seriously consider how we preserve and pass along the institutional history of our divisions.

For example, the head of the Council of Divisions, Jan Slater (Ohio), suggested we provide to our membership such basic information as: 1) a description of the officer duties and individuals serving in those positions in previous years, 2) the division's bylaws, and 3) any bylaws or guidelines related to division journals.

I seriously considered bonking myself on the

head like Homer Simpson, and saying, "Doh!" Of course, we need to do this! In fact, we need to do more. So in addition to posting this information on the division's new website in 2007, I am also asking for your help in collecting any documents, notes, newsletters, photos or other Law and Policy Division-related materials.

These materials will be scanned and uploaded onto the website for everyone to access. Of course, if you have any materials in electronic form, please send those instead of the paper version. In addition, if you would like your personal materials returned, just let me know, and I'll send them back once I'm finished with the scanning process.

Please send anything you think could help build our institutional history to me at: Jennifer Jacobs Henderson, Department of Communication, Trinity University, One Trinity Place, San Antonio, TX 78212.

Head Notes

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to friends using office computers or surfing the web for sports scores during lunch). As recent federal legislation upheld by the Supreme Court requires businesses involved in federal litigation to produce information stored electronically during the discovery process, employers are more likely to archive e-mail communication. As I explain to my students, this threat to privacy has moved from the orange to red level.

After the explosion of social networking sites, such as MySpace, Facebook, and Friendster, I also cautioned strongly against posting any information that could be embarrassing if accessed by people in positions of authority – such as professors or employers, two

groups who regularly search such sites for details about students' personalities and character.

I often use as an example the following (I'm afraid to admit, true) story: Last year, I received a link from a colleague to the MySpace homepage of an honor student and campus leader who, in her leadership role, met weekly with our university president. She had posted photos from her holiday party, which included, but was not limited to, a photo of her with a red Santa hat, matching bra and panties and nothing else. As her departmental and pre-law advisor, I (after almost choking on my coffee) had a rather blunt, private conversation with her about privacy and public relations.

So, how to turn *The Star* cover story into a teaching moment? Or, at the very least, a highly cau-

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Making Choices

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Not surprisingly, more attention is paid to commercial speech issues in the advertising and public relations sections. But, as Hoefges points out, it's unlikely any student on the job is going to be required to put the *Central Hudson* test into use. When Hoefges designs his syllabus, he said, he thinks about "if I were a lawyer advising people going into this field, what should be on their radar screen?...I spend more time putting the issues into context" for this group of students.

One result, for Hoefges, is more time spent on the specifics of advertising regulation and privacy law. Specific FTC and FDA regulations for drug advertising get more time and emphasis. And more time is spent on the specifics of HIPAA. "You want someone coming out with a public relations degree to know something about HIPAA," he said, because of the demand for public relations health professionals.

A Curriculum Review to Come

Wright said the separation of sections has worked well over the years but the school will be going through a curriculum review soon, and everything is on the table for discussion. As for Wright, "I'm 60-40 in favor of" keeping the sections separated, he said. "Some folks get a silo mentality when they're taking a course in their major," he said, and that can work against a broader view of First Amendment concerns and what students should take away from their media law course.

Other institutions offer media law course electives that focus on specific issues such as advertising or public relations, including Northern Kentucky and Oklahoma State. Penny Summers at Northern Kentucky and

Joey Senat at Oklahoma State, both responding to me by e-mail, raised some concerns that students get the same core material, which might be compromised by splitting sections.

Summers also raised the issue that not all students wind up working in the exact media fields they select, so having a discussion across disciplines is valuable in the long term.

In-depth Survey Useful

In my program of 300 majors, splitting up the course is unlikely, so I take an in-depth survey of my students every semester to find out who's in what major and then adjust the syllabus accordingly. Over the summer I had more education majors than journalism majors in my class, so we spent quite a bit of time talking about recent developments in student expression and spent time on the Student Press Law Center site. Other semesters my classes are dominated by public relations majors, and so I make an effort to leave enough time for commercial speech.

But these days I simply want to make sure my students understand what the law says about censorship, because I have so many first-generation college students who don't understand why the government doesn't just step in to censor the media whenever, wherever. That view, once shocking, is one I now expect and am ready to address. And so I now spend more than two weeks on prior restraint with the goal of getting them to understand First Amendment theory.

When starting from that point, it's no wonder I never teach everything I hope to.

Writer's Note: Thanks to those of you who responded to my query on the listserv about this issue. For those who missed my note, I'm still interested in hearing from you or your institution. Please e-mail me at vekstra@bgsu.edu.



Submissions Online in 2007

Call for Papers

The Law & Policy Division invites submission of original research papers on communications law and policy for the 2007 AEJMC Convention in Washington, D.C. Papers may focus on any topic related to communications law and/or policy. The Division welcomes a variety of theoretical orientations and any method appropriate to the research question. A panel of judges will blind referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the convention to present accepted papers.

Paper authors should submit via the online submission process as described in the Uniform Paper Call. Please see submission criteria and instructions at: http://aejmc.org/_events/convention/papercall/uniform_call.php.

Law and Policy Division papers must be no longer than 50 pages (including appendices, tables, notes and bibliography).

Student authors of single-authored papers should clearly indicate their student status. Student submissions will be considered for the Top Student Research Paper and the \$100 Whitney and Shirley Mundt Award. The Law and Policy Division will also cover convention registration fees for the top three student paper presenters.

For the 2007 conference of the Association for Education in Journalism and Mass Communication in Washington, D.C., all divisions require authors to submit manuscripts electronically. The Law and Policy Division is pleased to participate in this new process.

The online submission site is expected to be available sometime in January 2007 at: <http://>

AEJMC Conference in D.C.

Call for Judges

The Law & Policy Division of AEJMC needs the help of its membership to review papers for the 2007 AEJMC conference in Washington, D.C. As the popularity of the Division continues to grow, so does the demand for paper reviewers. To ensure that only the highest quality papers will be presented at this year's conference and to keep the number of papers per reviewer at a manageable level, your assistance is needed.

If you would be willing to serve as a reviewer for this year's submissions, please contact Ed Carter via

convention2.allacademic.com/one/aejmc/aejmc07/.

Both paper authors and manuscript reviewers will create individual electronic accounts that will allow them to submit, access and review papers online. Paper authors will input their identifying information and an abstract in one portion of the site, but authors should take special care to remove any identifying information from the electronic manuscript they submit. This includes not only removing the title page but also, for Microsoft Word users, accessing the file's Properties menu and removing the author name from the "Summary" tab. Detailed instructions will be available at the submission website given above.

Eventually, the online submission process will convert all submitted manuscripts to PDFs, and thus no electronic alterations can be made. Authors are encouraged to submit their manuscripts early to eliminate any last-minute glitches or confusion. Once an author has submitted his or her paper electronically, he or she can still make alterations online (and even upload a new file) up until the submission deadline of 11:59 p.m. Central Standard Time on April 1, 2007.

Online Submission Advantages

The new online submission process should provide several advantages for both authors and reviewers. For authors, time and resources will be saved due to the elimination of need to photocopy and physically mail their manuscripts. Meanwhile, reviewers should have more time to read and comment on manuscripts, due to elimination of time spent waiting for the mail to arrive.

For questions please contact:

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e-mail at ed_carter@byu.edu or by phone at 801-422-4340. If you have already agreed to serve as a reviewer, thank you.

To help coordinate paper topics with reviewers, please specify in your e-mail or voice mail message your legal interests, e.g., libel, privacy, copyright, etc.

Please be aware that reviewers for the Law and Policy Division *will not* be allowed to submit papers to *this division*. Papers submitted to other AEJMC divisions, of course, are acceptable.



Head Notes

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tionary tale? The story broke at the very end of the semester, and for a moment I considered including it as an extra-credit case problem on the final exam. But, as many of the women who received the original e-mail message were also students in my class, I thought twice.

It was actually my students who came up with the teaching moment. Within 24 hours of the story's first publication, 20 of the 32 students in my Media Law and Policy class had e-mailed me with their legal analyses (and not even an assignment!) To their credit, they realized immediately that the student in the story had no legal recourse in this situation. Almost every possible legal remedy available was offered for discussion in

those e-mail messages.

This wasn't defamation or false light; no one doubted its truth. This wasn't appropriation; it was news. This wasn't intrusion; *The Star* journalist didn't break into the hotel room to find the facts. Could it be the publication of private facts? Oops. No, not when she distributed the facts herself – to 22 of her closest friends. What about the source who leaked the story? Could we prosecute the “friend” who either purposefully or accidentally let the contents of the e-mail slip into the hands of *The Star*? For what? Thankfully, sources haven't been prosecuted yet for passing along legal information. Each, in his or her way came to realize the uncomfortable reality of free speech.

So, Vince and Jen are through. A student's life, at least in the very short run, is shattered. And for what? News? To protect the First Amendment?

Legal Currents

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journalist as long as the topic is of “more or less deplorable popular appeal.”

The *Benz* court, however, sided with the plaintiff. Here's the sky-collapsing quote: “The Court is persuaded that it is unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column of a widely distributed newspaper.”

What?! Get on the phone to celebrity magazine editors pronto and tell them to stop the presses! By this standard, virtually every article will be actionable.

Now, sure, the *Benz* case is in the earliest stages and the newspaper may yet win on a motion for summary judgment. But, no matter the outcome, I see in that line about single women and dating and it being none of the public's business a warning of emerging trouble for journalists in the courts.

Rift Between Law and Journalism

It used to be that courts refused to “blue pencil” journalists in these cases because, they wrote, law must give journalism First Amendment-mandated breathing space. Judges should not act as super-editors. But over the past few years, courts have grown less deferential and journalists' conception of newsworthiness has given ground to judicial protection of personal privacy: a photo of a youth baseball team including victims of the coach's alleged sex abuse, a mother's words to her dead son in a hospital room, and video of an accident victim's care in a hospital. In years past, each of these cases might well have been resolved in favor of journalists on grounds of newsworthiness. Instead, the courts ruled that juries should be permitted to impose liability.

The problem ultimately has constitutional im-

plications. Courts have not only narrowed news and limited journalism's breathing space, there's no uniformity or clear standard in privacy decisions regarding what's appropriately newsworthy. Moreover, there is effectively no guidance from the Supreme Court about how courts should define the concept of news value. And so journalists are left in a sort of legal limbo.

Showing a Crime in Progress

Compare the recent pro-plaintiff decisions with one from February 2006 when a federal district court in Oklahoma sided with a local television station that had aired portions of a videotape of a woman's alleged rape. The alleged rape was news, the court wrote, and the reporter's use of portions of the tape (“brief shots of plaintiff's feet and calves [and] the alleged attacker's face . . . portions of his naked body [including his upper torso, arms, hands, and a leg] moving above and around plaintiff's obscured body,”) strengthened the story's credibility by showing the alleged crime in progress.

How can it be consistent with notions of protected privacy to broadcast thirty-nine seconds of a woman's alleged rape and yet legally sanctionable to list a handful of men a CNN journalist has dated? The videotaped rape has a far weaker claim to newsworthiness, both legally and ethically, and yet that's the case in which journalism won, at least in the preliminary stages. (I believe that a major public ethics push, both in classrooms and in newsrooms, would be a formidable antidote to all this, but that's another essay.)

Both cases are making their way through the court system. As I write this, discovery continues in the gossip column case and appellate briefing is complete in the videotaped rape case. The outcome in either case could change. Still, as of right now, it looks to me like the sky is falling. And I sincerely hope that someday you'll be able to call me Chicken Little.

Law & Policy Division Panels: AEJMC, Aug. 8-12, 2007

Wednesday, Aug. 8, 2007 (pre-conference day)

5:30-10 p.m.: Pre-conference workshop: "The Future of Communication Law and Policy"

Thursday, Aug. 9, 2007

10 – 11:30 a.m.: "Covering THE Court: Reporters on the Supreme Court Beat"

11:45 – 1:15 a.m.: "Minority Media Ownership and Advocacy: A Status Report"

1:30 – 3 p.m.: "Censorship of Gay Issues in High School and College Media"

3:15 – 4:45 p.m.: Mini-plenary: "The View from the FCC: A Conversation with FCC Commissioners"

5 – 6:30 p.m.: "The View from the Other Side of the Conference Table: Media Lawyers and Their Real-Life Journalism Decisions"

Friday, Aug. 10, 2007

8:15 – 9:45 a.m.: Refereed Research Paper session

3:15 – 5 p.m.: Tour of the United States Supreme Court

5 – 6:30 p.m.: Refereed Research Paper session

Saturday, Aug. 11, 2007

7 – 8 a.m.: Executive Committee and Publications Board meeting

8:15 – 9:45 a.m.: "A Class in Privilege Then and Now: Is There Any Change?" Lead sponsor: Law & Policy

12:15 – 1:30 p.m.: Scholar to Scholar Refereed Research Paper session

1:45 – 3:15 p.m.: "U.S. 'Propaganda' at Home and Abroad: Ethical and Legal Concerns

3:30 – 5 p.m.: "Eroding Press Freedoms: Where Do We Go From Here?"

5:15 – 6:45 p.m.: Refereed Research Paper session

7 – 8:30 p.m.: Members' Meeting

8:30 – 10 p.m.: Executive Committee and Publications Board meeting

Sunday, Aug. 12, 2007

8:15 – 9:45 a.m.: Refereed Research Paper session

10 – 11:30 a.m.: "Making Ethics Law"

11:45 – 1:15 p.m.: "Witnessing Atrocity: Legal Restrictions and Ethics of Documenting Inflammatory Images"

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Martin E. Halstuk, editor

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