Media Law Notes

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Head Notes

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Four days after the U.S. Supreme Court heard oral arguments in *Pleasant Grove City v. Summum* in November, I visited the nondescript Utah park at the heart of one of the most important First Amendment cases in the Court's 2008 Term.

I spent an hour trying to figure out if the park contained government speech, and I found only a dozen dilapidated pioneer artifacts strewn haphazardly through an unkempt lot. The Ten Commandments monument donated by the Fraternal Order of Eagles in 1971 stuck out like a sore thumb, but nothing about the monument led me to think it contains the city's own message.

All nine U.S. Supreme Court Justices, however, saw it differently. The Court held unanimously on February 25, 2009, that the Ten Commandments display was government speech and thus could not be challenged by dissenters asserting their First Amendment speech rights. Nothing about my visit to Pleasant Grove's Pioneer Park convinced me that the Justices are correct.

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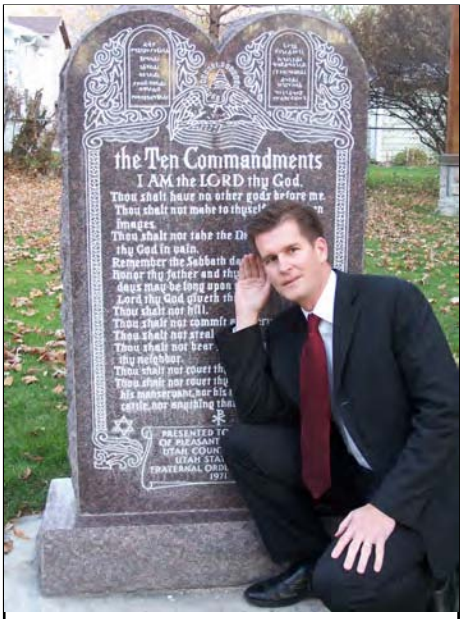

When Carter visited the Utah park at the heart of the Pleasant Grove v. Summum Supreme Court case, he received a message but it was not the government's.

AEJMC Panels for Boston

The Division is looking forward to a great lineup for the Boston convention – many, many thanks to those of you who submitted panels, and my apologies to those who didn't find your panel in the program. Space was tighter than ever this year, but I think we did the best we possibly could under the circumstances. We'll feature three Law Division-led panels this year:

-- The 20th Anniversary of Reporters Committee for Free Press v. Department of Justice: The State of Privacy Interests in FOIA

Twenty years ago this year, the freedom of information world was transformed by a seminal case, known to scholars simply as the *Reporters Committee* case, which reshaped the contours of privacy under the federal Freedom of Information Act and which continues to dominate discussion of privacy in the informational context. A group of scholars led by Jane Kirtley, who headed the Reporters Committee at the time of the lawsuit, will discuss the modern right of privacy, and how technology changes that discussion in light of this historic case.

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Teaching Competition Call

Dan Kozlowski
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Good teaching is hard to do, and I've found that it doesn't get all that much easier with practice. I'm continually learning how to teach better, and I'm always eager to hear about assignments or activities or approaches other teachers have found to work well. I find talking about teaching to be stimulating – and productive.

So I was heartened by the healthy exchange of messages about teaching media law on our division's listserv late last semester. The conversations persuaded me that in future years an AEJMC panel or even perhaps an entire pre-conference workshop devoted to teaching media law would be a success. In the immediate future, though, division leadership decided to facilitate conversations about teaching in another exciting way: a teaching ideas competition seeking the most innovative ideas you use in teaching communication law and policy.

We're energized about the competition and hopeful you'll find it valuable. Please read the call below and consider submitting an idea. And please let me know if you have any questions.

Best Ideas in the Teaching of Communication Law and Policy Competition:

The Law and Policy Division is pleased to announce our new teaching ideas competition. We're looking for your best and most innovative ideas for teaching communication law and policy. Submissions could include an innovative assignment, activity, or lesson plan – or a particularly original approach to teaching the subject in general.

Winning submissions will receive a certificate and a cash prize - $100 for first prize; $75 for second prize; and $50 for third prize. Winners will also present their ideas to division members during our AEJMC convention business meeting, and we'll showcase the winning ideas on our division Web site and in our newsletter.

All submissions must be received by Wednesday, April 1, 2009. Submissions should be sent as an e-mail attachment to Dan Kozlowski at dkozlows@slu.edu (please mention "teaching ideas competition" in the subject line of your submission). Submitters need not be Law and Policy Division members. Both faculty and graduate students are welcome to submit.

Submissions should follow these guidelines:

(1) The first page of your submission should be a cover sheet that includes your name, affiliation, contact information, and the title of your teaching idea. Please do not include author name or identifying information anywhere else in your submission.

(2) You should then describe your teaching idea in no more than two pages according to the following format: title; an introduction; your rationale for the idea; an explanation of how you implement the teaching idea; and student learning outcomes.

A panel of judges will blind review each submission based on a teaching idea's creativity, innovation, practicality, and its overall value in teaching communication law and policy to our students.

Your submission will be acknowledged but not returned. Winners will be notified by May 8.

Colleague Updates

This new section of Media Law Notes will highlight recent accomplishments by AEJMC Law Division members.

¤ S.L. Alexander, coordinator of communication law on the faculty of Loyola University New Orleans, spoke on "Effective Communication with the Media" at the annual conference of the National Association of Women Judges in Portland last semester.

¤ Jeffrey L. Blevins, Greenlee School of Journalism & Communication at Iowa State University of Science & Technology, has two recent publications:

Brown, D. H., & Blevins, J. L. (2008). Can the FCC still ignore the public? Interviews with two commissioners who listened. Television & New Media, Vol. 9, No. 6 (pp. 447-470).

Blevins, J. L., & Anton, F. (2008). Muted Voices in the Legislative Process: The Role of Scholarship in US Congressional Efforts to Protect Children from Online Pornography. New Media & Society, Vol. 10, No. 1 (pp. 115-137).

¤ Sandra Chance (University of Florida) has been named the national coordinator of the First Amendment Liberty Tree Campus Initiative. She was asked by Ken Paulson to coordinate the program and worked to help fund it through a McCormick grant.

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Colleague Update Cont'd...

More information on the Initiative is on page five of this newsletter

¤ Tori Smith Ekstrand of Bowling Green State University has been selected a Scholar in Residence at BGSU's Institute for the Study of Culture andSociety. Tori will spend the Fall 2009 semester away from teaching and immersed studying the origins and culture of anonymous speech in U.S. law.

¤ Rick Peltz (University of Arkansas – Little Rock Law) has two new publications. First, Peltz published Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm, 34 Ohio No. U. L. Rev. 717 (2008), a paper presented at a symposium on media and the courts. The paper calls on media to develop more responsible norms of correction and clarification in the online environment, or face the erosion of common law tort privileges. Second, Peltz published Bringing Light to the Halls of Shadow, Preface, 9 J. App. Prac. & Process 291 (2007). The preface introduces the topic of Covering the Appellate Courts and contributions on the subject from Lyle Denniston, Tony Mauro, Judge Diarmuid O'Scannlain, and Robert Craig Waters.

Do you have any personal or professional accomplishments that you would like your colleagues to know about? Be sure to emal them to Amy Gajda for the next Media Law Notes. Please include your name, your school, and a brief detail of your recent accomplishments. Be sure to look here again next issue for more announcements.

Iona College Conference

On June 12-13, 2009, Iona College will be hosting the inaugural Conference on Intellectual Property (CIP). This is a national conference and we hope to have academics and professionals from a variety of disciplines attend the conference. We initiated the conference because the subject of intellectual property is one that is of particular importance to a wide variety of professions, yet most conferences about the topic have been limited to intellectual property attorneys or academics in their individual fields. This conference will give scholars and professionals the opportunity to cross disciplines to discuss the practical and theoretical issues surrounding intellectual property.

If you have questions, please feel free to contact Amy Stackhouse at astackhouse@iona.edu. You may also visit our website at www.iona.edu/cip.

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The inaugural Conference on Intellectual Property (CIP) will be held on June 12-13th, 2009, at Iona College in New Rochelle, NY, and will include keynote addresses by Laura M. Quilter, M.L.S., J.D. and painter Joy Garnett.

Whether it be the submission of student papers to plagiarism-detecting websites, the marketing of a movie that chronicles the challenges of a windshield wiper inventor, or the latest debates over the application of nonobvious intention, issues involving intellectual property in the academic, economic, legal, and technological fields challenge the very notion of ownership: what we own, how we own, and who may claim ownership.

The purpose of this conference is to explore intellectual property, in a cross-disciplinary context, as both a concept and a reality relating to the professional fields whose concerns intersect in understanding its essence and implications.

We have invited papers and panels dealing with any and all aspects of intellectual property, from the origins of eighteenth-century literary property debates to the viability and ethics of plagiarism and plagiarism detection, from the economic impact of patents to the technological advances that may make intellectual property obsolete. We especially encourage papers/panels that embrace a multidisciplinary or interdisciplinary approach.

CIP papers and/or abstracts will be included in a conference proceedings, and selected essays may be published in a proposed collection for a peer-reviewed press.

For more information, please see the conference website at

www.iona.edu/cip.

Keynote Speakers:
Laura Quilter is an attorney and researcher in technology and information law and policy. Laura's research and practice particularly focuses on the rights of information users, including consumers, libraries, creators, and scientists, and she regularly speaks and writes on these matters. She earned her law degree from Boalt Hall School of Law, University of California, Berkeley, in 2003, and her library science degree from the University of Kentucky in 1993.

(Continued on page 4)

Iona Cont'd...

Please visit her website at http://lquilter.net/professional/briefbio.html
http://lquilter.net/index.php

Painter Joy Garnett appropriates news and documentary photographs from newspapers, internet and other media, and re-invents them as paintings. Her work mines the tensions between the open-ended narratives of art, and ubiquitous media representations of real-life events. Ms. Garnett's work has been exhibited in museums and galleries around the world, including the Whitney Museum of American Art in NYC, the National Academy of Sciences in Washington, D.C., and the Witte Zaal in Ghent, Belgium, and reproduced in numerous publications, from Harper's to Cabinet magazine. In 2004, she was awarded a grant by the Anonymous Was a Woman foundation, and she currently serves as Arts Editor for Cultural Politics, a refereed journal published by Berg in Oxford, UK.
http://www.firstpulseprojects.com/joy.html

Boston Cont'd...

-- The Impact of ***FCC v. Fox***

For the first time in 30 years, the U.S. Supreme Court this term will revisit the issue of broadcast indecency. The Court heard arguments in November and will issue a ruling this term in *FCC v. Fox*, a case involving the FCC's ban on "fleeting expletives" during television broadcasts. The Second Circuit Court of Appeals vacated the policy in June 2007, calling it "arbitrary and capricious." This panel will assess the implications of the Supreme Court's forthcoming ruling, which by then will of course be on the books.

-- Instilling Appreciation for the First Amendment, On Our Campuses and Beyond

In a recent "State of the First Amendment" survey of more than 1,000 adults, 40 percent could not name any of the freedoms protected by the First Amendment – the highest number in the survey's 11-year history. Nearly 40% of respondents also said that the press in America has too much freedom to do what it wants. High school students don't fare much better. A recent "Future of the First Amendment" survey revealed that nearly half of the students who responded believed that newspapers should not be allowed to print freely without government approval.

Those statistics are alarming. And they present an opportunity for this panel to address what journalism and mass communication educators can do and should be doing to instill a love and appreciation for the First Amendment on our campuses and beyond. What strategies, activities, assignments, events, and/or discussions can we champion that work to build awareness of the First Amendment and ensure its protections are valued?

We sure hope you can make these and our other co-sponsored panels, as well as the research sessions. See you in Boston!

-- Charles Davis

Media Law Scholarship and the Change Movement

Victoria Smith Ekstrand
Bowling Green State University
PF&R Chair

As I write this, millions of U.S. citizens are poised to participate in a one-day service project to honor the work of Dr. Martin Luther King. It is an initiative designed to answer President-elect Obama's call to volunteer on the January 19 King Holiday. More than 11,400 service projects are expected to take place.

As a media law teacher and researcher, I, like many of you, am often called to serve as the voice of free speech on campus. Like you, I get requests for panels and discussions and an occasional interview in a campus or local paper when some free speech debate erupts.

But as I watch legions of ordinary citizens sign up to serve and advocate for some cause – and do so quite actively, sleeves rolled up and all -- I wonder just what exactly is our responsibility as media law scholars to serve in this way? Are the panels and papers enough to say we've served our cause? Like many of you, I wander the halls of AEJMC's annual convention, always impressed by your work but wondering who else is really listening except the next scholar who might tip their hat with a citation.

In other words, at what point does that scholarship become truly active? And what exactly does active scholarship actually look like?

On this campus, the phrase "scholarship of engagement" has become popular, now a whole separate section on our c.v.'s, along with some accompanying snickers. That response is quite unfortunate, in my view, because when done well our scholarship can truly engage beyond the typical panel discussion and published article. Scholarship

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Change Cont'd...

always advocates. Why shouldn't it also actively engage?

A fascinating case in point has been the ongoing work of Stanford University law professor Lawrence Lessig, whose work on copyright reform many of us have followed with interest over the last decade. Lessig last year announced that he would cease working on and writing about copyright reform, because his work had essentially hit a wall: There would be no change on the issue of copyright policy until there was fundamental change in way Congress conducted policy reform. And there would be no change in the way Congress conducted policy reform until the influence of big money on policy changed.

Not surprisingly, Lessig had discovered that the influence of big money copyright holders was so great, there was no amount of common sense or reasoned scholarship that could be brought to bear to change copyright policy. The only option left was to actually change Congress.

So in April 2008, Lessig, a long-time lawyer, author and academic, changed his focus and launched Change Congress, an online social movement with an admittedly idealistic goal: to reduce the influence of big money on congressional elections, which in turn, would help to reduce the influence of big money on policy.

Ironically, the issue of changing the rules regarding campaign contributions rings all the familiar free speech alarm bells. But Lessig isn't advocating a reversal of *Buckley v. Valeo*. What Change Congress seeks are many of things we seek, such as transparency in government and greater access to records. Beyond those goals, Change Congress is launching a major campaign to publicly finance congressional elections and end the earmark problem.

In January, Change Congress used its Web site to launch a donor strike. Congressional donors signed up on the site and pledged not to donate to any federal candidate unless they support legislation making congressional elections citizen-funded, not special-interest funded. The online campaign is an effort to support the bipartisan Fair Elections Now Act sponsored by Sens. Dick Durbin (D-IL) and Arlen Specter (R-PA), and Reps. John Larson (D-CT) and Walter Jones (R-NC).

As the Change Congress site details (www.change-congress.org), under this legislation, congressional candidates who raise a threshold number of small-dollar donations would qualify for a chunk of funding—several hundred thousand dollars. If they accept this funding, they can't raise big-dollar donations. But they can raise contributions up to a certain amount (such as $100 or $250), which would be matched several times over by a central fund. This would create an incentive for politicians to opt into this system and run people-powered campaigns.

The strike attracted attention across the Web and in the traditional media. As of this writing, it has resulted in a half million dollars in withheld pledges – clearly not enough to change Congress, but certainly enough to create the kind of conversation that combines both scholarship and action. Lessig, of course, continues to write, research and present in the halls of academia. But he, like others, has recognized that real change doesn't happen on the basis of a study or a presentation. It involves understanding how to engage real people in the real issues that we study.

What might engaging real people in the debate on free speech look like? And how active and skilled are we in using the tools of online media to conduct that conversation beyond the narrow halls of academia and the newsroom? Can we, like Professor Lessig, take what we know to real people with the power to effect real change in the free speech debates?

LIBERTY TREE INITIATIVE

Liberty Tree Initiative Kicks Off Campus Program

McCormick Foundation grant supports First Amendment Education

At a time when only 3 percent of Americans can name the five freedoms of the First Amendment and a surprising number support government limits on freedom of expression, a new initiative is being launched to help raise awareness of these fundamental freedoms on America's college campuses.

The Liberty Tree Initiative, funded by a $100,000 grant from the McCormick Foundation, is designed to build awareness by bringing thought-provoking First Amendment programs

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Libety Tree Cont'd...

and speakers to campuses nationwide.

"The Liberty Tree Initiative is a remarkable partnership that taps into the energy of the First Amendment and the insights of experts, academic leaders, artists, musicians and journalists across this country," said Ken Paulson, editor of USA Today and one of the driving forces behind the initiative.

"The Liberty Tree Initiative is a wonderful opportunity to focus on the virtues of First Amendment freedoms," said Clark Bell, the McCormick Foundation's Journalism Program Director. "We are honored to support these festivals of freedom on college campuses and their communities."

These programs will continue the tradition of constructive and collegial conversations about freedom started by America's earliest patriots under an elm tree near the Boston Common in 1665. The program hopes to see a Liberty Tree, like the one in Boston, planted on participating college campuses as a symbol of the importance of the First Amendment to an educated public.

Paulson added that "there's no better place to explore and celebrate the First Amendment than America's campuses, and no better time than now."

The McCormick Foundation's grant will be used to fund programs and conferences on the core principles protecting freedom of speech, press, religion, assembly and petition protected by the First Amendment.

The initiative was founded in partnership with the American Society of Newspaper Editors, and with help and support from the Knight Foundation, the McCormick Foundation and the First Amendment Center at Vanderbilt University. The Center's perennial studies, available at firstamendmentcenter.org, reveal a fundamental lack of First Amendment education and diminishing support for free expression in this country.

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Head Notes Cont'd...

Of all the items in this particular park—the original Town Hall, Old Bell School (oldest known school building in the state), façade of the city's first fire station and replica pioneer log cabin, among others—the F.O.E. Ten Commandments display is the least likely candidate to consist of the government's speech. Perhaps I'm dense, but what would the city of Pleasant Grove be telling me with a five-foot stone decorated with the Eagles' eagle, the Chi Rho, the Star of David and the "all-seeing eye"?

As far as I can tell, those symbols have very little if anything to do with the history, Mormon pioneer or otherwise, of Pleasant Grove. The city of Pleasant Grove initially did not argue the Ten Commandments were its own speech when a small Salt Lake City religious sect named Summum sued in 2005 for the right to place a monument of its Seven Aphorisms in Pioneer Park. In fact it was not until Summum's appeal was pending in the U.S. Court of Appeals for the Tenth Circuit that Pleasant Grove began to wield the government speech argument.

The right of "government speech" is a new and undefined yet powerful threat looming over a variety of well-established free speech doctrines. It was not until 2005, in a case involving mandatory fees for beef advertisements, that the Supreme Court explicitly held government speech is not subject to constitutional challenge.

The ironic thing about so-called government speech cases is that the government never actually seems to be speaking. In 2005, Justice Scalia wrote for the Court in *Johanns v. Livestock Marketing Association* that an industry-funded ad campaign for beef was the government's speech, even though the ads were not paid for or produced by the government and even though the government did not identify itself in the ads. In 2006, Justice Kennedy wrote for the Court in *Garcetti v. Ceballos* that a Los Angeles County deputy district attorney spoke not for himself but rather for the government when he wrote a memorandum critical of a search warrant affidavit.

Even after reading the *Pleasant Grove* opinion, I am still not sure the Supreme Court knows how to define government speech or set appropriate limits on that supposed government prerogative. It seems to me the government speech doctrine is enveloping much of the territory formerly occupied by forum doctrine.

One thing is clear after *Pleasant Grove*: The Supreme Court's holding that Ten Commandments displays are government speech will not stop the constitutional challenges. Now that the government has adopted the display as its own speech, the obvious next step is a lawsuit based on the Establishment Clause.

Liberty Tree Cont'd...

"We were honored to host the first campus Liberty Tree program and help educate our students and the wider university community about the awesome rights and responsibilities embedded in the First Amendment," said Dr. Richard Campbell, director of the journalism program at Miami University, in Oxford Ohio, which hosted the inaugural Liberty Tree program in April of 2008. "We look forward to revisiting the First Amendment every April on our campus and hope other universities will join the effort."

"We're thrilled to be able to bring outstanding speakers and First Amendment programs to college campuses and grateful to the McCormick Foundation for making this exciting program possible," said Sandra Chance, the campus coordinator for the Liberty Tree Initiative and executive director of the Brechner Center for Freedom of Information at the University of Florida.

Colleges and universities interested in applying for a $5,000 grant can learn more about the program by contacting Chance at schance@jou.ufl.edu or by calling 352-392-2273.

McCormick Foundation

The McCormick Foundation is a nonprofit organization committed to strengthening our free, democratic society by investing in children, communities and country. Through its five grantmaking programs, Cantigny Park and Golf, and three world-class museums, the Foundation helps build a more active and engaged citizenry. It was established as a charitable trust in 1955, upon the death of Colonel Robert R. McCormick, the longtime editor and publisher of the Chicago Tribune. The McCormick Foundation is one of the nation's largest charities, with $1.2 billion in assets. For more information, please visit www.McCormickFoundation.org.

Annotated Bibliography, Winter 2009

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Free Speech

Ellis, E. M. (2008). "Garcetti v. Ceballos: Public Employees Left to Decide "Your Conscience or Your Job"." 41 Indiana Law Review 187.

In *Garcetti v. Ceballos*, a sharply divided 5-4 Supreme Court held that a public employee's speech made "pursuant" to the speaker's official job duties was afforded no First Amendment protection against an employer's retaliatory actions because such speech is made in the capacity of an employee and not in the capacity of a citizen for First Amendment purposes. This article makes an argument that courts should take a narrow interpretation of *Garcetti* when defining "official duties" to minimize unjustifiable interference with constitutional protection for speech on matters of public concern. The elementary school bus driver needs to raise his concerns regarding bus inspection violations. The levee district official needs to communicate her observations on levee maintenance and safety. The police officer needs to raise allegations of police brutality. Society needs to be afforded the opportunity to hear speech on such matters of public concern.

Suma, S. F. (2008). "Uncertainty and Loss in the Free Speech Rights of Public Employees Under Garcetti v. Ceballos." 83 Chicago-Kent Law Review 369.

In 2006 the Supreme Court held in *Garcetti v. Ceballos* that the First Amendment does not protect speech made pursuant to a public employee's official duties. Under the bright-line rule established by *Garcetti*, the government, as employer, does not need to justify its restrictions or retaliatory acts based on its employees' speech made pursuant to their job duties. Four justices dissented in *Garcetti* and this article considers these challenges to the majority's approach and considers practical and policy objections to the bright-line rule. It concludes that *Garcetti* may prompt litigation, discourage internal reporting, and preclude protection for the most valuable forms of public employee speech and proposes guidelines for how Garcetti should be interpreted and applied in order to mitigate these practical drawbacks.

Papandrea, M.-R. (2008). "Student Speech Rights in the Digital Age " 60 Florida Law Review 1027.

For several decades courts have struggled to determine when, if ever, public schools should have the power to restrict student expression that does not occur on school grounds during school hours. In the last several years, courts have struggled with this same question in a new context-the digital media. The dramatic increase in the number of student speech cases involving the Internet, mobile phones, and video cameras begs for a closer examination of the scope of school officials' authority to censor the expression of minors as well as the scope of juvenile

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Bibliography Cont'd...

speech rights generally. This article takes a close look at all the various justifications for limiting juvenile speech rights and concludes that none of them supports granting schools broad authority to limit student speech in the digital media, even with respect to violent or harassing expression. Furthermore, this article argues that the tests most courts and commentators have applied to determine whether a school may control student speech grant schools far too much authority to restrict juvenile speech rights. The article concludes that the primary approach schools should take to most digital speech is not to punish or restrict such expression, but instead to educate students about how to use digital media responsibly.

Press, J. S. (2008). "Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory." 102 Northwestern Law Review 987.

For almost twenty years, society and the courts have struggled to harmonize the principles of the Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Speech Clause. The tension between these two clauses has preoccupied the bench, legal thinkers, and ordinary citizens alike. But rarely do these two dictates conflict more than in the context of "hate speech," or antilocution regulation, and universities' antiharassment policies, or--as they are more disparagingly known--"campus speech codes."

Price, A. E. (2008). "Understanding the Free Speech Rights of Public School Coaches." 18 Seton Hall Journal of Sports and Entertainment Law.

Anyone who has ever been a member of a sports team, from youth soccer to Division I athletics, understands the importance of the relationship between the coach and the athletes. While public school coaches, like public school teachers, are subject to the authority and control of their school employer, such control must be exercised within the limits of the Constitution. A recently decided Third Circuit case, *Borden v. School District of the Township of East Brunswick*, addresses the issue of the extent to which constitutional safeguards are afforded to public school coaches. This article argues that since public school coaches are not afforded a right to academic freedom, the Free Speech Clause must protect them.

National Security

Eyink, B. D. (2008). "Constitutional Secrecy: Aligning National Security Letter Nondisclosure Provisions with First Amendment Rights." 58 Duke Law Journal 473.

First created in the 1980s, national security letters and their nondisclosure provisions evaded judicial review until 2004. These secretive investigative tools allow federal agencies such as the FBI to compel disclosure of information about hundreds of thousands of people while also allowing the same agencies to unilaterally issue gag orders that can silence the people who receive these letters. This article examines the nondisclosure provisions in the national security letter statutes. It argues that the nondisclosure provisions are unconstitutional prior restraints on speech and content-based speech restrictions. This article then proposes a three-part solution that constitutionally balances the government's need to protect national security with its citizens' rights to freedom of speech.

Internet Law

Hackett, L. L. (2008). "Taming Cyberspace: Broadcasting as a Model for Regulating the Internet." 14 Widener Law Review 265.

The Internet is a modern technological marvel, inundating users with information "as diverse as human thought." Information diversity in an uncensored state, however, has brought an alarming amount of sexually explicit material to children with just a few clicks of a mouse. The increased availability of such material has led to an explosion of criticism regarding the legislative efforts to regulate this new medium of communication. Online pornography has still prospered, despite Congress's efforts to devise legislation protecting children. This article focuses on the similarities of the Internet and broadcasting medium, which receives the most limited First Amendment protection, and why these similarities justify more limited First Amendment protection on the Internet.

Penney, J. W. (2007-2008). "Privacy and the New Virtualism." 10 Yale Journal of Law & Technology.

First generation cyberlaw scholars were deeply influenced by the uniqueness of cyberspace, and believed its technology and scope meant it could not be controlled by any government. Few still ascribe to this utopian vision. However, there is now a growing body of second generation cyberlaw scholarship that speaks not only to the differential character of cyberspace, but also analyzes legal norms within virtual spaces while drawing connections to our experience in real space. The author calls this the New Virtualism. Situated within this emerging scholarship, this article offers a new approach to privacy in cyberspace by drawing on what Orin Kerr calls the internalist or virtualist perspective. The virtualist approach to privacy in cyberspace shifts the focus away from the concept of privacy itself, which has been over-theorized and over-categorized by privacy theorists, to analyzing and theorizing persons in cyberspace and how they ought to be understood. It focuses on virtual persons and the distinct privacy concerns they raise, and reconnects ideas about informational and data privacy to traditional normative justifications for privacy based on personhood. Adopting a virtualist approach to privacy in cyberspace has conceptual, normative, constitutional, and public policy benefits.

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