Media Law Notes

Volume 41, No. 2 Law and Policy Division, AEJMC Winter 2013

Head Notes

By Kathy Olson
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The biggest news out of this year's winter meeting in Dallas, other than the unqualified success of vice head and program chair Derigan Silver's chip tossing/program planning, is the long-awaited end of the chip auction as we know it. It is no more. Ceased to be. Expired and gone to meet its maker.

Kathy Olson

Still left unsettled is what, exactly, will take its place. The Council of Divisions is setting up a working group to examine a short list of options that can be implemented for next year. Options include setting up a system to "convene" electronically (either in real-time or not) or having someone (a panel of conference planners or someone at AEJ) do the scheduling after divisions and interest groups send in their preferences. Cost and flexibility will be key factors in the final decision, as will the ability to keep the communal nature of the current process. While the chip auction produced NYSE-level noise and clamor, it also allowed for a lot of personal interaction and shared planning among divisions and interest groups, something the COD is eager to retain.

The new system will be implemented for the 2014 conference in Montreal. That means next year's putative vice head and program chair, Chip Stewart, must forgo the pleasure of poker chip-flinging in a far-flung locale. More important, it will save the division $800 a year, the amount allotted for officers to attend the winter meeting.

As for this year's conference, Derigan did yeoman's work to get the division excellent time slots for our programming in August. The location in D.C. provided for some first-rate programming, including panels on the FCC and the Supreme Court. Joseph Russomanno of Arizona State has arranged for a special tour of the high court, as well. If you're interested in the tour, be sure to email Joe at russo@asu.edu as soon as possible, because space will be very limited.

PF&R chair Amy Sanders is putting together another pre-conference legal roundup, this time on the law of social media. This panel may prove to be an annual thing – it was very popular last year and is a great way to prep for fall semester classes.

In other news, Courtney Barclay, our Southeast Colloquium chair, reported a bumper crop of paper submissions, so this year's conference – in sunny Tampa, Fla., at the end of February – should be a big success. You can find registration and hotel information on the AEJ site.

Finally, an announcement. The winner of the contest to raise the most money for the Centennial Campaign was ... drum roll, please ... the Mass Communication and Society division. Oh! So close!

Highlights From UNC *Hazelwood* Symposium

By Frank LoMonte
Executive Director
Student Press Law Center

Virginia journalism teacher Kate LaRoue is a walking specimen of, as she puts it, "what happens when *Hazelwood* goes wrong."

In May 2011, LaRoue was yanked into her principal's office at James Madison High School and told that her students' newspaper, The Mountaineer, was being impounded and any remaining issues for the term canceled.

The flashpoint was a student editorial, "Falling Apart at the Seams," that detailed the unsafe and handicapped-inaccessible condition of Madison High's antiquated building.

Days later, LaRoue was notified that she'd be stripped of her journalism duties and reassigned to a special-education class in a different building. Instead, she quit and moved across the state to a more supportive district.

LaRoue shared her story with dozens of law students, educators and attorneys who gathered Nov. 7 and 8 at the University of North Carolina-Chapel Hill for a symposium reflecting on 25 years under the legal standard created by the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*.

In *Hazelwood*, the Supreme Court decided a St. Louis-area principal did not violate the First Amendment by yanking two pages from the student newspaper over concerns that the stories dealt with "mature" subject matter and might embarrass some families.

The Court's January 13, 1988, decision marked a drastic retreat from *Tinker v. Des Moines Independent Community School District*, the landmark 1969 ruling in which the Court held that nothing less than "material and substantial interference" with

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INSIDE THIS ISSUE:

The First Amendment Dream Docket That Just Won't Be

By Clay Calvert
Professor
University of Florida

When October 1, 2012 rolled around and the U.S. Supreme Court began its current term, veteran journalist and legal correspondent Tony Mauro observed on the First Amendment Center's website that no "direct First Amendment cases" were on the argument docket, suggesting "a possible respite from free-speech . . . cases for the near-to-middle future."

In its three previous terms, the Court took on a truly eclectic mix of high-profile speech battles. The disputes made great fodder for academic scholarship and classroom discussion, even if the end results in some instances were minimalistic, predictable or anticlimactic. There were crush videos, fleeting expletives and violent videogames, and there were funeral protesters, lying scoundrels and big-spending corporations – colorful topics and characters, one and all.

Because a short-term, high-court reprieve from such provocative areas means less grist for the classroom mill, I've assembled my own dream docket of topics, cases and controversies involving First Amendment issues the Supreme Court should be hearing this term. And because professors generally live in fantasyland, assembling this list was a snap for me.

I mean, forget the rule of four – Paul Robert Cohen, by the way, probably would have put that last phrase differently – in granting writs of certiorari. This is the rule of one. This is my one shot, my one opportunity to seize everything I ever wanted in a high court docket, and I'm not going to let it slip. So here goes – four topics the Court should be taking on, some more serious than the others.

1. Off-Campus, Online Student Speech: Giving new meaning to the phrase "high court," Chief Justice John Roberts and his colleagues had fun back in 2007 with the phrase "Bong Hits 4 Jesus" in the quirky case of *Morse v. Frederick*. But the Court has since passed repeatedly on recent opportunities – in 2012, it denied cert in *Kowalski v. Berkeley County Schs.*, *Blue Mountain Sch. Dist. v. Snyder*, and *Hermitage Sch. Dist. v. Layshock* – to consider a serious issue that arises far more often than do cases about addled dudes hoisting banners near Olympic Torch relays. In particular, the Court needs to establish, sooner rather than later, the jurisdictional authority and substantive rules that govern school officials' efforts to punish students for online speech that is created, posted or transmitted while off campus during non-school hours. Until the rules are clearly established, school administrators will continue to weasel off the hook of monetary liability for their censorial deeds under the doctrine of qualified immunity. While winning over Justice Clarence Thomas on the speech rights of students admittedly is a lost cause, clarity and uniformity across lower-court jurisdictions is badly needed.

2. The FCC's Indecency Regime: The Court dodged the First Amendment bullet in 2012 in *FCC v. Fox Televisions Stations* (Fox II), but I'd like to put the FCC on some fast-track "fair notice" that the Court should now hear those substantive issues in what will be Fox III. It's time to either declare the indecency rules void for vagueness or to heed Justice Ginsburg's call in Fox II to overrule Pacifica Foundation. And, just for kicks, the Court in the same case should find a way to attack the FCC's current and vastly expansive definition of "profane language," which employs the nebulous phrase "so grossly offensive." It's not as if modifying "offensive" by the word "grossly" makes the standard 144 times more clear.

3. Public Employee Speech Involving University Professors: The Supreme Court in 2006 in *Garcetti v. Ceballos* rejected "the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties." It left open the issue of whether "the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching," although Justice Kennedy wrote for a narrow majority that "some argument" can be made "that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence." It's time for the Court to resolve this issue for all of us teaching at public institutions, and I'm willing to be the test-plaintiff if the ACLU has my back.

4. Alabama Code § 13A-12-200.2 (2012): This law makes it a crime to sell – wait for it – vibrators, using the outdated, moralistic notion of obscenity as its legal lynchpin. Specifically, the statute makes it unlawful "to knowingly distribute, possess with intent to distribute, or offer or agree to distribute any obscene material or any device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." It's unclear in Alabama how many people have been killed by guns compared to Rabbit Pearls. Even in the face of *Lawrence v. Texas*, the U.S. Court of Appeals for the Eleventh Circuit upheld the statute in 2007 and, sadly, the U.S. Supreme Court denied certiorari in *Williams v. King* that same year. The Court should consider this law not only to expand notions of sexual privacy, but also to gut the whole notion of an obscenity standard that is based on moralistic judgments about what is prurient and patently offensive. In the meantime, Pink's song "U + Ur Hand" continues to take on added significance in Alabama.

That's my docket and I'm sticking with it.

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

Call for Submissions for the Division's Fifth Annual Teaching Ideas Competition

By Michael T. Martínez
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The call for submissions for the Fifth Annual Teaching Ideas Competition of the Law and Policy Division is now open. We are looking for the best and most innovative ideas for incorporating experiential learning in communication law and policy classes. Experiential learning is the process of gaining knowledge and insight through direct experiences – learning by doing. Submissions could include an innovative assignment, activity, or lesson plan, or a particularly original approach to teaching through experiential learning.

Winning submissions will receive a certificate and a cash prize – $100 for first place; $75 for second place; and $50 for third place. Winners will also be recognized during the AEJMC Law and Policy Division business meeting, and the winning ideas will be showcased on our division website and in our newsletter. Previous winners are available at http://www.aejmc.net/law/teaching.html.

All submissions must be received by Monday, April 15, 2013. Submissions should be sent as an email attachment to Michael T. Martinez at mtmartinez@utk.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 (single-spaced) according to the following format: title; introduction; your rationale for the idea; explanation of how you implement the teaching idea; and the student learning outcomes.

A panel of judges will blind review each submission based on the 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 15, 2013.

If you have any questions please do not hesitate to contact me at mtmartinez@utk.edu.

(Hazelwood, continued from page 1)

school business could justify censoring students.

As a result of *Hazelwood*, schools may censor "curricular" speech for any reason "reasonably related to legitimate pedagogical concerns."

Because *Hazelwood* casts such a shadow over not just the teaching of journalism but the teaching of civic values, the Student Press Law Center organized the UNC symposium in partnership with the UNC Center for Media Law and Policy, UNC's First Amendment Law Review, and the North Carolina Scholastic Media Association. More than 120 people attended parts of the seminar, which was sponsored by Education Week magazine.

One objective of the event was to bring together experts in journalism education with leaders in the field of civics education. Advocates for civic education have long recognized the importance of discussing provocative social and political issues as part of the learning process, but they have not mobilized in opposition to school censorship as the scholastic journalism community has.

Attendees at the symposium learned, from experts such as Erwin Chemerinsky, that the practical effect of *Hazelwood* has virtually read the First Amendment out of existence in public schools – and, increasingly, in colleges as well. In January 2012, the Sixth Circuit U.S. Court of Appeals became the fourth of the nation's 12 geographic circuits to adopt Hazelwood as the standard governing the speech of students at all levels, even – in that case – the speech of a 31-year-old graduate student.

Illustrating just how little legal protection students can count on, Texas trial lawyer Larry Watts riveted the audience with the story of his client, "Hillaire S.," a 16-year-old high school cheerleader from Silsbee, Texas, who was sexually assaulted by a group of student athletes at an off-campus party.

At a basketball game weeks later, the cheerleading squad performed a personalized routine to cheer on a player who had been identified as the lead attacker (and who later pleaded guilty to a misdemeanor assault charge). Rather than recite the attacker's name, Hillaire quietly sat down – prompting her coach and principal to remove her from the squad and send her home.

When Hillaire and her parents sued the Silsbee Independent School District for violating the First Amendment, a federal district judge threw out her case as frivolous and ordered the family to pay the school's legal bills. Relying on the precedent of Hazelwood, a three-judge panel of the Fifth U.S. Circuit Court of Appeals agreed: "In her capacity as a cheerleader, H.S. served as a mouthpiece through which [the school] could disseminate speech – namely, support for its athletic teams."

The ruling, said Watts, devastated the teenager: "She was raped physically. She was raped emotionally. She was raped judicially."

Panelist David Cuillier, director of the University of Arizona Department of Journalism, framed the severity of school censorship as an issue of college readiness.

"I just have to say, plain and simple, the data show we're raising a generation of sheep," Cuillier said. "I don't think it's extreme to say we risk democracy.

"I have been so alarmed by the kinds of students coming into our college programs who are completely unprepared for what journalism is about. They think it's okay to be told what to print and what not to print," he said. "They don't challenge authority like they should. We have to reprogram them."

Law & Policy Division Schedule at the 2013 Conference

By Derigan Silver
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The 25th anniversaries of two major communication law cases and a location with access to major communication policy experts, media lawyers and journalists who cover the U.S. Supreme Court have all combined to make for an excellent schedule for the Law and Policy Division for the 2013 AEJMC Conference in Washington, D.C. In addition to great panels, we have great panelists who have already committed to attending the conference, including Sherrese Smith, chief legal counsel for the Federal Communications Commission. The location of the conference will give many of the panels a Supreme Court theme, kicking off with a private tour of the Court on the first day of the conference for the first 15 members of our division to sign up. In addition, we will have panels with journalists who cover the Court and lawyers who argue in front of it. Adam Liptak from the New York Times, Robert Barnes from the Washington Post, Pete Williams of NBC News, and Tom Goldstein, the founder of SCOTUS blog, have all agreed to appear together. We also have several lawyers who have argued before the Court, including Alan Isaacman (*Falwell v. Hustler Magazine*), Lee Levine (*Bartnicki v. Vopper* and *Harte-Hanks v. Connaughton*), and the aforementioned Tom Goldstein. The only bad part about being the programming chair this year was that not all the amazing panels we had submitted could be accepted. Thanks to all our members who submitted proposals, and I hope you will submit your great ideas next year if they were not selected for this year's conference.

Wednesday, August 7
Pre-conference sessions

9:30 a.m.-1:00 p.m.	**PFR panel: Social Media Law Update** Amy Sanders, coordinator and moderator 9:30-10:30 a.m. Panel #1: Getting to Know Social Media 10:45-11:45 a.m. Panel #2: Legal Issues in Social Media 12:00-1:00 p.m. Panel #3: Ethical Issues in Social Media

Thursday, August 9

10:00 a.m.-12:00 p.m.	**Tour of United States Supreme Court Building** Joseph Russomanno, coordinator and moderator Note: This is a private tour of the building and will be limited to the first 15 Law and Policy Division members who sign up. To make room for members, no non-members will be eligible for the tour. To register, email Joseph Russomanno at russo@asu.edu
1:30-3:00 p.m.	**Refereed research paper session**
3:15-4:45 p.m.	**PFR Panel: Covering the U.S. Supreme Court in the Digital Age** (co-sponsored with Political Communication Interest Group); Richard Davis, moderator
5:00-6:30 p.m.	**Refereed research paper session**

Friday, August 9

7:00-8:00 a.m.	**Law and Policy Division Executive Committee Meeting**
8:15-9:45 a.m.	**PFR panel: Blasphemy, Freedom of Speech and Global Communication** (co-sponsored with Ethics Division); Matt J. Duffy, moderator
11:45 a.m.-1:15 p.m.	**PFR panel: Current Issues at the Federal Communications Commission: What's likely to change after the 2012 election?** (co-sponsored with Electronic News Division); Jane Kirtley, moderator
1:30-3:00 p.m.	**Scholar-to-Scholar session for our division**
3:15-4:45 p.m.	**PFR panel: Life After 25 Years of Hazelwood** (co-sponsored with Scholastic Journalism Division); Dan Kozlowski, moderator
5:00-6:30 p.m.	**Teaching panel: Student Media, J-School Newsrooms and Class Publications: Can They Coexist?** (co-sponsored with Council of Affiliates); Peter Bobkowski, moderator
6:45-8:15 p.m.	**Division Membership Meeting**
8:30-10:00 p.m.	**Off-site Law and Policy Division Social** Location: TBA

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(Division Schedule at the 2013 Conference, continued from page 4)

Saturday, August 10

8:15-9:45 a.m.	**Research panel: 25 Years After Hustler: The Current State of Intentional Infliction of Emotional Distress** (co-sponsored with Newspaper and Online News Division); Joseph Russomanno, moderator
1:45-3:15 p.m.	**Refereed research paper session**

Sunday, August 11

11:00 a.m.-12:30 p.m.	**Refereed research paper session**
12:45 p.m.-2:15 p.m.	**Refereed research paper session**

Call for Papers for the 2013 AEJMC Conference

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2013 AEJMC Conference in Washington, D.C. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, FCC issues, intellectual property, obscenity, freedom of information, and a myriad of other media law and policy topics. Papers outside the scope of communications law and policy will be rejected.

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 conference to present accepted papers. Paper authors should submit via the online submission process as described in the Uniform Paper Call. The deadline for submissions is 11:59 p.m. Central Daylight Time on Monday, April 1, 2013.

Law and Policy Division papers must be no longer than **50-double-spaced pages** with one-inch margins and 12-point font, including cover page, appendices, tables, footnotes and/or endnotes, and end-of-paper reference list, if applicable. (Footnotes and/or endnotes and reference list may be single-spaced.) Papers that exceed 50 total pages or are not double-spaced will be automatically rejected without review. Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities, including APA, Chicago, or MLA styles.

Papers that include author-identifying information within the text, in headers, or within the embedded electronic file properties will be **automatically rejected** (review the instructions on the AEJMC website for stripping identifying information from the electronic file properties). Authors are solely responsible for checking the final uploaded version of their paper for any and all author identifying information.

There is no limit on the number of submissions authors may make to the Division. Any paper previously published or presented at a conference except the AEJMC Southeast Colloquium or the AEJMC Midwinter Conference is not eligible for the competition.

In 2013, the Division is introducing a **Top Debut Faculty Paper Award**. The top paper accepted by a faculty member who has never had a paper accepted by the Division will be awarded a prize of $150 and will receive free conference registration. For papers with multiple authors, multiple faculty and/or faculty and student, to be eligible none of the authors of the paper may have previously had a paper accepted by the Division at the national conference. In addition, only the faculty author presenting the paper will be eligible for free conference registration.

Student authors of single-authored papers should clearly indicate their student status on the cover page. Student submissions will be considered for the $100 Whitney and Shirley Mundt Award, given to the top student paper. The Law and Policy Division will also cover conference registration fees for the top three student paper presenters.

If you have questions, please contact Chip Stewart, Law and Policy Division Research Chair, Schieffer School of Journalism, TCU Box 298060, Fort Worth, TX 76129. Phone: (817) 257-5291; email: d.stewart@tcu.edu

Call for Reviewers for the 2013 AEJMC Conference

The Law and Policy Division needs your help in reviewing papers for the 2013 AEJMC Conference in Washington, D.C. To ensure that only the highest quality papers are presented at the upcoming conference and to keep the number of papers per reviewer at a manageable level, we need about 75 to 80 reviewers.

Reviews will occur between April 1 and May 1, 2013. Ideally, we will have enough reviewers volunteer so that each reviewer will handle three papers – but this depends on how many volunteers we have.

If you would be willing to serve as a reviewer, please contact Chip Stewart, Law and Policy Division Research Chair, via email at d.stewart@tcu.edu or by phone at (817) 257-5291.

Please note that graduate students may not review papers, and you may not both review for and submit a paper to the Law and Policy Division. If you aren't sure if you will submit a paper, please volunteer to review and we can take you off the list when the time comes. If you submit a paper to other AEJMC divisions, you are still eligible to judge for Law and Policy.

To help best match reviewers to paper topics, please specify in your email or voice mail message your legal interests and methodological specialty (e.g., libel, freedom of information, broadcast regulation, survey research). Also, if you would like to serve as a discussant or moderator for the conference, let me know.

Thank you for your help to make the conference a success.

Legal Annotated Bibliography

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


David Wolfgang

OFFENSIVE SPEECH

Bot, M. (2012). "The Right to Offend? Contested Speech Acts and Critical Democratic Practice." 24 Law and Literature 232.

In the wake of the Danish cartoon crisis, Islam critic Ayaan Hirsi Ali defended the right to offend against an allegedly hegemonic, "multiculturalist" obligation not to offend that she believed made it impossible to criticize Islam. By defending the right to offend, Hirsi Ali took exception to "self-censoring" newspapers and television networks that decided not to show the Danish cartoons, to politicians who dismissed the cartoons as "disrespectful" and "insensitive," and to corporations that distanced themselves from Denmark in advertising campaigns in the Middle East.

Legal philosopher Ronald Dworkin also intervened in the cartoon crisis with an argument against self-censorship, and the title of his article for The New York Review of Books, "The Right to Ridicule," is similar to the title of Hirsi Ali's speech, "The Right to Offend." Unlike Hirsi Ali, Dworkin argued that the decision by various editors not to publish the cartoons was wise in light of the sometimes deadly violence that had been unleashed around the world, but he nevertheless defended the right to ridicule as a matter of principle.

In this article, the author follows Hirsi Ali and Dworkin in considering contested expressions, such as the cartoons, as speech acts that need to be judged primarily based on the role they play in a democracy. The author argues that such judgments cannot be made within a narrow framework that simply balances "negative" liberties: the freedom from censorship versus the freedom from offense. Instead, judgments on contested expressions require analysis of the specificity of the speech acts that are being performed, as well as a conception of critical democratic practice.

FCC POLICY

Cramer, B. W. (2012). "Unasked Questions and Unquestioned Answers: The Perils of Assuming Diversity in Modern Telecommunications Policy." 17 Communication Law & Policy 265.

The term "diversity" appears regularly in American telecommunications statutes, so promoting that principle is a prominent policy goal. However, the term has never been defined in any statute. Without a working definition of "diversity," and with many statutory requirements to promote it, lawmakers and regulators have inaccurately conflated the principle with other political buzzwords and have subjected it to the winds of politics and ideology.

In short, the modern post-broadcasting media marketplace has eroded the government's justification for regulating media content (or much of telecommunications in general) in the public interest. Regardless, protecting and withholding the public interest remains a policy goal in existing telecommunications statutes, and recent devolutionary trends have not yet been reflected in legislation. Until the 1996 Telecommunications Act is updated or overhauled, the FCC will remain beholden (at least at a high level) to the responsibilities required by the undefined and possibly outdated public interest standard.

This article analyzes the regulatory history of the term "diversity" in media and telecommunications and covers the underlying legal issues in finding a working definition of the term. The article then discusses the poor judicial record of diversity regulations in light of equal protection and established communication law. Policymakers must not avoid these problems and must not assume that diversity does not need a working definition.

LIBEL

Ludginton, S. H. (2012). "Aiming at the Wrong Target: The 'Audience Targeting' Test for Personal Jurisdiction in Internet Defamation Cases." 73 Ohio State Law Journal 541.

In *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the Fourth

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Research Chair Highlights ExpressO and SSRN

By Chip Stewart
Research Chair
Texas Christian University

A couple of years ago, I was looking for a home for an article. It was an important one for me – basically the conclusion of my dissertation, years of work in the making – but my submissions to law reviews by traditional methods hadn't been successful.

At a conference, I was talking about this with one of my committee members, Richard Reuben, a professor in the law school at the University of Missouri who was well-versed in the submission game. And he asked a peculiar question, I thought at the time. "Have you tried expresso?"

First, I was irked, because I HATE it when people can't say "espresso" right. Second, I realized Richard was too smart to be saying that. He was, of course, referring to ExpressO, the law review manuscript submission site launched by law professors at Cal-Berkeley about a decade ago.

I tried it – not for this article, but for my next – and I was pleased with the results. While sending out a manuscript on copyright matters, I was able to choose from a list of communication law and intellectual property law journals. You write a generic cover letter (or specific if you think a journal would prefer it), upload your manuscript, and then you can submit to dozens of journals at once.

The cost was manageable – about $2 per journal – and the site tracks status, noting that journals have confirmed receiving your manuscript. You can easily withdraw manuscripts after receiving an offer and use the site to contact editors.

It also leads to some interesting results. I had the quickest rejection of an article in my personal history – about 12 hours from the Stanford Technology Law Review – but I had multiple offers to publish in a matter of weeks.

The site is not ideal for submitting to peer-reviewed journals, for obvious reasons – in particular, you won't be submitting to multiple journals at once – but if you're able to publish in law journals, it's worth checking out.

Another feature I've enjoyed on ExpressO is one it shares with Social Science Research Network (SSRN) – it serves as a home for papers in progress and accepted manuscripts, where readers can view and download them before formal publication. I currently have most of my articles either in downloadable format or with links to the URL where they can be downloaded in full on my ExpressO page. Each month, ExpressO sends me an email showing download and search results that led people to the page. For example, the most recent article I've posted – a manuscript that has been accepted for publication but won't actually come out until mid-2013 – has already been viewed more than 350 times on the site.

That ability to track search results and to make an article (even if just in draft form) available to the audience has some great benefits and risks. The main benefit is that your ideas can be in public circulation for discussion and comment so much earlier than the traditional print journal publication cycle allows. If you're writing about tech in particular, it's great to be able to have access to these works, even in draft form, as both an author and as a scholar. We're in a time when the traditional publication model doesn't lend itself well to the age of Google and open access. While ExpressO and SSRN may not be perfect models for what comes next, they're a start.

That said, there are unquestionably risks with using these sites. For one, your draft article may become more cited and used than your final published version – which is less than ideal if it hasn't been cleaned up and revised with the help of expert editors. I sometimes refer to the version of one article I have on ExpressO as the "director's cut" – it's about 10 pages longer, it's less well-organized, and it's less focused than the final version that the world will see when it's in print next year.

Second, you run the risk of screwing up the peer review process if you upload a manuscript on ExpressO or SSRN as it's being considered. This probably sounds very obvious to you, but I'm not as smart as you, so I learned this lesson the hard way. I uploaded a paper to ExpressO in April this year while also sending it to a peer-reviewed journal, and I shared the link to the manuscript on Facebook and Twitter for my professor friends for their comments. I then received a note from a journal editor that this was compromising peer review because some of the potential reviewers had either read the article or even just saw my link to it, thus disqualifying them. Lesson learned: don't upload until you're accepted. Let my embarrassment save you from the same.

Third, some journals may consider the online manuscript a "previous publication" that disqualifies your article from publication. It's worth checking with journals in advance to see what their policies are on this. (Personally, I say if a journal believes this is prior publication, then you should go find another journal to publish in, but that's for another column.)

Fourth, there's the nightmare scenario that somebody uses your work to build his or her own article, or to beat you to publication, thus stealing your thunder, as the saying goes. This may be urban legend, but a colleague has mentioned this very thing happening, leading to problems both for the original manuscript writer and the secondary author, who got both an earlier publication and allegations of plagiarism out of the deal.

Finally, some journals may not allow publication in this form even after the article has been accepted or published. It's worth reading the fine print on those author agreements you sign to see what your rights and limitations are. For example, Journalism & Mass Communication Quarterly allows you to upload and share the pre-peer-reviewed version of your manuscript in other repositories such as SSRN. Our sense after the Law and Policy Division members meeting in August was that Communication Law & Policy did not allow uploading manuscripts in this way.

SSRN and ExpressO may not be a perfect fit for you in light of these risks, but I've found them to be beneficial. I've referred students in my graduate Information Law and Policy class to SSRN to download draft articles for our readings and for their research papers. As I mentioned, this may not be where the future of academic publishing is, but it's a step in that direction, and it's worth checking out.

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Circuit crafted a jurisdictional test for Internet defamation that requires the plaintiff to show that the defendant specifically targeted an audience in the forum state for the state to exercise jurisdiction. This test relies on the presumption that the Internet - which is accessible everywhere - is targeted nowhere; it strongly protects foreign libel defendants who have published on the Internet from being sued outside of their home states. Other courts, including the North Carolina Court of Appeals, have since adopted or applied the test.

The jurisdictional safe harbor (ironically) provided by the very ubiquity of the Internet is no doubt welcomed by media defendants and frequent Internet publishers (e.g., bloggers) whose use of the Internet exposes them to potentially nationwide jurisdiction for defamation. But it may go too far in protecting libel defendants from facing the consequences of their false and injurious statements. For every libel defendant insulated from jurisdiction in a remote location, there is also a libel plaintiff who has potentially been denied an effective remedy in a convenient location.

This article argues that the jurisdictional test created in *Young* is flawed and particularly should not be applied to libel defendants. It concludes with a simple suggestion: that the appropriate test for personal jurisdiction over libel defendants in cases of Internet defamation is the standard minimum contacts analysis.

NET NEUTRALITY

Hazlett, T. H. & Wright, J. D. (2012). "The Law and Economics of Network Neutrality." 45 Indiana Law Review 767.

The Federal Communications Commission (FCC) released a Network Neutrality Order on December 23, 2010 ("NN Order") that regulates broadband Internet Service Providers. While Internet growth and innovation are significant, the FCC finds that the marketplace "faces real threats." Left unregulated, the FCC believes broadband providers will inevitably be tempted to bias the access service provided to end users by favoring applications that they own or are paid to support. This would force upstart service suppliers to bargain with a "gatekeeper," and this undermined the ability of users "at the edge" of the "open internet" to freely communicate with all others.

This paper critiques the NN policy – specifically the no blocking and no unreasonable discrimination rules. The article focuses on the economic impact of net neutrality regulations and explains the regulatory status of the Internet. It is beyond paradoxical that the FCC argues that it is imposing new regulations to preserve the Internet's current economic structure – a structure that has developed, thus far, in an unregulated environment where firms are free to experiment with business models – and vertical integration – at will.

The final part deals with the economic arguments marshaled by the FCC to support its claim that anticompetitive foreclosure threatens to disrupt broadband market gains. On the one side, the FCC ignores compelling evidence that "open access" regulations have distorted broadband build-out in the United States by reducing subscriber growth when imposed and increasing subscriber growth when repealed. On the other hand, the FCC manages to cite just one study – not of the broadband market – to support its claims of widespread foreclosure threats. This empirical study, upon closer scrutiny than the FCC appears to have given it, actually shows no evidence of anticompetitive foreclosure. This fatal analytical flaw constitutes a smoking gun in the FCC's economic analysis of net neutrality.

SHIELD LAWS

Lee, William E. (2012). "The Demise of the Federal Shield Law." 30 Cardozo Arts & Ent. LJ 27.

As part of its unprecedented crackdown on leaking, the Obama administration in late 2010 charged former CIA officer Jeffrey Sterling with unauthorized disclosure to New York Times reporter James Risen of national defense information about a CIA program to disrupt Iran's development of nuclear weapons.

The government wants Risen to testify at trial about his relationship with Sterling. Like many journalists before him, Risen claims he could not cover national security, intelligence, and terrorism without confidential sources; he has repeatedly said he will not reveal his confidential sources. United States District Court Judge Leonie M. Brinkema wrote that a criminal trial subpoena is "not a free pass for the government to rifle through a reporter's notebook." Because the government has other evidence, such as email messages, phone records, and computer files supporting its claim that Sterling leaked to Risen, the judge ruled that Risen's testimony was not critical to demonstrating Sterling's guilt. The United States disputes the existence of a First Amendment-based journalist's privilege in the context of a criminal trial and is appealing Brinkema's decision to the Fourth Circuit.

In this article, Lee shows that the Supreme Court remains committed to treating the First Amendment's press and speech clauses as interchangeable. There is consequently little prospect of the Court revisiting *Branzburg v. Hayes* and creating a First Amendment-based journalist's privilege. Any uniform federal shield protection will have to come from Congress, but as Lee explains, Congress has been unable to solve the problem of national security leaks in a manner that garners bipartisan support. Finally, Lee discusses the challenge posed to shield laws by the emergence of bloggers and "citizen-journalists."

BROADCAST REGULATION

Wright, George R. (2012). "Broadcast Regulation and the Irrelevant Logic of Strict Scrutiny." 37 J. Legis. 179.

For decades, legal regulation of the content of broadcast television entertainment programs has looked for guidance to the case of *Federal Communications Commission v. Pacifica Foundation*. However, *Pacifica* has not inspired complete approval among commentators or the courts. This article reassesses and ultimately rejects the *Pacifica* case as a framework for broadcast entertainment television content regulations. It rejects *Pacifica* even assuming that the decision was intended to promote the welfare of children, parental decision-making authority, and the broader public well-being. Any worthy interests that are significantly promoted by *Pacifica* and related cases must be shown, and not merely assumed, to exist.

The article focuses on questions of the realistic effectiveness of typical broadcast television regulations in promoting the typically cited governmental interests in our own contemporary technological and cultural environment.

Professor Teaches Students Nuances of Covering Courts

By Michael T. Martínez
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Students "start with a 911 call and walk through the process," Prof. Toni Locy said. That's how she teaches aspiring journalists how to cover trials in her "Covering the Courts and the Law" class at Washington and Lee University. "I try to teach them what I wish someone would have taught me before I started covering the courts," she said.


Michael Martinez

Locy, the Donald W. Reynolds Professor of Legal Reporting, teaches three courses dealing with the courts. In addition to the "Courts and Law" course, she teaches "Covering Great Trials in History: The Impact of the Press and the Public on Justice" and "Covering Crime & Justice: A Practicum." Two of these three courses focus on experiential learning.

Rather than only teaching the concepts of trial reporting in the classroom, Locy said she "prefers to do real stuff, get records, etc." She sends her students to pull files, read them and take notes. Locy reads the same files and then compares her notes with the students' notes. For example, one thing she repeatedly stresses is to write down the magistrate's name because you never know when you are going to have to try to reach him on deadline.

She wants her students to get over the fear of dealing with public officials. They have met with the police chief, prosecutors, and judges and they learn to deal with legal issues. Her students have toured the county jail and learned how the system works. Some of her students have conducted "jailhouse" interviews. They spend a lot of time on real cases, and she teaches them the reasons behind our legal rights.

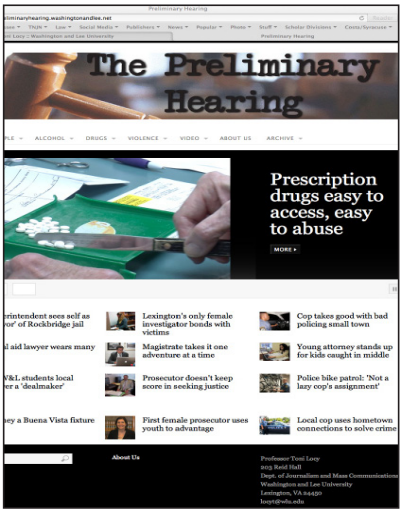
Overall, the public officials her students encounter have been very accommodating and helpful, she said. The police have been cooperative, and the prosecutors for the most part have been pretty good. One judge even allowed a camera in his courtroom for the first time in years. The only problem they have run into are court-appointed defense attorneys "who think their job is over [after the case is resolved] and don't want to speak to student reporters," Locy said. There aren't many trials anymore because the overwhelming majority of defendants plead guilty.

All of the early class work builds to a final project. Locy wrote a story for U.S. News & World Report in 1999 about daughters who were following in their incarcerated mothers' footsteps by getting into trouble with the law; she first became interested in the issue of women in prison when she saw a Bureau of Justice Statistics report (a research arm of the Justice Department) in the mid-1990s that detailed the explosion in the rate of incarceration of female inmates. Locy and her students spoke with an area prosecutor and he said the reason that he'd seen a rise in the rate locally was the increased abuse of prescription drugs and trafficking in them. They found 11 women incarcerated for illegal sales of drugs, including prescription drugs, some of whom they were able to interview.

Their work can be found on "The Preliminary Hearing," (http://preliminaryhearing.washingtonandlee.net/) a website that showcases the reporting and projects by students who have taken Locy's "Covering the Courts and Law" course since 2008. Three of this year's projects were regional finalists in the SPJ Mark of Excellence Awards. The Mark of Excellence Awards honor the best collegiate journalism in the U.S.

- Online In-Depth Reporting:
  - Third Place: Prescription drugs easy to access, easy to abuse – by Melissa Powell, Eleanor Kennedy, Caitlin Doermer and Robert Grattan.
- Television In-depth Reporting:
  - Second Place: UVA murder exposes flaws in access to protective orders – by Anne Vesoulis, Ben Petitto, Findley Merritt and Wit Robertson.
  - Third Place: The Preliminary Hearing – by Anne Vesoulis, Brooke Sutherland, Stephen Peck and Ben Petitto.

Locy has only been able to teach "Covering Crime & Justice: A Practicum" once, with four students in 2010. During the spring 4-week session, this group established the Washington & Lee "courts bureau" in Washington, D.C. The first two weeks were spent learning about the structure of the courts, procedures and legal terminology. They also spent this time researching the cases that were on the docket for the third week to be spent in Washington, D.C. The students got "hands on experience observing, reporting and writing about criminal cases and civil lawsuits in federal courts in the nation's capital," according to the Covering Crime and Justice website. "It was [my] old beat



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Join the division's Facebook Group!

Email webmaster Erin Coyle at ekcoyle@lsu.edu, and she'll add you to the group.

(Covering Courts, continued from page 9)
and the chief judge's press officer gave [me] the key to the press room," Locy said.

Students arrived at the courthouse before 9 a.m. and the first couple of nights they were not done until almost 10 p.m. After the first long days, they started having dinner meetings with professionals. They met with Joan Biskupic, the legal affairs correspondent who covers the Supreme Court for Reuters; Kevin Johnson, who covers national law enforcement and the Justice Department for USA Today; Michael Kortan, an assistant director at the FBI; and Chief U.S. District Judge Royce C. Lambeth.


Toni Locy

One of Locy's students, Michael McGuire, was able to conduct a sit-down interview inside the chambers of U.S. District Judge Ellen Segal Huvelle. The result was a magazine-style essay. Three students learned the challenge of producing video interviews that were available online, on the website, with defense attorneys for which Locy ran the video camera. All of this was in addition to daily reporting on the one trial that was going on that week and several hearings in ongoing cases they covered throughout the week. The students published their work on the "Covering Crime & Justice" website (http://journalism320.wordpress.com/).

For the last three years, Locy has been writing what she calls a hybrid book, part memoir/part textbook, titled Covering America's Courts: A Clash of Rights, that is due out after the first of the year. She said she only found two books that might work for her courses, but both were a few years old —Lyle Denniston's The Reporter and the Law and S.L. Alexander's Covering the Courts: A Handbook for Journalists. Denniston's book is more than 30 years old and Alexander's is nearly 10 years old.

Prior to joining the academy, Locy worked as a journalist for 25 years covering federal, state and local law enforcement, the federal trials and appellate courts and the U.S. Supreme Court.

Her first job fresh out of school was at the now defunct Pittsburgh Press. She shadowed Larry Walsh, a reporter who covered state civil cases. Three years out of college, a position covering federal court opened up. "I was a baby; they just threw me in," she said. From there she went to the Philadelphia Daily News, The Boston Globe, The Washington Post, U.S. News & World Report, USA Today and the Associated Press.

In 2008 a federal judge held her in contempt of court for refusing to reveal the identities of confidential sources who provided information for stories she wrote for USA Today about the FBI's investigation into the deadly 2001 anthrax attack. Eventually the U.S. Justice Department settled a civil lawsuit filed by scientist Steven Hatfill, and the judge vacated the contempt order against Locy, according to her bio on the Washington and Lee University website.

In 2006 she went back to Pittsburgh to study for a Master's Degree in the Study of Law at the University of Pittsburgh Law School. "I always had academia in the back of my mind," she said. "This [journalism] is a young person's game…I didn't want to be that cranky old lady reporter who winds up in the corner."

Accepted Papers for the 2013 Southeast Colloquium

By Courtney Barclay
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The Law and Policy Division received 45 submissions for the 2013 Southeast Colloquium, which will be held February 28 – March 2, 2013, at the University of South Florida in Tampa, Florida. This was a very competitive year, with many outstanding papers. Twenty papers (44 percent) were accepted for presentation. The division will host five panels to discuss issues ranging from academic freedom to true threats.

I also want to extend a special thank you to all of the reviewers who worked very hard to evaluate and comment on these papers. Your efforts are greatly appreciated.

I look forward to seeing many of you in Tampa for a great conference. Here is a preview of the panels:

Free Speech in Academic Settings

Hazelwood's Footnote Seven
Ryan N. Comfort, University of North Carolina at Chapel Hill

Let [Academic] Freedom Ring: A Legal Explication of the First Amendment Right to Academic Freedom
Jaime Riccio, Syracuse University *(Student Paper Award, Second place)*

Free Speech and Social Media: Do School Officials Shed their Disciplinary Authority at the Schoolhouse Gate?
Lorna Veraldi, Florida International University *(Faculty Paper Award, Third Place)*

(continued on page 11)

(Accepted Papers at the Southeast Colloquium, continued from page 10)

Accessing Information

Familial Privacy and Images of Death: Critiquing the Internet-Propelled Emergence of a Constitutional Right Preserving Happy Memories and Emotions
Clay Calvert, University of Florida *(Faculty Paper Award, First Place)*

Freeing the Prop 8 Tape: Perry v. Brown, The Presumption of Access To Civil Proceedings, And Preserving Judicial Integrity
Andrew A. Proia, Indiana University Maurer School of Law

Feeling for Rocks while Crossing the River: Analysis of Statutory Language of China's First Freedom of Information Law
Yong Tang, Western Illinois University

Journalistic Internal Reference: Exemption from China's Freedom of Information Law
Yong Tang, Western Illinois University

The Press, the Public, and Capital Punishment: California First Amendment Coalition and the Development of a First Amendment Right to Witness Executions
Elizabeth Woolery, University of North Carolina at Chapel Hill *(Student Paper Award, Third Place)*

Regulating Speech

Documenting Fair Use: Has the Statement of Best Practices Loosened the Fair Use Reins for Documentary Filmmakers?
Jesse Abdenour, University of North Carolina at Chapel Hill

10 percent and nothing more: A proposal to save newspapers in the digital age
Steve Bien-Aime, The Pennsylvania State University

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
Robert D. Richards & David J. Weinert, The Pennsylvania State University *(Faculty Paper Award, Second Place)*

Understanding Ophelia: How Sexualization Can Lead To Self-Produced Child Pornography and What We Can Do To Stop It
Stephanie O. Roussell, Louisiana State University *(Student Paper Award, First Place)*

The First Amendment in Review

Actual Malice in the Inter-American Court of Human Rights
Edward L. Carter, Brigham Young University

Abortion Informed Consent Laws: How Have Courts Considered First Amendment Challenges?
Jaya Mathur, University of North Carolina at Chapel Hill

A Decade of True Threats Decisions Since Virginia v. Black: The Digital Age Demands Supreme Court Attention to True Threats Definition and Doctrine
Lynn Marshele Waddell, University of North Carolina at Chapel Hill

When News(Gathering) Isn't Enough: The Right to Gather Information in Public Places
Elizabeth Woolery, University of North Carolina at Chapel Hill

Paid Placements: Commercial Speech Practices and Campaign Finance Disclosures

The Advertising Regulation "Green Zone": Analyzing Parallels of Commercial Speech Jurisprudence As It Might Apply to the Growing Issue of Medicinal Marijuana Advertising, Using the Denver Advertising Ban as an Illustrative Example
Joseph Cabosky, University of North Carolina at Chapel Hill

Consumer Protection Challenges on the Social Web: How the FTC Regulates Consumer-Generated Media as Endorsements and Testimonials in Advertising
Emily A. Graban, University of North Carolina at Chapel Hill

Clear as Mud: Campaign Disclosure Laws After Citizens United
Al Hackle, University of Memphis

How the FTC Has Enforced Its Deception Jurisdiction in Cases Involving an Ill, and Therefore, Vulnerable Audience
Emery Rogers, University of North Carolina at Chapel Hill

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