44.3
Spring 2016

Media Law Notes

AEJMC Law & Policy Division

Head Notes: Thoughts from Division Head

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I hope all is well for each of you as another academic year races to a close.

Your division officers have been keeping busy! Congratulations again to those who had papers accepted and who presented at the Southeast Colloquium last month. And thanks to those of you who attended the division's first-ever coffee hour at the colloquium. A big thanks to Brooks Fuller and to Erin Coyle for their work organizing that event. Thanks also to Mike Martinez for his work again this year as colloquium chair.

Congratulations to this year's winners of our teaching competition! Andrew Pritchard won first place, Genelle Belmas won second, and Jared Schroeder won third. Thanks to Teaching Chair Jon Peters for his work running the competition. You can read more about the competition in Jon's piece inside.

As I write this, reviews have completed for our conference research paper competition. Thanks to those who submitted papers, and thanks to our many reviewers who make the competition possible. Thanks also to Jason Martin for his work as research chair.

Registration is open for the Minneapolis conference! Here is a link to the conference microsite. The conference will run Wednesday, Aug. 3 through Sunday, Aug. 7.

Wednesday is the preconference day. We'll have a full afternoon of preconference sessions, starting at 1 p.m.! The first session, titled The Supreme Court and the First Amendment: Recent and Upcoming Cases, will run from 1 to 2:15. We're thrilled that Judge Diana Murphy of the U.S. Court of Appeals for the 8th Circuit and Aaron Van Oort, a partner with Faegre Baker Daniels, will speak on the panel, along with our own Courtney Barclay. The second session, titled Teaching Roundtables: Drawing Inspiration from Teaching Competition Award-Winners, will run from 2:25 to 3:40. That session will showcase recent winning ideas from our teaching competition and will include roundtable discussions of teaching generally. The third session will run from 3:45 to 5. Titled Comparative Law in the Classroom: Internationalizing Your Instruction, the session will highlight ways we can and should be internationalizing our communication law syllabi.

You can find conferences schedules with our preconference and featured panels listed inside. Just a reminder that the division social will be Friday at 8:30 p.m., after our business meeting. I've reserved an area of The News Room, a restaurant located near the conference hotel. I'm recruiting sponsors to help cover the costs of the social (translation: you'll get some free food and drinks!). The UNC Center for Media Law and Policy, the Silha Center for the Study of Media Ethics and Law, the Media School at Indiana University, the Center for International Media Law and Policy Studies at Indiana, and Clay Calvert have already pitched in. I'm still looking for others to join them!

And, finally, I want to encourage you to visit our website. We've made some recent changes to the site that – we hope – make it more user-friendly. You'll now see tabs at the top of the home page that make the site easier to navigate. Our division's constitution and bylaws are now online. You can also find Media Law Notes back to 2008 along with a list of past division heads. And we have a section devoted to teaching, where you can find – among other things – links to the winning ideas from the past two teaching competitions (we'll get this year's winners up soon). Thanks much to Matt Telleen for his work as webmaster.

Enjoy the issue!

In This Issue

Features

Conference News

Visit Our Website

Registration for Minneapolis Conference : aejmc.org/events/mpls16/

Law & Policy Divison : aejmc.us/law/

Defamation reformation? A teachable campaign moment

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Presidential campaigns often provide political science, civics and history teachers with those golden "teachable moments." But the 2016 presidential primary campaign has also livened up discussions in communications law classes.

With hecklers being beaten or kicked out of rallies and campaign events as well as reporters being threatened and manhandled, a range of significant questions of free speech and public debate values has gone beyond the evening news and the daily headlines.

While we can debate whether a campaign event is a traditional public forum or whether a speaker is inciting violence or whether a protester can shut down a campaign event, perhaps no issue has knocked on the First Amendment's door more than Donald Trump's vow to "open up" defamation law. Trump has publicly said political candidates and other public figures should have an easier time suing for defamation. These plaintiffs should also be easier winners, Trump said.

For those familiar with defamation law, we know that such a sea change would be practically impossible for a president to enact. There are multiple reasons: defamation law is defined by states not the federal government; the executive does not have power to change state law; and we still have the courts to interpret the First Amendment.

Furthermore, Times v. Sullivan is not going to be overturned anytime soon. Perhaps someone in the Trump camp should read the 1964 opinion which is the centerpiece of American free speech and free press law. As an aside, the late Justice Antonin Scalia was Sullivan's sharpest critic and openly spoke of his interest in overturning the case.

If any candidate should appreciate Sullivan, it is Trump himself, who has exhibited a propensity to shoot from his mouth. The same protections for speech that Trump has criticized have also provided him with a degree of immunity for hurling false statements at some opponents and critics.

As Justice William Brennan declares in Sullivan, debate on public issues and critique of public officials (and later public figures) is essential to our democracy. Sullivan's protection from frivolous defamation suits and the addition of the actual malice standard for public officials facilitates public discourse.

The actual malice standard – publication with known falsity or reckless disregard for the truth – does not make libel suits impossible, but it certainly makes them a lot more difficult. As unclear as Trump's defamation remediation plan appears, this is hardly the message we want to feed the public when it comes to First Amendment values.

Perhaps we can chalk up Trump's comments to just one more crazy extemporaneous campaign rant – one more crazy statement in a sea of insanity. Or we can be alarmed that a candidate for our highest office has little to no respect for the First Amendment or a free press, even as he reaps the benefits of First Amendment protections every day.

Our legal system and the protections our media have under the law to cover and criticize our leaders and people in authority makes this country great. How would you make America great again by eroding and erasing our First Amendment rights?

Roy S. Gutterman is an associate professor of communications law and journalism and director of the Tully Center for Free Speech at the S.I. Newhouse School of Public Communications at Syracuse University.

Law and Policy Division Pre-Conference sessions

2016 AEJMC Conference

Minneapolis, MN Wednesday, August 3, 2016

1:00-2:15 p.m.

The Supreme Court and the First Amendment: Recent and Upcoming Cases

Panelists:

Courtney Barclay, Jacksonville

Judge Diana Murphy, Circuit Judge, U.S. Court of Appeals for the 8th Circuit

Aaron Van Oort, Partnet, Faegre Baker Daniels, Minneapolis

Moderator: Jonathan Peters, Kansas

2:25-3:40 p.m.

Teaching Roundtables: Drawing Inspiration from Teaching Competition Award-Winners

Panelists:

Genelle Belmas, Kansas

Roy Gutterman, Syracuse

Andrew Pritchard, Iowa State

Peggy Watt, Western Washington

Moderator: Jared Schroeder, Southern Methodist

3:45-5:00 p.m.

Comparative Law in the Classroom: Internationalizing Your Instruction

Panelists:

Ed Carter, Brigham Young

Eric Easton, Baltimore School of Law

Kyu Ho Youm, Oregon

Moderator: Amy Kristin Sanders, Northwestern University in Qatar

9 Things Every Graduate Student Should Know Before Attending AEJMC

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Many of you remember your first AEJMC national conference fondly. AEJMC attracts preeminent scholars from all over the world to share research, teaching strategies, and insights about the future of mass communication. But for some, the excitement of that first conference is sometimes accompanied by a bit of trepidation. At AEJMC 2014, I hopped off the plane in Montreal and knew precisely one thing for certain about the conference: I was supposed to present a paper. The rest I had to learn from my mentors at the University of North Carolina and the gracious members of our division. But there's still a lot I would've liked to know my first time out.

So what can a first-time conference-goer do to better prepare for their first conference experience?

Well, in Buzzfeed fashion, here are a few things grad students can think about...In listicle form!

1) Get my money right!: This is, as Bernie and Donald would say, "Uuuuuuge!" Every finance and accounting office has its own set of rules about how to apply for reimbursement. At my university, we are no longer required to save receipts for meals, but many departments still require you to submit proof of all expenses. Be on the safe side and save all receipts from your first conference until you get the hang of it. If you're splitting the cost of a room, get separate hotel folios.

2) AirBnB or Conference Hotel?: I know students who have taken drastically different approaches to securing lodging for AEJMC. My advice: stay as close to the conference hotel as possible and secure a room as early as you can. The conference hotel is usually the epicenter for social opportunities, meet-and-greets, and the daily jog organized by Dave Remund, of the public relations faculty at Oregon. It's also usually the most affordable option. In mid-May, AEJMC sent information about the grad student room rate. Be sure to check this out!

3) Will I be able to show off my sweet Prezi skills?: The conference centers at AEJMC are usually set up with a computer for presentations such as PowerPoint or Prezi. However, and this is a big HOWEVER, the tech setup is not foolproof. Adapters go missing. File formats and operating systems lack compatibility. Brett Johnson, of Mizzou, saved the day in Montreal with his iPad PowerPoint setup. Clay Calvert, of Florida, prefers the old school three-ring binder approach. A backup plan is never a bad idea. Plan for contingencies!

4) Are the Moderators and Discussants my friends?: Yes, absolutely! Moderators will keep time for you to make sure your presentation stays on pace. Discussants will give you helpful feedback to get your paper ready for publication. Make sure you send your paper to your discussant two weeks before the conference so they can be as helpful to you as possible. Consider planning for a shorter presentation than the time allotted. Q&A is one of the best times to improve your paper.

5) So what do I do with my paper after I present it?: Editor of Comm. Law & Policy, Wat Hopkins, of Virginia Tech, reported at the business meeting last year that overall submission totals were down. Your presentation is an opportunity to workshop your ideas so that you can put together a publishable piece of work. Wat Hopkins would love to get more strong submissions to our flagship journal. Seek out advice from peers, mentors, and division members after you present.

6) Wait...business meeting?: No doubt. The business meeting is a great chance to network with other scholars, learn about opportunities for service and research in the division, and provide input about the conference. Graduate students members' voices are important to the Law & Policy Division. Make sure to renew your division membership. Depending on your funding, your department may pay for your membership, too!

7) I was told there'd be Happy Hour: And right you are! Keep your ears open about individual school-sponsored and division-sponsored gatherings around the conference. Sometimes the location is announced at the business meeting. Yet another reason to get involved in the Law & Policy Division!

8) They gave me this massive conference program. Isn't there a better way to get information about the conference?: Follow @AEJMC on Twitter and sign up for e-mail notification about the conference. You will also receive information about the conference mobile app. The app helps you search for interesting talks, navigate conference events, locate presentation rooms, and keep a calendar of the events that interest you. It's worth downloading!

9) I've bugged my advisor enough. Who else can help me figure out my first AEJMC?: The Law & Policy Division has dedicated leadership and members who are there to help you have a great first experience at AEJMC. Our leadership is exuberant, thoughtful, and experienced. @AEJMC_LP #blessed

Do You Have News for the Division?

If you have any news or would like to contribute to the newsletter, please contact Kearston Wesner by email, kearston.wesner@quinnipiac.edu.

A WILD idea

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A few years ago, my UNC colleague Deb Aikat wrote a piece for AEJMC about the Teaching Committee's Magnanimous Mentor Program. The program was designed to help match tenure track faculty with faculty at AEJMC who could offer the "friendly care and assistance of a mentor who is an empathetic colleague, reliable adviser and a trusted counselor." Deb reported that the program was generally successful, but admitted that good mentoring involves a lot of trial and error. So the program experienced some hits, but also some misses.

Not long after, I began a conversation with Kathy Olson at Lehigh University about the women mentors we have had in our lives, and it made me think: Just how did I get lucky twice with excellent women mentors within the media industry and then with academia? And just how well are we doing as a division in mentoring our young women academics and supporting diverse perspectives? What more could we be doing for them and for the division?

As Kathy and I talked about these issues, we hoped that one day we would witness a critical mass of women within the law division who met regularly, perhaps informally, but in the spirit of mentorship and sisterhood. It was a Women in the Law Division idea. A WILD idea, for short.

We have been fortunate that our division has had its share of women leaders and scholars, and that many of these women, myself included, have been wonderfully supported by the men in our division. At the moment, our division boasts 219 members. About 30 percent of those members are women. As our field undergoes change, however, we need to be thinking about the importance of supporting our ranks and including new minds from increasingly diverse perspectives, in all the ways we define diversity and inclusion today.

This year, the UNC media law program has its first international student from Beijing. She is young, she is a woman, and she will someday be an international media law scholar. I look at her and know that I will mentor her, but who else can she rely on in the division going forward? Who will understand her unique voice in the debate over global free speech issues? I would like to identify that support network for her and for others going forward.

In that spirit and with the very best of intentions, Law and Policy Division Vice Head Courtney Barclay is inviting all the women in the division – and the men in the division who have an interest in mentoring and inclusion – to join her and other division members for an informal breakfast in Minneapolis this summer. She's tentatively scheduled a breakfast gathering for Saturday, Aug. 6 at 7 a.m. at The News Room (990 Nicollet Mall), a two-minute walk from the conference hotel. (We don't have funding for the breakfast at the moment but prices are reasonable) Please email her at barclay@ju.edu to ensure a spot at the table.

I'm not sure it will be a "WILD" time, but we'll begin a conversation and explore what might be some next steps in thinking about mentoring and inclusion. No doubt there will be some trial and error to the process, but I look forward to seeing our developments.

Teaching Competition

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The Teaching Ideas Competition once again showcased a number of innovative strategies to bring to life the legal concepts that affect journalists and other mass communicators. Eleven entries were submitted, and a double-blind review process produced a close finish.

Ultimately, the winners were selected for their ideas to help students appreciate the importance and history of free expression as an ideal of American society, to enable students to experience flag desecration without setting off smoke alarms, and to require students to do something they likely had never done: read and understand the entirety of a terms-of-use or privacy agreement.

Winners will receive certificates and monetary awards ($100 for first place, $75 for second, and $50 for third) at the division's business meeting in Minneapolis.

Andrew Pritchard, of Iowa State University, won first place for his entry "Philosophers, Films, and the First Amendment," which requires students to think critically about free-speech theories and their limits.

Pritchard developed an 80-page booklet of historical and philosophical works titled "You Can't Tell Me What to Think! The Heritage of American Free Expression." Following a brief historical survey, the booklet's chapters correspond to major arguments for free expression. Each chapter includes two historical essays, three landmark writings, and a dissenting opinion challenging the arguments for free expression.

Students are assigned one chapter per class, and after a related in-class discussion, they watch video clips that Pritchard spliced together from popular films to dramatize the ideas from the chapter. Students get a list of seven lines from each clip, and they choose one to interpret from the perspective of a philosopher featured in that day's chapter.

As one student wrote, unsolicited, to Pritchard, "I truly loved this assignment. It really made me think. I'm walking away with a smile because I know I learned so much from this."

Genelle Belmas, of the University of Kansas, won second place for her entry "Eating the Flag: How to Teach about Flag Desecration (Without Threats on Your Life)," which uses experiential learning to discuss Texas v. Johnson and the Flag Code.

Belmas first came up with the idea of hosting a flag-burning-as-patriotism event as part of a freshman class on the First Amendment. When she floated it at a meeting, however, the public-affairs staff came unglued. So, instead, she purchased flag napkins and paper plates, and she ordered a sheet cake from a local bakery and requested a picture of the American flag on it.

Belmas required her students to read the Flag Code and to brief Texas v. Johnson, and she discussed in class Street v. New York and U.S. v. Eichman. Then she brought the cake and other materials to class, and as the students cut, served and ate the cake, they discussed whether they were desecrating the flag.

As one student wrote, unsolicited, to Belmas, "Now when I see [a flag display], I wonder if it's being treated like the code says it should be. My mom and I actually threw away a tshirt [sic] with a flag on it when we were cleaning before I left for

Continued on page 5

Continued from page 4

[college], and then after this I thought I should have burned it."

Jared Schroeder, of Southern Methodist University, won third place for his entry "Coming to Terms with Terms of Use Agreements," which makes the unit on privacy law both personal and meaningful to his students.

They select a service, such as Facebook or iTunes, and read its terms-of-use and/or privacy agreement. Then they analyze its clarity and privacy implications, and they discuss in writing what surprised them and what they learned. The students also read Woody Hartzog's "Privacy and Terms of Use" chapter from Social Media and the Law, because it gives them the vocabulary they need to consider their own privacy in regard to such agreements.

On the day the assignment is due, students are placed in groups of five, according to the service they chose. The groups address two issues in class: What most surprised them and how reading the agreement changed their feelings about the service. Each group presents its analysis so the other students can learn about the agreements their classmates read. And, finally, the class as a whole discusses the Hartzog chapter.

After doing the exercise, Schroeder said, "The students are very receptive to hearing about privacy law and the concerns that have arisen as networked technologies become more and more a part of our lives."

AEJMC Law & Policy Division Featured Panels

The Law and Policy Division's featured panels this year cover an array of diverse topics, from the impact of drones to legal issues regarding police body cameras. You may sign up for these sessions on the Conference Registration Form. Early registration ends on July 8.

Thursday, August 4

5 – 6:30 p.m.

"Ethics Aloft: Drones, Sensors and the Changing Boundaries of Media"

With the FAA currently in motion on a variety of rules and revisions regulating civilian Unmanned Aerial Vehicles (drones) in the U.S., news organizations and individual journalists face shifting legal terrain and emerging ethical questions when employing UAV technologies for a range of activities. This panel will explore the current state of laws addressing drones and sensors in journalism, as well as valuable frameworks for weighing the implications of this work for communities and journalists' relationships with them. (ETHC, LAWP)

Friday, August 5

1:30 – 3 p.m.

"Freedom of Information Act 50 Years Later: The U.S. Law Still Serving as the Touchstone?"

The year 2016 marks the 50th anniversary of the FOIA in the U.S. and the 250th anniversary of the Swedish Constitution, the first legal guarantee of the right to information. Freedom of information as a legal right was the exception, not the rule, even in the mid-1980s. Today, however, access to information is on the books in more than 100 nations as a constitutional or statutory right. The European Court of Human Rights, the Inter-American Court of Human Rights, and the UN Human Rights Committee have all held that it is a fundamental human right. In celebrating the landmark FOI events in 2016, an important question is what is the actual or perceived impact of the American FOI law abroad and how does it compare with other countries' laws. This panel proceeds from the premise that the tide has turned on government secrecy in recent years but that access to information remains an ongoing challenge for journalism and mass communication educators and practitioners around the world in the post-9/11 era of the global "war on terrorism." (INTC, LAWP)

3:15 – 4:45 p.m.

"Cohen v. Cowles Media at 25: Its Lasting Legacy"

The locale of the 2016 AEJMC conference affords a special opportunity to examine the past, present and future of one of media law's most important rulings – Cohen v. Cowles Media, a media law hall of fame case that originated in the Twin Cities. Moreover, 2016 marks the 25th anniversary of the U.S. Supreme Court's ruling. Featured panelists were reporters and attorneys on the front lines as the case unfolded. The session will examine the legacy of Cohen and what it will mean to the future of journalism, specifically the practice of granting sources confidentiality. (LAWP, NOND)

Saturday, August 6

5:15 – 6:45 p.m.

"(Sun)light, Cameras, Legal Action: A Look at Developments Related to Police Body Cameras"

The new spirit of transparency and accountability that has led law enforcement agencies to adopt body cameras has also raised a host of legal questions: how should open records laws apply to the recordings? How should privacy rights apply to the people recorded? How should law enforcement store this data? These questions have important implications for newsgathering and the public's right to information about law enforcement. This panel draws on local and national expertise to look at the latest legal developments on body cameras, as well as a look toward what journalists and educators can, and should, expect going forward. (LAWP, CTEC)

Legal Annotated Bibliography

Minch Minchin
Doctoral Student
University of Florida

Speech vs. Act Dichotomy
Campbell, Wesley J. (2016)
Speech-Facilitating Conduct
68 Stan. L. Rev. 1

For an act to be "expressive" for First Amendment purposes, the actor must attempt to convey a specific idea, and the audience must be likely to understand that message. Such circumstances, like burning flags and nude dancing, trigger heightened judicial scrutiny. Nonexpressive conduct, however, usually doesn't engender First Amendment protection at any level.

The Supreme Court has declined to say that all conduct expressing an idea is necessarily expressive speech. However, some protection for nonexpressive conduct is necessary to safeguard basic First Amendment ideals. For instance, taking photographs or owning a printing press is not innately expressive, but regulating or prohibiting these activities would raise obvious First Amendment concerns.

This article considers the merits of defining "speech-facilitating conduct" as a distinct category of First Amendment jurisprudence. Instead of applying heightened scrutiny to regulate nonexpressive conduct based on incidental burdens on speech, coverage depends on whether the government's rule target the speech process. Under this anti-targeting framework, courts can "evaluate free speech claims involving incidental burdens on expressive associations, compelled subsidies for speech (e.g., bar dues and union-shop dues), and putative newsgathering privileges for journalists."

The anti-targeting approach has two facets. First, it focuses on the relevant law does, not legislators' motivations. And second, it situates First Amendment rights as "negative," rather than "positive," so regulating nonexpressive conduct would not raise free speech concerns because the government is not targeting speech. Instead, "coverage of speech-facilitating conduct is . . . protect[ed] against targeted governmental interference with the speech process." Thus, by moving beyond the mere content-neutral vs. content-based dichotomy and by "viewing free speech rights in this area as a bar against certain governmental actions rather than as a shield around particular conduct, the anti-targeting framework rejects 'as applied' First Amendment challenges to general laws neutrally applied to nonexpressive conduct."

Professional Speech
Haupt, Claudia E. (2016)
Professional Speech
125 Yale L.J. 1238

Ordinary professional regulations cover such things as licensing and advertising requirements, and malpractice issues. However, new regulations address communication between professionals and clients. Sometimes, these regulations cut against professional insight. This piece suggests which of these new regulations are valid.

First, the article distinguishes commercial speech from professional speech. Professionals, who work within "a body of knowledge that is shared among their peers," should be construed differently under the law. The article suggests that special jurisprudence should cover those in occupations that have achieved "professional status," such as doctors, lawyers, and psychologists. These professionals' "shared notions of validity limit the range of acceptable opinions found within them."

Essentially, if knowledge communities share a consensus, then professional speech violating that consensus would receive less First Amendment protection than speech comporting with the consensus. Majority professional speech deserves more Constitutional protection than minority professional speech.

States can still regulate professions while protecting professional speech. Tort liability and professional malpractice stand as examples. But if state regulation interferes with the profession, "the First Amendment should protect the client's as well as the professional's interest in accurate communication of the knowledge community's insights when a professional speaks." In speech between the professional and the client, the marketplace of ideas metaphor does not apply because professionals are not opening their opinions to the open market when they're speaking within the context of a professional-client relationship.

Three examples illustrate how this perspective would play out: (a) state laws that criminalize doctors from talking about the benefits of marijuana; (b) state laws that require doctors to discuss risks pertaining to abortion; and (c) state laws that criminalize sexual orientation change efforts (SOCE). As for (a), doctors discussing the benefits of marijuana "within the physician-patient relationship does not offend the knowledge community's insights in the way communicating erroneous statements does. This highlights the difference between unclear (or emerging and as yet untested) insights and false (tested and rejected) assertions." Banning talk about marijuana, under this scheme, is a problem.

As for (b), she says, because there are no "known" risks of abortion, laws of this kind run afoul of the learned-profession knowledge community. After all, she states, "[w]hat is 'known' as a matter of professional knowledge is for the knowledge community to decide, not the state legislature." And as for (c), laws banning doctors from engaging in professional speech about SOCE are good, she says, because most people within the knowledge community would tend to agree that such efforts are counterproductive. "If professional speech coverage is determined by deference to the knowledge community," she states, then "the judge will not find that SOCE is protected under the First Amendment."

FCC
Campbell, Fred B. (2016)
The First Amendment and the Internet: The Press Clause Protects the Internet Transmission of Mass Media Content from Common Carrier Regulation
94 Neb. L. Rev. 559

This article argues that the FCC unconstitutionally abridged the First Amendment's freedom of the press protections when it categorized the Internet as a common carrier under Title II of the 1934 Telecommunications Act.

The article begins with the following question: "Is watching Netflix on the broadband Internet more like (A) watching cable television or (B) talking on the telephone? Common sense suggests the answer is 'A,' the court that overturned the previous net neutrality rules chose 'A,' and the First Amendment demands

Continued on page 7

Continued from page 7

'A.'" Had the FCC acknowledged that certain communications capabilities on the Internet are functionally equivalent to mail, the printing press, newspaper publishing, broadcasting and cable TV, then "it would have been obvious that classifying broadband (ISPs) as common carriers is an unconstitutional abridgment of the freedom of the press."

Much of the article criticizes the FCC's "virtuous circle" theory, which says that "Internet openness creates additional demand for Internet access services by enabling new uses of the network—including new content, applications, services, and devices. . . . which in turn lead to further innovative network uses." But this reference to "innovation" is really doublespeak for "speech." Roughly two-thirds of North American Internet traffic is video streaming, and more than one-third of total Internet usage comes from Netflix alone. This content competes with television and cable for viewers, so it is not "innovation" as much as it is pure mass media content.

The FCC contends that ISPs are just "conduits for the speech of others," which is wrong. The article relies in part on *Miami Herald v. Tornillo* to make the case that Title II Internet classification leads to content-based regulation (which is presumptively unconstitutional, especially after *Reed v. City of Gilbert*) and speaker-based regulation, because the "rules impermissibly discriminate between ISPs and other Internet intermediaries that have the same ability to act as gatekeepers between consumers on the one hand, and service, device, application, and content providers on the other."

The article suggests that courts will remedy this situation. Today, net neutrality would be unlikely to pass strict scrutiny—or even intermediate scrutiny, for that matter – partially there is no "scarcity" online, as there is with broadcast spectra. Broadband Internet access is just part of the "press" protected by the First Amendment, and "ISPs have a right to exercise editorial discretion over the content they choose to disseminate."

Online Speech

Fuller, P. Brooks (2016)

The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States in the Age of Twitter

21 Comm. L. & Pol'y 87

The protection of political speech lies at the heart of First Amendment ideals. The Supreme Court has repeatedly protected "hideous, violent and crude forms of political speech, even that which might intimidate or threaten many listeners, so long as the expression amounts to protected political advocacy or hyperbole." On the other hand, the high court has made it equally clear that true threats fall beyond the bounds of First Amendment protection.

But a doctrinally gray area occurs when virtual, Internet-mediated communications both include political advocacy and use hyperbolic, violent language to express criticism of—and distaste for—public officials. These cases "complicate important distinctions and exceptions in the true threats doctrine."

The article claims that the Twittersphere is the new First Amendment battleground for "pure political speech, violent abstract advocacy, and true threats," and that contemporary true threats doctrine is not completely adequate to handle contemporary, virtual-space nuances.

The paradigm case on this matter, *Watts v. United States*, addressed the scenario where defendant Robert Watts said that if he were drafted into the Vietnam War, he would shoot President Lyndon Johnson. The Supreme Court held that this speech was protected political hyperbole. However, the Court never defined political speech or true threats in its decision. Instead, it focused on the nuances of Watts' speech: it emphasized that the speech was conditional, caused an audience to laugh, and was crude.

The murky *Watts* decision has led to a broad range of circuit splits on the matter of true threats in virtual spaces, but the factors in the Court's determinations (such as audience laughter) should not be ignored. *Ad hoc* balancing tests are perhaps the most speech-friendly way to approach potentially threatening, political expression in the online realm.

The article draws on both the autonomy/expressive and the catharsis/safety valve theories of free speech to suggest that a true threats doctrine rooted in a physical and spatial paradigm are, for the most part, outmoded. The article says that "Twitter serves the cathartic ideal of political expression by creating a powerful rallying space without requiring the physical embodiment of protest. . . . Courts should recognize that the politically expressive power of Twitter is rooted in user autonomy and open sharing, not in organized spaces and enclaves." A proper balancing test would avoid strict reliance on "rote criteria such as audience response, conditional language, or limiting characterizations of traditional political participation such as public rallies." After all, he says, "just as 'one man's vulgarity is another man's lyric,' one man's threat may be another's call for political change."

Continued on page 8

AEJMC Conference Important Dates

We invite you to join us at the Top Papers Session and business meeting at this year's conference in Minneapolis.

Both of these events are slated for Friday, August 5.

5 – 6:30 p.m.
Top Papers Session

6:45 – 8 p.m.
Business Meeting

After the business meeting concludes, we will move to our off-site social at 8:30 pm. Our social will be in The News Room (990 Nicollet Mall), a restaurant located near the conference hotel.

Continued from page 8

Privacy

Banta, Natalie M. (2016)
Death and Privacy in the Digital Age
94 N.C.L. Rev. 927

Under common law, courts have long held that individual privacy interests do not survive death. Yet with the advent of digital assets—generally in the form of private data secured via passwords that are collected and stored on third-party servers—it is incumbent upon state legislatures, courts, and the public to reconsider the efficacy of a posthumous right of privacy. This article suggests that the current approach to digital asset privacy after death—which enables corporations to dictate the terms of posthumous privacy via individual contract—is inadequate.

The current approach is not sufficient "because these contracts do not allow individual choice or testamentary intent to control the use of personal information after death." To better align posthumous privacy interests with the needs of a digital future, "the law must ensure that succession principles honoring testamentary intent apply to privacy as well as property rights."

The article's main point is that "digital asset privacy will best be protected by acknowledging the importance of posthumous privacy in a digital age, honoring individual choice, and establishing a default rule that accords with a family-centered paradigm." This paradigm focuses on privacy via information control. To that end, the best way to reshape privacy interests is to treat them as a key part of estate planning procedures, "which allows surviving family members to control information about and commercial interests of a deceased individual and to protect a decedent's posthumous privacy interests."

This is especially important where the deceased has not made his wishes explicitly known. To handle such cases, a rule should be adopted that, by default, gives fiduciaries access to decedents' online accounts. At this point, eight states have taken this step statutorily, granting estates the power to receive or delete digital assets, irrespective of the terms of use agreed to by the deceased. In the putative interest of individual privacy, however, online organizations are fighting this trend.

The article approves of the eight states' legislative efforts, stating that even though the common law generally does not recognize any privacy interests after death, "constitutional law, statutory provisions, [and] our testamentary structure . . . all point to the principle that surviving family members should have a claim in controlling posthumous privacy interests in a digital future."

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