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Media Law Notes

AEJMC Law & Policy Division

Head Notes: Thoughts from Division Head



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As always, I left our conference invigorated and ready for the new semester. And it has been an exciting start to the academic year. Presidential campaigns, exploding tablets, ill-advised 9/11 themed ads have provided more than enough conversation starters for my mass communications and public relations classes (plus, I'm stocking up on great exam questions for the law class next semester).

I'm also excited to serve as head of the division this year. I have been a member of the division since starting graduate school and am honored to contribute to its continued success. I am lucky to be working with an amazing group of people on the board: Jason Martin is vice/head/program chair; Kearston Wesner is research chair; Roy Gutterman is clerk/newsletter editor; Jonathan Peters and Jared Schroeder are returning as teaching chair and PF&R chair respectively; Amy Sanders is our new web administrator; Mike Martinez is

once again doing a great job as Southeast Colloquium chair; and Brooks Fuller is continuing his work as graduate student liaison.

It still feels as if I just left Minneapolis, but Chicago is really just around the corner. All of the board members are already hard at work planning an amazing program. Some great speakers are getting confirmed, probably as I write this, and we will all be very excited to fill you in on the details of the preconference as soon as we can!

The 2017 conference in Chicago is scheduled for August 8 – 12 at the Chicago Marriott Downtown Magnificent Mile Hotel. This conference is a little different because it will begin with preconference on Tuesday, August 8, and wrap up with the final day on Saturday, August 12.

In the business meeting this year, we awarded the second Stonecipher Award to Professor Genevieve Lakier for her article, "The Invention of Low Value Speech," published in the Harvard Law Review. Thanks to the generosity of Kyu Ho Youm and Doug Anderson, AEJMC will bestow the Stonecipher Award

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Making Communication Law Real



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How do we make our communication law courses more real to the students?

I've been thinking a lot about this lately, not just as someone who teaches communication law, but as

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42nd Annual AEJMC Southeast Colloquium Call for Papers: Law and Policy Division

The Law and Policy Division of AEJMC invites scholars to submit original papers for the annual AEJMC Southeast Colloquium, which is scheduled to take place March 10-11, 2017 at Texas Christian University's Bob Schieffer College of Communication in Fort Worth, Texas. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, freedom of information, commercial speech, Federal Communications Commission issues, copyright, obscenity and other issues regarding freedom of speech and press. 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 colloquium to present accepted papers.

Law and Policy Division papers must be no longer than 50 double-spaced pages (including appendices, tables, notes and bibliography). Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities. There is no limit on the number of submissions authors may make to the Division. The top three faculty papers and top three student papers in the Law and Policy Division will be recognized. Student authors of single-authored papers should clearly indicate their student status to be considered for the student paper awards.

Authors should submit each paper as an email attachment (documents may be submitted in Word or PDF formats). In the body of the email, please provide the title of the paper, and the name, affiliation, address, office phone, home phone, fax and e-mail address for each author.

This is where students and faculty should indicate their status for consideration of the faculty and student top paper awards. Do not include any author identifying information on any page of the attached paper submission. Authors also should redact identifying information from the document properties. On the cover page of the attached paper, only the title of the paper should appear. Following the cover page, include a 250-word abstract.

Submissions should be emailed to mtmartinez@utk.edu. The deadline for paper submissions is 5 p.m. EST Monday, Dec. 12, 2016. If you have any questions about the submission process or the paper contest, please contact Dr. Michael T. Martinez by phone at (865) 687-2564 or via e-mail at mtmartinez@utk.edu. Helpful links: 42nd AEJMC Southeast Colloquium <http://schieffercollege.tcu.edu/aejmc/>.

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each year, recognizing the top work in legal scholarship concerning freedom of speech, freedom of the press, and communication law and policy. Our division has the privilege of choosing the recipient. I asked Dean Smith (High Point) to chair the award selection committee this year. The committee's task will be to identify the best research published in 2016. More details and a call for nominations will be distributed as we near the end of the year. Many of you submitted nominations, and I hope you will continue to do so.

A new development this year is the Women in Law group. A few early risers met at 7 am for coffee

to discuss issues in academia that are particularly challenging for women. This ranged from service expectations to family leave. We hope to continue these discussions online and conduct some research to better understand the scope of issues and what actions we may be able to take to address them. Please read future issues of Media Law Notes for more information on how you can join the conversation.

In this issue of Media Law Notes, you will find the calls for submissions and reviewers for the 2017 Southeast Colloquium. This year the Colloquium will be held March 9 - 11 at Texas Christian Univer-

sity in Fort Worth, Texas. Many thanks to Daxton "Chip" Stewart for his efforts chairing the conference this year. Our division always has a strong showing at Southeast and I remember it being particularly helpful as a graduate student. Thank you to all the members who continue to make that such a great experience by submitting papers, reviewing submissions, and serving as moderators and discussants.

I'm looking forward to a really great year for the division. If you have any suggestions about how we can make the division even better, please contact me via email, barclay@ju.edu. Thank you all for everything you do for our division!

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someone who is concerned more broadly about informing citizens in democratic society about their First Amendment rights. Many of us, each semester (or quarter or term), have a unique chance to tell a new group of people about their rights. They are sort of a captive audience, if we can just engage their minds. After all, where else will they learn about them if we don't engage them?

The problem is that the students, more and more, seem to see their communication law courses as impractical or distant. They view them as less valuable than news writing or broadcasting courses. The concepts just are not as real to them as learning to write a lead or to read from a teleprompter. There's some irony in this. Our classes are probably more immediately relevant to this generation of students than they have ever been in the past. Twenty years ago, using a phone to defame someone was nearly impossible. In fact, all you could do was call somebody with it. That's it. Now, each student generally brings what amounts to a modern-day printing press to class. Students can actually violate copyright and invade people's privacy during class, though I advise them against it.

So how do we make our classes more real? Here are a few ideas:

- Build assignments into the class that deliberately connect course concepts with the social media worlds the students live in: Make them read and reflect on terms of use agreements during the privacy portion of the class or have them compile their own version of "Mean Tweets," like Jimmy Kimmel does on his show, but with

reasoning regarding why or why not the tweets may be defamatory.

- Bring in guest speakers who have fought for their First Amendment rights or who have exercised them in a challenging way: Many of our students have never dreamed of protesting anything. Make foundational, "bedrock principle" and time, place, and manner concerns real by putting a real human in front of them. Many of our communities have seen Black Lives Matter-related protests during the past year. Many of those protestors are the students' ages or they are fellow students.
- Be comparative: There's the old saying, "the last thing a fish knows is that it is in the water." It's tough to make First Amendment concerns real to people who have never lived any other way. Compare rights in the United States to those experienced elsewhere. Show stories about online speech rights or protest rights from other nations, such as Russia, China, or North Korea.

- Bring current events to class: Communication law is constantly in the news. When the New York Times released Donald Trump's tax returns in October, it raised legal questions that immediately applied to course concepts. It provided a perfect way to engage students in a discussion about *Bartnicki v. Vopper* and the concept of public concern, for example.

This is not an exhaustive list. The Law and Policy Division's membership encapsulates so many different types of programs, class sizes, and communication law-related courses that there is no one template. The goal of making our courses more real to students, however, remains.

Hulkamania, Gawker and the First Amendment



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The invasion of privacy lawsuit by former pro wrestler Terry Bollea, aka, Hulk Hogan versus Gawker provides a contemporary case that can find its way into a wide variety of communications and communications law classes.

A \$140 million civil judgment put Gawker out of business by forcing the website into bankruptcy and liquidation. Even though Gawker's former owner, Nick Denton, vowed to appeal the jury verdict, the parties settled for \$31 million in November, putting the case to bed for good.

The Gawker case raises questions ripe for discussion for almost any communications venue: journalism ethics (questioning the publication of a stolen sex tape); news values (what constitutes news in our modern, web-based media); media ownership and business (the Univision empire bought Gawker and its other websites from bankruptcy); and, of course, invasion of privacy in the 21st Century.

How we view the concept of invasion of privacy in contemporary times, especially when dealing with a public figure such as Bollea, is a central question to the analysis of what transpired this past summer

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and spring in a Florida courtroom.

The case shows the precarious nature of a business that operated the narrow line of what is journalistically acceptable or otherwise illegal.

For the record, there is a gigantic gulf between Gawker's internet-age snarky tabloid gossip and serious journalism on public issues, public policy or international affairs. The First Amendment does not distinguish between the high-brow and low-brow. Nevertheless, there are some who believe entities like Gawker should not be permitted to operate.

This litigation and subsequent bankruptcy are prime examples of the marketplace at work, which in turn effect the so-called marketplace of ideas. In some ways, it is all a wonderful textbook example of media regulation; a bad player being ejected from the game.

That is until troubling facts are exposed from the provenance of the recording to the out-of-proportion jury verdict. The jury verdict also disregarded several well-established First Amendment legal principles relating to the media's use of illegally-made materials. No testimony or evidence proved that Gawker played a hand in the illegal recording. The Supreme Court has repeatedly spoken on this issue, sometimes referred to as lawfully obtained truthful information.

This case would have been a lot clearer if Gawker had played a role in the surreptitious illegal recording of the private act, and had the players been private people. Instead, there was a settlement with the individual who made the recording. And, much of Bollea-Hogan's purported private life had been previ-

ously exposed in media, from his own reality tv shows to interviews with Howard Stern.

Though juries do not set precedent, this case certainly sent a message to the media and the public. Gawker might not have been everyone's cup of tea, abusing or misapplying tort law is a modern form of punishing the media, which in many circles is censorship. There's a well-known axiom in legal circles: bad cases make bad law. But bad cases make for great class discussions.

This Grad Student Was Asked to Teach Media Law for the First Time. You Won't Believe What Happened Next!!!



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Grad students: you've weathered the storm of your first few months or semesters in a graduate media law program. Most likely, you and your adviser have agreed that it's time for you to gain some teaching experience so that you can compete on the tenure-track job market. If you're not going the tenure track route, you might still be asked to

teach a course during your time in grad school. Either way, it's time to think about your pedagogy. Like most first times (shoutout to Campari, Jerry Falwell, and Larry Flynt), it helps to have a clear idea of what to expect so that you can create effective strategies for your first semester in the classroom.

Continue reading for a few helpful hints about teaching your first class, yet again in BuzzFeed listicle form:

1) Seek out advice. First thing first. Every program is different

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Southeast Colloquium: Call for Reviewers

The Law and Policy Division has a proud tradition of hosting an engaging research paper competition at the Southeast Colloquium each year, and we anticipate that 2017 will be no different. With our growing number of papers comes a need for an equally vigorous team of reviewers. For us to limit reviewers to three papers each, we'll need approximately 40 reviewers. If you are not submitting a paper to the colloquium this year, the division invites you to help with the competition. Reviewers will receive a package of papers in mid-December, with a mid-January deadline for returning reviews. For more information, please contact Dr. Michael T. Martinez by phone at (865) 687-2564 or via e-mail at mtmartinez@utk.edu. For more information on the 2017 Southeast Colloquium see the website: <http://schieffercollege.tcu.edu/aejmc/>.

Do You Have News for the Division?

If you have any news or would like to contribute to the newsletter, please contact:
Roy Gutterman by email (rsgutter@syr.edu)

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and every department has its own way of doing things. If you're unsure of implementing a strategy, ask the savvy veterans in your department. This may include your adviser, your media law professor, and fellow students.

2) Daaaaaaamn, Daniel...back at it again with the pop culture references. I find that students appreciate the levity of a few well-placed pop culture references especially when the material seems dated or dull. For example, during my lecture on First Amendment theory, I've adopted DJ Khaled's method of "major key alerts" (follow DJ Khaled on Snapchat and you'll see what I mean). I tag important PowerPoint slides with a simple key emoji and I throw out the reference during lecture. It usually prompts a laugh and the thoughtfully placed emojis act as breadcrumbs for students who use the slides during study sessions. In class, the visual learners see this as a signal to perk up and listen. But be careful! Too many such references can be distracting.

3) Guest lecturers. #blessed. From the moment you began graduate school, you have been surrounded by brilliant professionals and academicians who are shaping media practice. Leverage those relationships when it comes time to teach. For example, one of my dear

friends graduated from our masters program at UNC and now edits an online news magazine that focuses on issues that are relevant to the universities in the Research Triangle. Each semester, we trade lectures. She teaches my students how to file FOIA and NC open records requests. I give a libel lecture to her news writing class. Additional piece of advice: schedule guest lectures for the busiest times during the semester.

4) Say it with me: "I. Don't. Know." It's easy in your first semester teaching (regardless of the class) to try to answer every student question with supreme confidence. The truth of the matter is that everyone in the classroom, you included, probably still has a lot to learn. This is especially true in dynamic fields such as media law. It's cool to say you don't know an answer. And it's even cooler to use your uncertainty as an opportunity to engage with students outside of class as you seek out answers. Your teaching evaluations will reflect your hard work outside of class, and you'll be better prepared for the curveball questions from students in later semester or even in future job talks and research presentations. The words "I don't know" are not part of the Carlin monologue. You can say them.

5) HMU on Twitter. Look around

the Law and Policy Division and you will see some prolific tweet-savvy profs. A quick Google leads you to many of our members' Twitter accounts. These are excellent places to get teaching ideas, new course content, hot-off-the-press commentary, or to engage in discussions about emerging issues and cases. If you think it might contribute even slightly to your pedagogy, ask your students to follow you on Twitter. And if you take this advice, make sure you publicize your account and your course hashtag. Remember that some students participate better in the Twittersphere than in the classroom. Their level of engagement might pleasantly surprise you. Also, if you want to publicize your work to the division, follow @itsPBrooks and tweet at me when something cool happens with your work!

6) Chi-Town, stand up! AEJMC 2017 is in Chicago! If you made a splash during your first semester teaching or you have stellar teaching ideas that you plan to implement, please submit your ideas to our annual Law and Policy Division teaching competition! Details forthcoming in future editions of Media Law Notes. Follow @AEJMC_LP on Twitter for updates as conference deadlines approach.



Follow us on Twitter

@AEJMC_LP

Legal Annotated Bibliography



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Doctoral Student
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Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 *GEO. L.J.* 1559 (2016)

In this piece promoting the right of citizens to film law enforcement officers, Brooklyn Law School Professor Jocelyn Simonson finds her theoretical grounding not in traditional free speech justifications such as the marketplace of ideas or the Meiklejohnian ideal, but instead in the critical cultural theory-spawned value of dissent. The “value of filming police as speech lies not only in its future contributions to public discourse and democratic dialogue,” she writes, “but also to that in-the-moment communication to police officers. . . . For civilian filming of the police is not only a tool of police accountability, but also a method of power transfer from police officers to the populations that they police.”

Currently several circuit courts, including the First, Seventh, Ninth and Eleventh, have identified a First Amendment right to video police. Several federal jurisdictions have yet to confront the issue, and others have suggested that such a right either does not or should not exist. In 2015, she points out, “district courts within at least five different circuits held that there is

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not yet a clearly established First Amendment right to record police activity in public, a finding that results in qualified immunity for police officers accused of violating the right.” As for the future of police filming, she predicts that we are headed “toward a national recognition of a First Amendment right to record on-duty police officers in public. The real challenge for courts will not be whether there is a First Amendment right to record the police, but rather where its limits lie.”

In finding those limits, and in order to maximize the amount of freedom to record officers, Simonson proposes a pair of guiding principles for ascertaining when filming the police should be constitutionally protected. “[F]irst, she says, “the act of recording on its

own can never be enough to constitute interference; and second, any prohibited conduct must constitute physical interference with, or obstruction of, police work.”

Ultimately, Simonson makes the case that police officers need to be held accountable for their actions, if not knocked down a peg, as it were. Courts around the country “should remember,” she concludes, “that observation is a form of power, especially when backed up by the record button, and that the populations who most frequently interact with the police—poor people of color—are also the populations with relatively little political power.” In the interest of equality, therefore, a nationwide recognition of the right to film police officers is both justified and desirable.

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Amy Adler, Fair Use and the Future of Art, 91 N.Y.U.L. REV. 559 (2016)

New York University Law Professor Amy Adler begins her attack on the contemporary state of the fair use doctrine by offering a little history of how it reached its current state. Initially, the Copyright Act of 1976 established a four-part test for ascertaining fair use: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality, and (4) the effect of the use upon the potential market. Although the four-part test still remains good law, its application changed significantly in the 1994 Supreme Court case of *Campbell v. Acuff-Rose Music*, in which the Court “retreated from its market-focused approach that had emphasized the fourth factor.” In *Campbell*, the Court promoted the first factor into higher prominence and essentially boiled the test into one question—whether the derivative work is transformative. “Specifically,” Professor Adler explains, “a court must ask whether the secondary work adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. If the answer is yes, the use is transformative and the other factors recede in importance.”

This new development, which was intended to give artists more leeway to build upon existing works, has instead “made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that fundamentally misunderstands the very

creative work it governs.” One of the reasons this is the case, Adler asserts, is that “the transformative inquiry asks precisely the wrong questions about contemporary art. It requires courts to search for meaning and message when one goal of so much current art is to throw the idea of stable meaning into play. It requires courts to ask if that message is new when so much contemporary art rejects the goal of newness, using copying as a primary building block of creativity.” Put another way, the prevailing vision of copyright law makes the value judgment that new art should not copy pre-existing works, when sometimes that’s precisely what art should do.

Yet beyond the normative, another practical problem plaguing artists in the fair-use realm is that the concept of the “meaning” of the original work, which is central to the transformative analysis, is under-theorized, allowing courts to approach the matter “in a hodgepodge, undisciplined fashion. Without any theory of interpretation, courts have actually taken three widely divergent approaches to determining meaning in fair use cases: some depend on the artist’s statement of intent, some depend on aesthetics or formal comparison, and some depend on the viewpoint of the ‘reasonable observer.’”

To account for these problems, Adler advocates for the abandonment of the transformative test. Instead of forcing courts to evaluate the expressive value and often-inscrutable messages within art, Adler advocates for the test to instead think of art as a market commodity. This approach, she concludes, would not only take courts out of difficult enterprise of adjudicating meaning, but it would

likely promote a greater protection for copying in art.

Xiyin Tang, Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses, 101 IOWA L. REV. 2021

Like Professor Adler, Xiyin Tang, IP associate at Mayer Brown and visiting fellow at Yale, starts from the assumption that the current fair use doctrine is unfair to artists. Her proposed solution, however, is quite different. To account for the expensiveness, unpredictability and inherent unfairness of fair use, she advocates for the expansion of the genericide doctrine, which she endearingly describes as the “bastard child of all defenses, relegated to the backseat” of intellectual property law. After suggesting that the relationship between the First Amendment and the fair use doctrine is rife with inconsistencies—with the fair use tail wagging the First Amendment dog, so to speak—she makes the case that the doctrine’s myopic focus on parodies should expand to place more emphasis on public perception of marks.

Her soliloquy of the canon is worth quoting at length: “Genericide does everything fair use does not do. It recognizes anti-uniqueness in an age rife with appropriation art (in which images and objects are taken straight—and often wholesale—from our collective pop culture) and satire (in which the copyrighted work is used as a vehicle for general commentary on the state of society, a genre of work, and so on, rather than targeting the work itself) and the eradication of the author. It ac-

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commodates the use of marks not for purposes of commenting upon but for purposes of signification; it recognizes the right of the public, not the trademark owner, to decide a mark's fate. It is audience-friendly and First Amendment-approved. And, once a mark is held to be generic, it is free for all to use, comment on, and appropriate—which both decreases the enormous litigation costs associated with a fair use defense and serves as a potential deterrent to overzealous mark owners.”

After establishing a baseline assumption trademarks exist to serve the dual functions of promoting consumer heuristics and mark-holder goodwill, she turns to hip-hop culture to illustrate her point that enhancing the genericide defense is the best route forward. “Premised on depictions of excess,” she explains, “rap lyrics themselves often call out a roster of trademarked names, used not as commentary on the marks themselves but as evocations of a lifestyle. Consider, for example, rappers’ penchant for evoking Cristal in the ‘90s—so constant, in fact, that . . . [m]entions of the vintage bubbly have become so common in hip-hop circles that the brand name Cristal has often come to stand in for the very word champagne itself.” To use another example, she queries, “[i]sn’t genericide, after all, about what happens when a mark ceases to signify the source, but rather a category of good? Louis Vuitton not for Louis Vuitton, but Louis Vuitton as merely a stand-in for this vast category of luxury goods.”

Using empirical studies to suggest that the prevalence of specific

brands does not correlate to its fame or power as a trademark, she proffers that the use of Louis Vuitton in its hip-hop application, for example, does not necessarily diminish the brand’s commercial value. Ultimately, she concludes, the increasing commercialization of popular culture all but demands the placing of popular perception and categorical heuristics near forefront of the IP analysis.

Eugene Volokh, The Freedom of Speech and Bad Purposes, 63 UCLA L. REV. 1366 (2016)

In this article, UCLA Professor Eugene Volokh analyzes what role scienter and subjective intent play in freedom of expression cases. In particular, he takes stock of “purpose tests,” in which “otherwise constitutionally protected speech loses its protection because of the speaker’s supposedly improper purpose.” Most of the time, Volokh points out, the Supreme Court has avoided purpose-based tests, following the general line of reasoning opined by Chief Justice John Roberts in *FEC v. Wisconsin Right to Life*: “Under well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.” Some lower courts, however, have been quicker to embrace purpose-driven tests in certain contexts. On the criminal side, some of these areas include government employee speech, crime-facilitating speech, harassment, sexually motivated expression and revenge pornography; in the civil sphere, these may include right-of-publicity claims, interference with business relations and threats.

It is important to note that none of these areas are topically value-

less under the First Amendment in the same way that child pornography, fighting words or obscenity are. Purpose tests are, however, more context-specific in the above-mentioned areas, and generally consider defendants’ states of mind. This is not to say that scienter never matters, however, as the high court has generally shied away from strict liability, even when considering speech that has no First Amendment value—such as obscenity and child pornography; courts in those types of cases merely apply an objective standard: what a reasonable person knew or should have known about the properties of their speech. These properties, for example, may include the “content of the obscene material, or the age of a child depicted in child pornography—and not on what they sought to accomplish using the speech.”

Although the Supreme Court generally avoids purpose tests, there are a few high court cases—that remain good law—that include them. Principal among these is *Brandenburg’s* incitement analysis, which permits speech to be restricted if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” This recent propensity to avoid purpose tests notwithstanding, Volokh doubts that such extant, vestigial tests will go away any time soon because they are generally tied to narrow actus reuses and so the rarely come up.

On the whole, Volokh approves of the recent trend and makes the normative case that purpose tests are usually unfruitful and should be avoided. “A speaker’s purpose ought not be seen as stripping First Amendment protection from other-

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wise protected speech,” he articulates. “Speech is generally harmful or valuable because of what the speaker says, not because of the speaker’s purposes. Purpose-based tests thus often suppress valuable speech (given that the speaker’s purposes don’t strip the speech of value). And they often deter even speakers who lack the forbidden purpose, because purpose is unusually hard to reliably identify. . . . If the content of speech is indeed harmful and valueless enough to be banned, it should be banned without regard to the speaker’s purpose. And if the content is indeed valuable enough to be protected, it should be protected without regard to the speaker’s purpose.”

Floyd Abrams, Free Speech and Civil Liberties in the Second Circuit, 85 FORDHAM L. REV. 11 (2016)

In this historically oriented article, Cahill Gordon & Reindel partner Floyd Abrams outlines the role that the Second Circuit Court of Appeals has played in the evolution of First Amendment law. His thesis is that the “Second Circuit has played a major role in the development of First Amendment law. From the days in which Learned Hand reigned intellectually on the Second Circuit through current rulings, the court has assured that broad protections for freedom of expression were afforded. First Amendment arguments did not always prevail, and there is no reason to think they always should have. But the court has always been receptive to them, and its decisions have reflected a high level of dedication to assuring that

the communications capital of the nation remains at the forefront of defending the freedoms set forth in the First Amendment.”

Abrams begins his tale prior to Schenck and Abrams at the dawn of the contemporary First Amendment era, when then-district Judge Learned Hand in *Masses Publishing Co. v. Patten* considered the recently enacted Espionage Act. Although Hand recognized that Congress may have the authority to “forbid the mails to [circulate] any matter which tends to discourage the successful prosecution of the war,” he simultaneously “urged that it was necessary, even in wartime, to limit the scope of a broadly phrased Espionage Act so that it could not be read to justify ‘the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies.’”

Judge Hand also played significant roles in *United States v. Dennis*, in which twelve Communist organizers were convicted of advocating the overthrow of the U.S. government, and *United States v. One Book Entitled Ulysses*, in which both Hand and his cousin Augustus affirmed district Judge James Woolsey’s conclusion that the correct legal test for obscenity was whether a book tended “to stir the sex impulses or to lead to sexually impure and lustful thoughts.” Although, Abrams points out, “[t]he opinion was not couched as a First Amendment opinion, but rather as one interpreting the congressional statute at issue,” it still had important, long-term First Amendment repercussions and opened the door to the importation and publication of serious literary works that involved sexual subjects.

The Second Circuit was also

instrumental in the so-called Pentagon Papers case, which the court pushed through “at juridical warp speed,” as well as *Edwards v. National Audubon Society, Inc.*, which assessed the newsworthiness of false charges and the protection of journalists who print them. Although several decades-old, precedent-setting cases such as these arose from the Second Circuit, Abrams also points to more recent examples of this court of appeal (and its districts), leading the way in First Amendment cases. These include the areas of libel (*Chau v. Lewis*, protecting opinions from defamation claims); panhandling as speech (*Loper v. New York City Police Department*, subjecting an anti-begging statute to an elevated level of scrutiny); commercial speech (*United States v. Caronia*, giving pharmaceutical companies First Amendment protection for their truthful speech.); compelled speech (*Martin v. Hearst Corp.*, allowing news outlets to maintain web pages that accurately describe expunged arrests); government employee speech (*Matthews v. City of New York*, giving a police officer more breathing space to comment on NYPD policy); and journalist

Minutes of the Law and Policy Annual Division

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Division Head Dan Kozlowski (DK) called the meeting to order at 6:50 p.m.

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DK welcomed all in attendance to the Law and Policy Division members meeting.

Approval of Minutes

The first agenda item was to approve the minutes from the 2015 members meeting, which were prepared by Jason Martin (JM) and published in the fall issue of the Media Law Notes. A motion was made and seconded. The motion had no opposition and passed unanimously.

Stonecipher Award

This year's winner of the Harry W. Stonecipher Award was Genevieve Lakier (GL) of the University of Chicago Law School for her paper, "The Invention of Low-Value Speech." GL couldn't be here to accept the award in person, so Kyu Ho Youm (KHY) accepted on her behalf. He thanked the committee members for their work and extended a special thanks to Derigan Silver (DS). He also explained that the previous recipient, Jane Bambauer of the University of Arizona Law School, participated in the selection process. KHY said he hopes we can continue with the kind of groundbreaking research Lakier's paper represents. KHY also wanted to recognize the work of Douglas Anderson, who was instrumental in developing this award, and said that he hopes the award will be with the division forever. KHY said he would say a few words about the award at the AEJMC business meeting on Saturday.

DK said GL was gracious and appreciative, and will mail her \$1000 check and plaque due to KHY's generosity. DK says GL conveys her thanks to the division for the honor.

State of the Division

DK said the top paper session, which took place right before the business meeting, was a hit. He offered his congratulations to all the winners. He also was pleased with the session on Cohen v. Cowles, and noted that Dan Cohen made an appearance.

DK shared an announcement from the Council Division. Overall, AEJMC has 3412 members this year, which is down about 100 in terms of overall membership. Paper submissions overall this year were down a bit too. As a conference, the record number of submissions was in San Francisco last year. This year, though, there were about 1500 submissions total.

Next year, the annual conference will take place in Chicago from August 9 through 12 because every five years the conference goes back to Chicago. The Chicago pre-conference session will take place on a Tuesday, and the conference will be held on Wednesday through Saturday. The conference will be in Washington, DC, in 2018 and Toronto in 2019. At tonight's meeting, DK noted that we will vote on where the conference will be in 2020. Courtney Barclay (CB) will take the lead.

DK said this time last year, the Law and Policy Division (L&P) had 231 members. This year, L&P saw an increase in membership to 238 members. Of the 28 total AEJMC divisions, L&P has the sixth highest number of members.

DK then discussed budget issues. This year, he engaged in a forensic analysis of the L&P budget. Despite the slight increase (by seven members) in membership this year, there has been an overall drop in membership in the past decade. This overall decline poses conse-

quences for L&P's budget because membership dues are the source of a significant portion of the budget. DK explained that faculty members pay \$30 to be a member of L&P, \$20 of which goes to Communication Law and Policy (CLP). Graduate students pay \$7 to join L&P. Membership peaked in 2009, when L&P had 309 members. By 2011, membership declined about 283. Despite the small bump this year, numbers have declined steadily. Overall, L&P is down 71 members in the past decade. In practical terms, L&P now earns about \$700 less than it did in 2009.

L&P is not the only division that has realized an overall decrease in membership in the same time frame. DK explained that PR and Mass Comm and Society, for example, have lost about the same number of members. DK noted that 54% of people join AEJMC but decline to join divisions, and this number is increasing. AEJMC is aware of this issue but has yet to come up with a solution. The decline in membership has consequences for us because L&P has been spending more money than it earns overall. The situation is not sustainable in the long term.

DK put up a slide to illustrate budget information. For this conference, L&P spent \$475 in prize money, allocated as follows: \$100 to the student paper winner; \$100 to the first-place teaching award winner; \$75 to the second-place teaching award winner; \$50 to the third-place teaching award winner; and \$150 to the debut faculty paper award. L&P also awarded \$175 in free conference registration to the debut faculty award winner. L&P also paid \$40 per plaque for 13 plaques, for a total of \$520. More

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winning coauthored papers this year more plaques. L&P also spent approximately \$20 for certificates for the teaching winners and top poster awards. AEJMC charged \$25 per certificate, but money was saved this year by having Jason Martin (JM) design and print his own certificates. JM noted that the \$17 outlay this year will cover certificates not only for this year but for the next several years.

DK then addressed the issue of donations. In recent years, L&P has given \$500 to the Student Press Law Center (SPLC) and \$500 to the Reporters Committee for Freedom of the Press (RCFP). In past years, L&P has also added an additional \$500 donation to the Electronic Frontier Foundation (EFF). DK would discourage continuing the donation to EFF.

L&P also spent \$50 for a coffee hour at the Southeast Colloquium this year.

L&P's expenditures this year added up to about \$2250. L&P brought in about \$2350 with our membership dues. DK noted that L&P currently has a barely balanced budget without much room to grow or spend on other opportunities. DK noted that Jonathan Peters (JP), for example, had proposed inviting Judge Posner to a panel, but L&P couldn't pursue the idea for budgetary reasons, as it had no honorarium to offer.

Amy Kristin Sanders (AKS) asked whether we could fix L&P's budgetary problems by collecting \$40 from Clay Calvert (CC) for every plaque he won. The audience laughed.

DK discussed L&P's efforts to increase membership and boost the budget. He mentioned Brooks

Fuller (BF), who worked this year with outreach to graduate students. DK also discussed L&P's efforts of recruiting sponsors for the division social and mentioned that the Women in Law Division (WILD) group is meeting for breakfast tomorrow. CB said she has more ideas about increasing membership that she will share later in the meeting.

DK mentioned that another avenue for money for L&P is from the CLP account. L&P could spend this money for division needs. DK explained that he believed there was a perception among L&P members that the division was already spending the CLP account money, but it has in fact not. DK said this issue would be addressed later in the meeting.

Reports

Communication Law and Policy (CLP) Report – Wat Hopkins (WH) WH passed out a draft of his report and said it will be circulated electronically when some corrections, mostly about page numbers, are made. The report goes through autumn; however, the autumn issue is not out yet. Unlike previous publishers, Francis & Taylor does not send page numbers, so WH will correct this issue before circulating the report.

WH passed around a sign-up sheet for interest in editorial board and informed L&P members to make sure their email addresses are legible.

WH said this was a good year for CLP. CLP received 47 submissions for volume 21, which is the most submissions it had received since volume 9. Of these submissions, CLP published 11 articles, for an acceptance rate of slightly more than 23%. WH explained that ideal

acceptance rate is slightly below 25%. Over the 21-year run of the journal, the acceptance rate has been 28%. If the estimate is correct this year, CLP is publishing 482 pages, which is an increase of 11 pages over last year.

WH noted one concern, which he said has never happened before. All of the authors publishing in volume 21 are men. The autumn issue, which commemorates the 50th anniversary of FOIA, features four invited authors. Dave Cuillier suggested this; DC and WH invited four authors. The fifth featured author was not invited, but had coincidentally submitted an on-point article that was accepted after peer review. WH then encouraged women to submit to CLP.

WH addressed personnel changes on the editorial board. – One member retired, and two were added.

WH mentioned L&P division limits and noted that there were six vacancies. WH asked people to join the board based on topics of articles coming in.

WH said there was nothing more to add to the report at this time. He will have some corrections and clean up the numbers before sending out the final report.

AKS thanked WH. As new member of editorial board, AKS said she just got a glimpse of all the things WH does for L&P.

Graduate Student Liaison – BF DK introduced BF. BF is the first graduate student liaison, a position recommended by Chip Stewart (CS).

BF introduced himself and explained that he intends to vacate the position next year because he is graduating. BF asked division members to think about who would

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be a good candidate to replace him next year.

BF said the first year of the liaison position has mainly been one of fact finding. He has been figuring out what attracts grad students to L&P. Next year, BF hopes to focus on how to grow membership without incurring costs. The coffee hour at the Southeast Colloquium was a success. Fifteen people RSVP'd and showed up, but BF estimates that the actual number of attendees was double that number. The coffee hour yielded good interdisciplinary discussions. BF recommends doing the coffee hour again next year at the Southeast Colloquium at TCU.

BF also put a column in last year's Media Law Notes (MLN). BF said he is looking for additional opportunities to educate graduate students who are new to the program and find out what they really need to know.

BF says he envisions his position over the next year as a party whip. Encourage grad students to come see what we do. He will reach out to faculty in L&P to discuss ways to connect one-to-one with graduate students and publicize grad students' work in CLP. BF said we also need to look at where else graduate students are submitting. For example, their ICA work might find a home in CLP. Publicity is great, so L&P should offer this to graduate students and help them get their names out there. BF encouraged L&P members to pass along more ideas.

Southeast Colloquium Chair – Michael Martinez (MM)

This past year, Southeast Colloquium was at LSU's Manship

School of Mass Communication. MM received a total of 22 submissions. Thirteen were accepted, for an acceptance rate of 59%. Four of these papers were from faculty, and three were accepted, for an acceptance rate of 75%. Of 18 student submissions, 10 were accepted, for an acceptance rate of 56%. These numbers are consistent with previous years. L&P's numbers are strong at Southeast, which shows we're really active in the process.

Southeast is at TCU next year. CS is the chair. MM encouraged all L&P members to submit and participate. CB noted that we need reviewers too.

PF&R Chair – Jared Schroeder (JS)

JS talked about how good the preconference session was. JS said the teaching session had good discussions. He was pleased that the session was able to highlight the ideas of the award winners, not just present them with a check. He talked about one memorable exercise during the session where participants desecrated a cake designed to look like an American flag. JS also mentioned he contributed articles to MLN this year. He concluded by talking about the excellent panels and programming at the conference.

Webmaster – Matt Telleen (MT)

MT tried to make changes to L&P's website this year. MT joked that his colleagues couldn't provide assistance because they were Amish. MT said AEJMC stopped giving divisions editorial access to websites a while back. He, however, tracked down person with access, who made the necessary changes. DK noted the site is much more robust now.

Newsletter Editor – Kearston Wesner (KW)

KW thanked all of the contributors to this year's issues of MLN. She noted that some of the contributions this year were unsolicited and thanked contributors for reaching out to provide content. She extended a special thank you to Minch Minchin (MM), who wrote the legal bibliographies this year. KW thanked JM for making his files available to make production easy. KW also thanked DK for distributing the newsletter.

Teaching Standards Chair – Jon Peters (JP)

The competition was great this year. There were 11 submissions and four judges. Last year, we had 10 submissions and four judges. The high point was in 2014, with 16 submissions. All of the submissions this year were of high quality. JP thanked those who submitted or judged.

JP said the L&P website has all of the award-winning entries. JP invited L&P members to mine the entries for ideas for the classroom.

JP thanked AKS and JS for organizing panels during the preconference sessions. These were well attended and offered a variety of approaches and perspectives on old and new issues.

With regard to MT and the website, one of award winners in teaching comp last year has used lots of pop culture videos and audio files. JP suggested creating a repository to dip into. WH suggested MT put them all up on website.

JP handed out the first-place award to Andrew Pritchard for his 80+ page booklet on the history

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and philosophy of First Amendment.

JP handed out second place in absentia to Jenelle Belmas from University of Kansas for her entry of a flag desecration exercise.

Third place went to JS's entry, which involving getting his students to read TOS agreements.

Research Committee/Paper Competition Chair – Jason Martin (JM)

This was another great year for research competition. JM thanked CB, DK and CS for preceding him.

There were 53 entries, 25 of which were accepted, for a 47.2% acceptance rate. This rate is higher than previous years. Submissions are down a bit. AEJ wants us to keep the acceptance rate below 50%. JM mentioned we could have added another session, but this would have bumped up our rate.

Four or five submissions left identifying information in the PDFs. These papers were saved after JM notified the authors by email.

The competition was very competitive. The score averaged a 3.8 for all papers across categories.

Of 32 faculty papers, 15 were accepted. For debut faculty papers, four of six were accepted (66.7%). For students, 10 of 21 were accepted (47.6%).

Reviewers reviewed between two and four papers each. Most reviewers had 3 papers. All reviews came in on time.

Research sessions averaged 33 people in attendance. JM gave out plaques and checks. Student paper awards were handed out. First place went to Minch Minchin, Keran Billaud, and Kevin

Bruckenstein from the University of Florida. Second place went to Sarah Papadelious from the University of Florida. Third place went to Lindsay Trago of UNC Chapel Hill.

Faculty paper awards were then handed out. Both first and second place went to Clay Calvert of the University of Florida. Third place went to Andrew Pritchard and Eliana Conrad of Iowa State. Conrad is an undergraduate coauthor of the paper.

Top poster awards will be chosen on Saturday.

Vice Head/Program Chair – Courtney Barclay

CB reiterated that papers accepted for poster sessions do not necessarily reflect where the paper fell in judging. Oftentimes this is just a programming issue to keep sessions cohesive.

This year involved "speed dating" in programming. DK wrote about system in last year's MLN. Now there is an online matching system, and we try to partner with other divisions. This lets L&P offer more programming and underscores the importance of interdisciplinary endeavors. The matching system yielded six great panels. The 3:00 panel tomorrow is on the internationalization of media law. At 5 is a partnership w Comm Tech on police body cameras; journalists and legal experts are on the panels.

L&P partnered with many different divisions: twice with International Comm; once each with Comm Tech, Scholastic Journalism and Media Ethics and the Newspaper Division for the Cohen panel.

CB thanked everyone for submitting proposals. Because of the process, it's good to submit as early as possible. Submitting sooner al-

lows L&P to build relationships w other divisions, and there's a better chance of getting a panel approved.

Eight panels were proposed. Three were officially accepted. EU submitted through another division (Scholastic Journalism), and we partnered on that.

Peaceful Transfer of Power

There was a transfer of power. CB became head, JM became vice head, and KW became research chair.

DK thanked the division and told everyone they're in great hands.

New Business

CB said her first official duty is to honor DK. She spoke about DK's mentorship practices and said she hoped to follow his lead. She gave DK a plaque.

L&P voted for San Diego as the 2020 AEJMC location. The three options were Phoenix, San Diego and San Francisco. Phoenix was the cheapest option; the other locations were double the cost. Three votes were for Phoenix; five for San Francisco; and 24 for San Diego.

CB then talked about the journal account. In DC, we first found out about giant account we hadn't known about. L&P started researching to figure out how to use the money. Last year, L&P decided to donate additional funds to EFF. In reviewing the bylaws, L&P determined that the decision regarding account funds lies with WH, as CLP editor. How L&P spends money must also benefit the journal. CB will work with WH this year to see if things come up to benefit the division and CLP. CB raised the idea of bringing in speakers and paying them a small

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stipend from the account. Ideally, L&P would spend at about 5% of journal budget every year so as not to deplete fund entirely.

DK explained that other divisions do this. Mass Comm & Society is giving out \$40K in awards from their budget next yr.

DK also mentioned that Taylor & Francis (T&F) had been invoicing us 300 members even though we don't have 300 members. DK reached out to T&F, who agreed to drop the requirement and only invoice us for the actual members in division.

CB proposed to change L&P contributions from a set dollar amount for donations to an amount of 1/3 our anticipated budget. There's a challenge of setting a dollar amount because we don't get the final budget until October. David Arant seconded CB's motion. CB called for discussion; there was none. The vote passed unanimously.

Officer Elections

Newsletter Clerk – CB noted that Roy Gutterman (RG) of Syracuse expressed interest in the Newsletter Clerk position. There were no other nominations. Nominations were closed.

RG said he would like to keep strength of MLN. He's taught at Syracuse for 11 years. Before that, he was a practicing lawyer in NJ for 5 years and a newspaper reporter at the Cleveland Plain Dealer, where he worked for editors who took cases to Supreme Court. RG would like MLN to reflect tenor of division, which is strong and talented.

RG left room. CB called for comments.

Unanimous vote.

PF&R Chair – JS indicated an interest in continuing as chair. No new nominations were put forth.

JS expressed he hopes to keep working for division.

AKS moved to continue vote by acclimation. The motion was seconded. JS was voted in.

Teaching Standards Chair – JP, the current Chair, spoke. He said he wanted to work on building a repository.

CB moved for other nominations. There were none. JS was voted in by acclimation.

Webmaster – CB said MT would prefer not to continue. AKS had expressed interest. CB moved to vote by acclimation. The vote was seconded, and AKS was voted in.

Southeast Colloquium Chair – MM was appointed as chair for one more year at least.

Graduate Student Liaison – The position is not yet in the bylaws. It's an ad hoc position, appointed by the head. BF agreed to stay on.

Publications Committee – Jason Zener left the publications committee, and Kathryn Blevins (KB) stepped on for a two-year term. KB couldn't be here because she was starting a new job at Idaho.

Stonecipher Committee – CB used her discretion to appoint an ad hoc committee for the Stonecipher award. Dean Smith agreed to chair this year. CB asked for more volunteers to fill the committee. Stonecipher nominations are in January. In mid-late March, the committee would get the list of articles to read. In mid-May, committee members would submit their ranking of the articles with some justification.

CLP – Next year is the last of WH's CLP term. This year, we

would traditionally look for new editors or renew. In January, the winter issue will feature a call for applications. WH is keeping us on edge of our seats and will let us know then if he wants to renew his position. CB thanked WH for his work on the journal.

Other information

CB said the bylaws are out of date. They don't enable us to do electronic voting. This year, the executive board will be reviewing the bylaws. CB asked the division to look at the bylaws on our website and forward suggestions. The summer issue of MLN will likely include proposed bylaws amendments that we'll vote on during the next annual meeting.

Ed Carter noted when he was division head in 2008-2009, he looked for the bylaws, and nobody knew where they were. The bylaws were rewritten and adopted in Boston in 2009.

The WILD breakfast is tomorrow at 7 a.m. CB invited division members to attend. WILD will talk about issues affecting women in academic positions and graduate school. These issues attach to other minorities and men in the division as well.

CB invited everyone to join us at social tonight.

Meeting adjourned at 8:09 p.m.