45.2
Winter 2017

Media Law Notes

AEJMC Law & Policy Division

Head Notes: Thoughts from Division Head

Courtney Barclay
Jacksonville University
barclay@ju.edu

It seems opening a paper or turning on the television is a stressful act these days. There are almost daily challenges to the principles on which our division was founded. And yet, I am reminded by the strength of our membership that there are many who stand and fight for free speech and an independent press. There is a lot of work to be done, but thanks to our dedicated Newsletter Clerk Roy Gutterman, this issue of Media Law Notes highlights some of the important work that our members are doing in legal scholarship.

So many of our members are working in diligently in the classroom to promote the values of free speech. Jared Schroeder has contributed a piece this month exploring the discussions we have in the classroom regarding President Trump's actions and policies. This piece emphasizes the importance of the theories and skills we teach our students. Amy Sanders has written about her experiences teaching free speech abroad. Amy offers concrete tips to include international law in your classes, as well as key resources. I can't wait to implement some of her ideas. I know many others are continuing to innovate in the classroom, and I hope you will consider sharing your teaching success by submitting an entry to our annual teaching competition.

Congratulations to those of you who will be presenting your research at Southeast Colloquium! Michael Martinez has once again worked to provide us with a great lineup that you can check out inside this issue. This year the Colloquium will be held March 9 – 11 on the campus of Texas Christian University in Fort Worth, Texas. If you're attending, please make sure to attend our graduate student coffee hour organized by our graduate student liaison, Brooks Fuller.

Looking forward, we already have some great plans for the national convention in Chicago.

Thanks to Vice Head Jason Martin, Teaching Chair Jonathan Peters, and PF&R Chair Jared Schroeder for their hard work

See Head Notes, 2

In This Issue

Alternative Facts and You

Jared Schroeder
Southern Methodist University
jcschroeder@mail.smu.edu

In his first week in office, President Donald Trump informed federal employees at certain government agencies that they can no longer speak with reporters, send out news releases, or update social media accounts. They essentially can no longer communicate with the public about its

See Making Law Real, 3

Call for Papers: 2017 AEJMC Conference: Law and Policy Division

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2017 AEJMC Conference in Chicago, IL. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, FCC issues, intellectual property, obscenity, freedom of information, and a myriad of other media law and policy topics. Papers outside the scope of communications law and policy will be rejected.

The Division welcomes a variety of theoretical orientations and any method appropriate to the research question. A panel of judges will blind-referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the conference to present accepted papers.

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

Papers that include author-identifying information within the text, in headers, or within the embedded electronic file properties will be automatically rejected (review the instructions on the AEJMC website for stripping identifying information from the electronic file properties). Authors are solely responsible for checking the final uploaded version of their paper for any and all author identifying information. Submitting before the conference deadline will allow you to fully check your submissions as they are entered into the system so that a resubmission prior to the deadline is possible if necessary.

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

The Division again will award a Top Debut Faculty Paper. The top paper accepted by a faculty member who has never had a paper accepted by the Division will be awarded a prize of $150 and will receive free conference registration. For papers with multiple authors, multiple faculty and/or faculty and student, to be eligible none of the authors of the paper may have previously had a paper accepted by the Division at the national conference. In addition, only the faculty author presenting the paper will be eligible for free conference registration Student authors should clearly indicate their student status on the cover page. Student-only submissions will be considered for the $100 Whitney and Shirley Mundt Award, given to the top student paper. Co-authored papers are eligible for the competition so long as all authors are students. The Law and Policy Division will also cover conference registration fees for the top three student paper presenters. In the case of co-authored student papers, only the student author presenting the paper will be eligible for free conference registration.

If you have questions, please contact Kearston Wesner, Law and Policy Division Research Chair, Quinnipiac University, School of Communications, 275 Mount Carmel Avenue, Hamden, CT 06518. Phone: (713) 443-1431; email: kearston.wesner@quinnipiac.edu.

Head Notes, continued from 1

organizing the conference panels and pre-conference sessions. This year, the conference will run from Wednesday, August 9 – Saturday, August 12. I hope you'll join us for our pre-conference day on Tuesday, August 8. Based on the positive feedback we received, we'll have another session focusing on teaching, as well as a special guest panelist to talk about recent legal developments. More details will be provided in the next issue of Media Law Notes.

We are planning the Division social for Friday, August 11 immediately following our members' meeting. If you are interested in sponsoring the social, please contact me. Thanks to the generosity of many, we were able to have a great reception last year. I hope we can continue this tradition in Chicago.

Finally, you'll find the Stonecipher Award call inside. Nominations for this award are due March15. Please submit the articles you feel made an impact on media law scholarship. The article must have been published in 2016. Nominations should be sent to Dean Smith at High Point University via email, dsmith1@highpoint.edu, before March 15.

Alternative Facts, continued from 1
government's activities.

Days earlier, Press Secretary Sean Spicer questioned journalists' coverage of the inauguration's crowd sizes, ultimately reading a list of numbers that were widely considered to be inaccurate. A senior Trump adviser later branded Spicer's numbers, which were delivered to the White House press corps, as "alternative facts."

In light of the fabricated, misleading news reports that received substantial attention before and after the election, it is unlikely that these and other similar incidents at the very start of the Trump administration can be dismissed as aberrations. They might be the new normal.

These events, however, place those who study and teach communication law in a uniquely important position as the new administration begins. Following are four ways in which our concerns for freedom of expression can be particularly valuable to democratic society in coming years:

Education: As access to information is limited, journalists are derided, and facts are, well, made more opaque, the importance of those who have both the knowledge and the passion to teach others and explore the way our freedoms are understood only increases.We must teach our students, despite the actions and words of a substantial portion of elected officials, about tolerance and discourse and the central place unpopular and untested ideas play in society. In short, our role in explaining the value of freedom of expression to those who cross our paths, in the classroom or otherwise, has become more important.

Press Support: Beyond our teaching and scholarship more generally, our service to educating and otherwise supporting journalists has also become more important. As news gatherers face more insults and mistreatment and increasing numbers of road blocks are placed in the way of their efforts to access public records and sources of information, arming journalists with the knowledge needed to file and pursue Freedom of Information Act requests and the ability to clearly articulate their rights to be in certain spaces and to communicate information to others will become more crucial.

Advocacy: Our expertise in communication law can be an important resource for lawmakers, journalists, and non-profit organizations that seek to advocate for protecting freedom of expression. We can act as sources, witnesses, and sounding boards for such efforts.

Scholarship: All indications are that some of the Trump administration's actions will raise new questions within a variety of areas of communication law. Our scholarship should examine the legal, scholarly, and theoretical concerns that surround such issues as they arise, ultimately contributing to how we understand First Amendment rights.

Donald Trump's actions, both in his first weeks as president and as a candidate beforehand, have raised substantial concerns regarding the course of freedom of expression. Constructively, through education, press support, advocacy, and scholarship, we have the administration that brought us "alternative facts."

The Growing Importance of International Media Law

Amy Kristin Sanders
Northwestern University in Qatar
amy.sanders@northwestern.edu

For many of us, the creeping importance of international media law began with Dow Jones v. Gutnick. I remember pretty clearly the first time I read the 2002 defamation decision issued by the High Court of Australia. Even though it was in English, the opinion and its particulars were completely foreign to me – the structure of the citation, the controlling precedent, and most certainly the approach to adjudicating a libel case. It portended a future I could never have anticipated ,and most certainly dreaded, prior to my move halfway around the world.

Since that time, the importance of understanding and appreciating international media law has become even more clear – even if the foreign court opinions aren't. In the past decade, we've witnessed stark changes globally to the structure of defamation, intellectual property and most certainly privacy law. No longer can we sit idly by inculcating our students in the American way. In part, this is true because of the waning persuasive value of the American Exceptionalist approach to freedom of expression on the global stage. But, perhaps equally

See International Law, 4

International Law, continued from 3
important is the increasing number of our students practicing their craft outside the reach of the First Amendment's protections.

The introduction of international media law into the American classroom presents a number of challenges, not the least of which is the sheer volume of material we already feel obligated to address. Few professors have the luxury of tailoring one law class toward news/editorial students, another to advertising/PR students and yet a third to those interested in entertainment media. As a result, our time with students is precious. So, how can we justify introducing legal concepts from across the world when we can't fully cover American law.

A second major challenge has to do with our capabilities as educators. If you're like me, graduate school is increasingly a distant memory and likely didn't serve to prepare you well for the burgeoning importance of extraterritorial jurisprudence. In law school, I had the option of taking one international law course, which I foolishly avoided at all cost. Because of this, the learning curve as it relates to international treaties and foreign court rulings is steep.

And then there's the language issue. My elementary proficiency in French is hardly enough to ensure I don't inadvertently order shellfish at a restaurant, let alone unmask the subtleties that come along with legal documents in another tongue. Although some documents are available in translation, I often question the quality of the translation.

But, rest assured that all is not lost. With a few small steps, you can begin to slowly introduce key international law concepts into your classroom. You don't have to conquer the world in a day – this isn't the "Amazing Race." Here are a few tips to help you start slowly.

First, an increasing number of English-language resources are available to help you internationalize your syllabus. Even here in Qatar, I'm slowly gaining access to more legal documents that have been translated from Arabic to English.

In addition, many organizations – like the University of Amsterdam and the Annenberg School – are offering summer training programs to help faculty brush up their understanding of global issues.

Casebooks like my own are starting to highlight the areas ripe for comparative discussion. Talk to your publishers. Ask for comparative and international law resources.

Perhaps most importantly, our Law Division programming last year in Minneapolis offered up a smorgasbord of global flavor, in what I hope will be an increasing trend. This summer we head to Chicago, and I encourage division members to think about ways we can connect our programming to the ever-increasing bevy of international law issues that our students face.

Finally, as the Division's webmaster, I am working to pull together a number of these international resources on the Law & Policy website. Feel free to pass along any suggestions of American or international materials that you use in your classroom.

Together, we can create an amazing set of resources to teach. It takes a global village to prepare our students for the increasingly small world in which they will work.

Stonecipher Awars Announcement

The Stonecipher Award Selection Committee of AEJMC's Law and Policy Division is seeking nominations for the 2016 Harry W. Stonecipher Award for Distinguished Research on Media Law and Policy.

The award honors the legacy of Harry W. Stonecipher. Stonecipher, who died in 2004, was an acclaimed and influential First Amendment educator.

The Stonecipher Award for Distinguished Research on Media Law and Policy is open to all journalism and communication scholars within and outside AEJMC. The award will be presented to the research that most broadly covers freedom of expression as a whole. The award is not limited to research that centers on media-specific issues. In addition, the successful nomination will ideally be global in scope, rather than U.S.-centric, given that media law and policy as a research topic is inextricably intertwined with the rest of the world in the 21st century. Preference will be given to research with a strong theoretical component that demonstrates the potential to have a lasting influence on freedom of expression scholarship. Nominations may be for articles, monographs, peer-reviewed journal articles, law review articles or other scholarly publications. Self-nominations are welcome.

In order to be considered for the award, the research must have been first published between January 1, 2016, and December 31, 2016. Nominations should be sent to Dean Smith at High Point University via email, dsmith1@highpoint.edu, before March 15.

Jason Rezaian: 2017 Tully Award Recipiant

Roy Gutterman
Syracuse University
rsgutter@syr.edu

In 2009, Jason Rezaian moved to Iran to work as a foreign correspondent, telling the world stories of the multi-layered country mired in mystique, controversy and international intrigue. He became the Washington Post's Tehran bureau chief in 2012. But by 2014, Rezaian became the story after he was arrested and imprisoned for 544 days.

His arrest and imprisonment on trumped up charges catapulted Rezaian to international prominence as a global symbol of modern abuses and challenges faced by journalists around the world.

Rezaian, currently a fellow at the Harvard Nieman Foundation for Journalism, was the 2016 Tully Center for Free Speech Award recipient. He visited Syracuse and spoke to students and faculty in October.

Perhaps no journalist represents the challenges and abuses faced by the press in modern times more than Jason Rezaian. The 544 days he spent in Iran's notorious Evin prison exemplified the hazards journalists face in some places in the world. He was released in January 2016.

His story of more than a year in solitary confinement and other abuses he suffered captivated students and delivered an important lesson in the dangers faced by journalists around the world. There was a time when press credentials provided some degree of indemnity from violence in dangerous places.

But times have changed. The Committee to Protect Journalists reported that 48 journalists were killed in 2016 while 259 were jailed or imprisoned around the world. Many of these journalists work in dangerous places, war zones, dictatorships or lawless regions. Many of the endangered reporters cover hazardous beats, things like crime, drug or human trafficking, corruption, politics or war.

Though he worked in Iran, Rezaian described his work as typical journalism, telling stories of every-day life in Iran and human interest stories. He also covered politics and was one of the only Western journalists permanently stationed in Iran. In other places around the globe, his stories probably would not have raised too many eyebrows.

Rezaian's own story placed the Washington Post's Tehran bureau chief in the middle of an international political chess game. He faced a trial on trumped-up espionage charges, though evidence was never fully disclosed and the trial took place behind closed doors. Last year, he sued the nation of Iran in U.S. District Court for damages. He is not the first American to sue Iran.

While on fellowship, he is writing a book about his experience. The journalist in him also wants to go back to Iran one day to be able to tell more stories.

For those of us who teach First Amendment law, journalism or free press issues, we mostly draw from caselaw or secondary sources such as press accounts. Many of the heroes from our hall of fame of Supreme Court cases are long gone or far away. Bringing the person behind the news to talk with students and professors adds a real-life dimension to these stories and lessons. Rezaian's story opened a door that many of us here cannot even fathom.

Plan Your Work and Work Your Plan: One Graduate Student's Advice for Taking a Research Agenda to the Job Market

Brooks Fuller
UNC-Chapel Hill
pfuller@live.unc.edu

During my first week of graduate school, I sat across from my advisor in the first of our weekly meetings. "What are you going to write about for the law class?" he asked. He told me then, and would tell me again when I entered the job market, that I needed to "make a splash." Having not a clue what that meant in the academic landscape, I was utterly paralyzed by a relatively simple question and charge from one of my key mentors.

I came to realize, however, that buried in my advisor's bit of hopeful and collegial advice were a few directives:

See Grad Student, 6

Grad Student, continued from 5

Start early: Don't get caught off guard by the research cycle. Jot. Think. Reflect. Record your ideas (even the "bad" ones). Do so early and often. When the time comes for conference submissions and publication deadlines, your free writing will hopefully have paid dividends. My most productive colleagues are the ones with the research notebooks full of bold ideas. They write with reckless abandon and they do so because they take the time to record as the muse allows.

Speak across disciplines: Seize opportunities to engage outside of canonical legal theory. Let your research agenda reflect your willingness to grow. One of the best pieces of advice I received during the job search process was that I rarely be talking to "law folks" in the process. Political communication, health communication, media effects, and journalism scholars would be a significant swath of my audience, and I should embrace that.

Build: Making a splash means bringing something new to the table. My first scholarly piece was anything but. Largely a survey of my particular pet area of First Amendment law, it made a simple argument through deep description of themes in case law. That piece shattered not a fragment of earth. The payoff (caveat: I say this largely from a place of hope), however, is that it laid a broad enough foundation for more daring, unconventional, critical, and interdisciplinary future work.

At the risk of this piece devolving into a hackneyed bit of personal reflection, I'd like to recommend a book draws from experiences far more diverse and authoritative than my own. In "The Professor Is In: The Essential Guide to Turning Your Ph.D. Into a Job," Karen Kelsky, Ph.D. walks readers through the academic job search from the simple but unsettling premise that many advisors fail to adequately prepare Ph.D. students for the job market. Her main idea does not jibe with my experience, but my informal chats with colleagues in other disciplines suggest that Kelsky is onto something.

Kelsky's main concern is that advisors, through no conscious fault of their own, concentrate primarily on helping students develop research skills and a decent publication record without teaching them how to translate those skills into success on the job market. For applicants seeking faculty positions in social science and humanities departments (perennial targets for budgetary haircuts and thus unable to offer an abundance of jobs) it is a sobering, critical read.

Kelsky writes frankly of promising job candidates' soaring successes, epic flameouts, and persistent frustrations on the job market. Along the way, she teaches readers hard lessons about dissecting job postings, avoiding the dreaded flaccid or poorly tailored cover letter, and negotiating an offer. To my fellow graduate students: Kelsky's book may help you as you craft your research agenda for the academic job market. It was abundantly helpful to me during the past year.

Time and experience will reveal whether this advice contained in this column has any real merit. From my (admittedly limited) perspective, however, it seems that open, honest, and reflective conversations with dedicated advisors help students achieve many of the marks Kelsky lays out in her book and I have discussed here. A strong advisor is indispensible to a graduate student who wants to make waves in his or her respective discipline and begin a career with a grand and rewarding splash.

Legal Annotated Bibliography

Minch Minchin
Doctoral Student
University of Florida

Toni M. Massaro, Chilling Rights, 88 U. Colo. L. Rev. 33 (2017)

One of University of Arizona College of Law Professor Toni Massaro's goals with this article appears to be challenging the preferred position that the First Amendment often receives. Presenting an elaborate series of arguments related to facial overbreadth challenges that concern fundamental, constitutional rights, she makes the case that "Challenges to laws on overbreadth grounds may be treated more favorably in free speech cases than in cases that involve other fundamental rights. . . . This differential treatment is not constitutionally or normatively justifiable." To fix the problem, Massaro calls for the creation of a test that treats all constitutionally overbroad laws uniformly.

She does not necessarily suggest the lowering of the First Amendment's status, but the el-

See Bibliography, 7

Bibliography, continued from 6
evation of all the others to be on par with the freedom of expression—an environment in which all putatively overbroad laws that implicate fundamental rights receive the same degree of exceptionalism, as it were. "The free speech overbreadth tail should wag the whole constitutional dog. That is, facial challenges of laws that are substantially overbroad and may chill constitutionally protected conduct all should receive the same . . . treatment that overbroad laws receive in free speech cases."

One of the ways in which this would practically work itself out, she contends, is at the threshold matter of justiciability and third-party standing. Whereas First Amendment cases often allow for third-party standing, Massaro argues, courts should broaden this allowance to include all fundamental rights in order to comport with substantive due process-informed conceptualizations of fairness. By widening the scope of potential litigation and giving courts more room within which to work, all rights, not just First Amendment ones, justice would be furthered.

For further comparison, Massaro highlights that "in a free speech case, the Court eases the test for when a facial challenge on overbreadth grounds may succeed. Specifically, the Court asks whether the overbreadth is 'real…[and] substantial…judged in relation to the statute's plainly legitimate sweep," as was done in U.S. v. Stevens, which held overbroad an anti-animal cruelty statute. "Yet in non-speech cases," she avers, "the Court's concerns about noblesse oblige fade. It ostensibly imposes a much stricter, 'no set of circumstances' test for facial challenges of overbroad laws."

In the big picture, taking her suggested steps would not be out-of- turn, she contends, because for all the talk of minimalism, gradualism, and narrow decisions, "the Court allows facial challenges in non-speech cases far more often than the Court's rhetoric about avoiding facial challenges suggests." In addition, the author sees the recent abortion case of Whole Women's Health v. Hellerstedt as an example of moving the standing and overbreadth doctrinal requirements from other rights—in this case, abortion vis-à- vis privacy—to be more in line with challenges made under the First Amendment.

Rebecca Tushnet, The First Amendment Walks into a Bar: Trademark Registration and Free Speech, 92 Notre Dame L. Rev. 381 (2016)

Georgetown Law Professor Rebecca Tushnet uses the recent case of Simon Tam and his band The Slants as a springboard to discuss the content-neutrality doctrine and its role within the contemporary regulatory state. As a brief recap, Tam was denied a trademark to call his band The Slants due to a Lanham Act provision that gives the USPTO discretion to deny disparaging trademarks; the moniker in this case putatively offensive to individuals of Asian ancestry. The Court of Appeals for the Federal Circuit recently ruled in Tam's favor, and the U.S. Supreme Court granted certiorari for the next judicial term.

Tushnet sees the Tam case as part of an expansion of First Amendment jurisprudence that, especially since Reed v. Town of Gilbert in 2015, has broadened the content-neutrality doctrine to mandate that any law that distinguishes a topic on its face is subject to strict scrutiny. Her essential thesis is that "Tam is wrongly reasoned even given the Supreme Court's increased scrutiny of commercial speech regulations, and that to hold otherwise and preserve the rest of trademark law would require unprincipled distinctions within trademark law. More generally, the Supreme Court's First Amendment jurisprudence has become so expansive as to threaten basic aspects of the regulatory state."

Tushnet concedes that keeping the government out of the business of judging disparagement may arguably be good policy in a vacuum, yet if the high court strikes down the disparagement provision of the Lanham Act, she warns, it will bind itself to an untenable precedent to decide analogous cases in other contexts. Existing defamation law would be problematic, she says, because "falsely and in bad faith praising someone, with resulting unwarranted gain to his reputation, is not actionable, while falsely and in bad faith denigrating someone, with resulting unwarranted harm to his reputation, is defamatory. While the content of speech is very much relevant, the only 'viewpoint' being consistently suppressed is the viewpoint that defamation is a perfectly fine thing."

After suggesting that trademarks perhaps ought to be considered a "First Amendment-free zone," similar to much of copyright law, Tushnet articulates three pre-Tam

See Bibliography, 8

Bibliography, continued from 7
arguments that have been used to justify the disparagement provision—which she calls a "bar." "First," she says, analogizing from the rationale used by the Supreme Court in Walker v. Sons of Confederate Veterans, "the bar avoids the harm done by the government endorsement represented by a registration; second, the bar implements a decision to withhold government resources from disparaging or scandalous terms; and third, the bar is acceptable because of the lack of any effect on a user's ability or right to use the mark."

Delving into the commercial speech doctrine, secondary meanings and consumer psychology, Tushnet writes: "One core purpose of trademark is to allow consumers to rely on nonfunctional symbols as indicators of source, so they can use those symbols to select the products and services they want. By definition, a descriptive term without secondary meaning doesn't work that way for consumers (just as the disparaging meaning of a disparaging term may be so insulting that it detracts from any identification function, at least for the targeted group), so a producer who uses such a term can be excluded from the government program. Central Hudson's framework can probably accommodate this rationale, but not strict scrutiny." Ultimately, she contends, content- based laws in the commercial context are necessary, and the Supreme Court perhaps ought to both overturn the Federal Circuit in Tam and itself in a denunciation of Reed.

Jeremy K. Kessler, The Early Years of First Amendment Lochnerism, 116 Colum. L. Rev. 1915 (2016)

In this historical piece, Columbia Law Professor Jeremy Kessler goes to significant lengths to illustrate the history of the nexus between the First Amendment and the regulation of economic activity—and how it affects current visions of civil liberties. Currently, he says, a significant number of legal scholars believe that we are in the midst of a "relatively recent, economically libertarian hijacking of civil liberties law" by libertarian- and conservative-leaning justices who are appropriating civil liberties ideals in the name of the First Amendment. In response to this putatively misguided belief, Kessler offers an historical look at the origins of the current debate by looking first to the famous Footnote Four of Carolene Products, which, he says, spawned the "preferred position" of the First Amendment in the years that followed.

During the 1940s, "the 'preferred position' doctrine struck many jurists as a dangerously broad interpretation of the Footnote's ambiguous language . . . [and] the Court's five most 'liberal' Justices confirmed the danger, declaring that the First Amendment's 'preferred' constitutional status meant that even an indirect and attenuated financial burden on free exercise or free expression—even when that exercise or expression took the form of commercial activity—was forbidden."

The problem with this position, dissenters at the time explained, was that "prohibiting indirect regulatory burdens on activities that were both expressive and commercial in nature threatened to reverse the New Deal's victory over judicial meddling in the economy, while transforming the First Amendment into a tool of economic libertarianism"; in other words, the First Amendment during the 1940s had become an offensive sword to further the rights of some, rather than a shield that, in the words of Justice Frankfurter, promotes the "sharing equally in the costs of benefits to all . . . provided by government."

These arguments made by dissenting justices such as Frankfurter in the face of "First Amendment Lochnerism" (analogizing expression as a type of "new property" in a contemporary freedom-of- contract context) are worth re-considering, Kessler argues. Yet on the other hand, in a post-Citizens United era, when a large contingent of civil libertarian judges are using the First Amendment to interfere with duly enacted economic regulations, liberal-leaning thinkers should not treat "First Amendment Lochnerism as a recent corruption of an otherwise progressive project of judicial civil libertarianism." They "are not wrong to identify a new judicial zeal for immunizing corporations from economic regulation on civil libertarian grounds," he continues, but considering that Supreme Court majorities have held this position for nearly eighty years, liberals would be better served not to work within the contemporary, entrenched framework, but to instead "position themselves as reformers, seeking to break with a legal tradition long insensitive to the deleterious impact of judicial civil libertarianism on political regulation of the economy."

He concludes: "First Amend-

See Bibliography, 9

Bibliography, continued from 8
ment itself has [never] offered a dependable doctrinal check on the judicial protection of private economic power in the name of civil liberty." Contemporary critics of First Amendment Lochnerism ought to see the state of First Amendment jurisprudence for what it is—and seek doctrinal revolution.

Helen Norton, Truth and Lies in the Workplace: Employer Speech and the First Amendment, 101 Minn. L. Rev. 31 (2016)

University of Colorado School of Law Professor Helen Norton fears that important employee-protection laws "are now increasingly vulnerable to constitutional attack in light of the recent antiregulatory turn in First Amendment law, in which corporate and other commercial entities seek—with growing success—to insulate their speech from regulation in a variety of settings." Norton begins her article by describing the significance of how OSHA, ADA, Family and Medical Leave Act, National Labor Relations Act, Employee Retirement and Income Security Act, and other similar provisions currently provide key regulatory assurances to protect employees from potentially unscrupulous bosses.

Norton laments the deregulating effects of Citizens United—as well as the confusion after U.S. v. Stevens, which left the issue of whether per se lies are constitutionally protected up in the air. Approaching the issue of employer speech from a critical-cultural- influenced base, Norton plays out several themes in this article, including the autonomy and dignity theoretical justifications for the freedom of expression and the asymmetry of power in the employee-employer relationship. "Our constitutional comfort (or discomfort) with government's efforts to regulate employer speech," she says, "depends on how we characterize this relationship and the resulting flow of information and power within the workplace. . . . [Employer speech] takes place in a communicative relationship in which workers are comparatively disadvantaged in terms of information and power."

Due to this lack of power parity, Norton calls for a "listener-centered" approach to employer speech. "Because workers' interests as listeners are frustrated by employers' lies and nondisclosures, a listener-centered view of workplace relationships would understand the First Amendment to permit government to prohibit employers from lying about certain workplace issues, as well as to require employers affirmatively to tell the truth by compelling them to disclose information about those matters." The practical suggestions she offers include mandatory truth-telling by employers and compelled disclosure via posters throughout the workplace of information related to worker rights. Although such requirements would indeed be compelled speech, she says, they do little to no harm to traditional notions of First Amendment interests. This is because, she says, the harm in most compelled-speech cases is the fear that speakers will be forced to say what they do not believe, while in this case the speech will pertain to the factual, objective state of workers' rights. "The expressive costs of such disclosures are thus very low." Ultimately, she concludes, the "First Amendment should be understood to permit government to require employers to make truthful disclosure about workers' legal rights and other working conditions, as well as to prohibit employer lies or misrepresentations about these matters that threaten to coerce or manipulate workers' choices."

Andrew Gilden, Punishing Sexual Fantasy, 58 Wm. & Mary L. Rev. 419 (2016)

Using Obergefell v. Hodges and the federal recognition of same-sex marriage as an analytical springboard, Willamette University College of Law Professor Andrew Gilden makes the case the "legal treatment of sexuality contains an overlooked paradox." The paradox is that the law recognizes the legitimacy of an ever-expanding plurality of sexual relationships and practices yet simultaneously denies the means through which sexual identities are reached. Perhaps nowhere is this divergence more apparent, he writes, than in the digital realm. Although a relatively high degree of academic writing has dealt with the dangers and problems surrounding sexual expression in the virtual context—such as obscenity, child pornography, sexual predators, revenge porn and cyberbullying—relatively little has dealt with the positives. "Often missing from these debates," he says, "is any acknowledgement of the potential value of exploring sexual desires or the chilling effect of harshly policing and punishing sexual fantasies."

In particular, he asserts, one of

See Bibliography, 10

Souteast Colloquium Law and Policy Division Paper

Announcement

The Law and Policy Division will host three panels presenting thirteen papers at the Southeast Colloquium, March 9-11 at the Bob Schieffer College of Communication of Texas Christian University in Fort Worth.

Theory and Doctrine
Discussant: W. Wat Hopkins
Moderator: Lindsie, Trego
Date & Location: Friday, March 10, 10:30 a.m. — 11:50 a.m., Moudy South, Room 339

- *Can the Undue Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence?: A Proposal Cutting Across Constitutional Domains for Time, Place & Manner Regulations,* Clay Calvert and Minch Minchin, University of Florida (Top Student Paper)
- *The "Reign of Witches": Jefferson, Sedition and the Birth of the Modern First Amendment,* Joseph Russomanno, Arizona State University (Faculty)
- *Regulating the Filth and Disease of Dirty Businesses: What the Health Claims and Substantiating Evidence in Adult Entertainment Case Law Suggest About the Secondary Effects Doctrine*, Kyla Garrett Wagner, University of North Carolina – Chapel Hill (Student)
- *Revisiting Copyright Theories: Digital First Sale and Democratic Copyright,* Yoonmo Sang, Howard University (Faculty)

Open Records, Privacy and Defamation…Oh My!!!
Discussant: Joseph Russomanno
Moderator: Robyn Stiles
Date & Location: Friday, March 10, 3:30 p.m. — 4:50 p.m., Moudy South, Room 339

- *Reining in Internet-Age Expansion of Exemption 7(C): Towards a Tort Law Approach for Ferreting Out Legitimate Privacy Concerns and Unwarranted Intrusions Under FOIA,* Austin Vining and Sebastian Zarate, University of Florida (Top Student Paper)
- *Essential of Extravagant: Considering FOIA Budgets, Costs & Fees,* A.Jay Wagner, Bradley University (Faculty)
- *The Hulk Hogan Sex Tape & Intentional Infliction of Emotional Distress: Some Lessons from and Overlooked Theory in Bollea v. Gawker Media,* Clay Calvert, University of Florida (Top Faculty Paper)
- *Defamation, Actual Malice and Republication: A Case Study of Eramo v. Rolling Stone et al.,* W. Wat Hopkins, Virginia Tech (Faculty)
- *Mug Shot Mayhem? The Right to Privacy v. The Right to Know at the Local and State Levels,* Deborah Dwyer, University of North Carolina – Chapel Hill (Student)

Student Speech and Commercial Speech
Discussant: Clay Calvert
Moderator: Austin Vining
Date & Location: Saturday, March 11, 9 a.m. — 10:20 a.m., Moudy South, Room 339

- *Knowledge Will Set You Free (From Censorship): Examining the Effects of Legal Knowledge and Other Editor Characteristics on Censorship and Compliance in College Media,* Lindsie, Trego, University of North Carolina – Chapel Hill (Student)
- *Social Media Under Watch: Free Speech, Cyberbullying, and Willingness to Self-Censor on College Campus,* Shao Chengyuan
- *Public College Campuses: but Where can the Markets be Located?,* Robyn Stiles, Louisiana State University (Student)
- *Impossible Expectations: Digital Manipulation of Models' Bodies an Unfair Practice in Advertising,* Deanna R. Puglia, University of North Carolina – Chapel Hill (Student), University of North Carolina - Chapel Hill (Student)
- *The Marketplace of Ideas on Digital Manipulation of Models & Bodies an Unfair Practice in Advertising,* Deanna R. Puglia, University of North Carolina – Chapel Hill (Student)

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)

Bibliography, continued from 9

the main benefits of sexual fantasy expression online is that it helps people figure out who and what they are, sexually. "Reading, writing, and reflecting on sexuality—whether taboo or otherwise—allows individuals to understand their own desires and pursue a range of socially desirable ends; they might 'come out,' seek treatment, channel the fantasy into a consensual offline form, openly question the wisdom of the underlying taboo, or use the fictional account to cathartically let off steam and aggression." However, Gilden states, much of what is currently frowned upon both by societal norms and legal doctrines are essentially conditions precedent to otherwise legal and acceptable behaviors and lifestyle choices—and judges and juries "have largely been dismissive of both the merits and value of fantasy-based defenses."

Although professional screenwriters and authors are generally shielded behind a robust First Amendment fortress for their depictions of criminal sexual behavior (such as underage sex, prostitution and rape as depicted in Game of Thrones), private online parties in chat rooms and in message boards are less likely to receive the same degree of protection. "In the Internet context, Gilden explains, "reading and writing about sexual fantasies are often conflated with acting out the fantasy in the precise manner in which it is discussed. This has resulted in a surprisingly large body of case law in which individuals face decades in prison and lifetime sex offender registration without ever demonstrably endangering themselves or another person." These areas include "divorce" and custody decisions, 'sexting' prosecutions, attempt and conspiracy crimes premised on sexual fantasies, admission of sexual fantasies as character propensity evidence, failed entrapment defenses"

Using Brown v. Entertainment Merchant's Association to illustrate the lack of conclusive social science evidence that engaging in violent escapism forms a direct causal link with actual violence, Gilden decries several high-profile incidents in which the discussion of violent sexual fantasies landed citizens on the wrong side of the law. These include a mother who lost custody of her children for having sexually explicit conversations with her ex-boyfriend, a teenage lesbian couple who were prosecuted for child pornography sending nude pictures, and a police officer who was convicted following the discovery of conversations made on a "dark fetish role-playing website," in which he discussed in graphic detail the kidnapping, killing, butchering, cooking and eating of five women, including his wife.

National Conference: Call for Reviewers

The Law and Policy Division needs help reviewing papers for the 2017 AEJMC Conference. To keep the number of papers per reviewer at a manageable level, we need about 75 to 80 reviewers. Reviews will occur between April 1 and May 1, 2017. Ideally, we will have enough reviewers volunteer so that each reviewer will handle three papers. To volunteer, please contact Kearston Wesner, Research Chair, at kearston.wesner@quinnipiac.edu.

Please note that graduate students may not review papers, and you may not both review for and submit a paper to the Law and Policy Division. If you aren't sure if you will submit a paper, please volunteer to review and we can take you off the list when the time comes. If you submit a paper to other AEJMC divisions, you are still eligible to judge for Law and Policy. To help best match reviewers to topics, please specify your legal interests (e.g., libel, freedom of information, broadcast regulation, survey research). Also indicate if you would like to serve as a discussant or moderator for a session.

Law & Policy Division Officers

Head
Courtney Barclay
Jacksonville University
904-256-7114
barclay@ju.edu

Vice Head/Program Chair
Jason Martin
DePaul University
312-362-7396
jmart181@depaul.edu

Research/Paper Competition Chair
Kearston Wesner
Quinnipiac University
203-582-7727
kearston.wesner@quinnipiac.edu

Clerk/Newsletter Editor
Roy Gutterman
Syracuse University
315-443-3523
rsgutter@syr.edu

Teaching Chair
Jonathan Peters
University of Kansas
785-864-0611
jonathan.w.peters@ku.edu

PF&R Chair
Jared Schroeder
Southern Methodist University
214-768-3395
jschroeder@mail.smu.edu

Southeast Colloquium Chair
Michael T. Martinez
University of Tennessee
865-974-1567
mtmartinez@utk.edu

Webmaster
Amy Kristin Sanders
Northwestern University in Qatar
974-4454-5037
amy.sanders@northwestern.edu

Graduate Student Liaison
P. Brooks Fuller
UNC-Chapel Hill
919-962-1204
telleenm@etown.edu