AEJMC Law & Policy Division

Assessing the State of the Division

Head Notes

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As I near the end of my term as division head, I have been completing numerous assessment activities. One task is compiling an annual report of division activities and our plans for next year. Another is guiding the division through our audit, which each division goes through every five years. So these head notes come at a time of deep introspection.

It is fortuitous, then, that I have been involved in numerous recent conversations about the state of the division and how we should position ourselves for the future.

These discussions have carried over to our social media platforms. On Twitter, we talked about how to encourage more substantive feedback from reviewers during the research competition. This conversation also led me to reach outside our division to assess how others have approached the review process. Submitters across divisions share the same concerns and seek more thorough feedback, particularly for rejected papers.

At the same time, division members Tori Ekstrand and Kyla Garrett Wagner had already envisioned and started to create a survey to learn about your views regarding media law teaching and research. Special thanks also go out to Kathy Olson, Amy Kristin Sanders, Caitlin Carlson and Kriste Patrow for their invaluable feedback during this process.

The survey is available for you to take at [this link](#).

It asks questions about your program's media law course(s), your research and tenure and promotion process, your interest in serving as a

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Thunderdome: A New Proposal for the Format of a Media Law Panel

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In the era of social media, we have the ability to debate and discuss contemporary media law issues in a running format. It was such a debate, in this case over the pros and cons of Section 230 of the CDA, that gave rise to the Thunderdome Panel which took place in March at the SE Regional.

Technically, it was this PM from me to Dr. Tori Ekstrand that launched the idea to do something different:

Mono y mono debate format?
29 Nov 2018 ✓

230 Thunderdome?
29 Nov 2018 ✓

The idea: Take the debate over CDA Section 230 and use it to build a Law and Policy division panel around a media law (and policy) issue where there are some divergent viewpoints. Do this outside of the usual box, without papers or powerpoints, with the hope the talk would lead to some new thinking and (eventually) scholarship on this important, and contentious issue.

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letter writer and/or outside reviewer for others in the Law and Policy Division, your interest in serving as a mentor or receiving mentorship, your opinions in general about the division, and basic demographic information. The survey will be used strictly for internal analysis.

Ultimately, we hope that the survey will help guide discussions we want to have regarding the division's work and the support it receives from AEJMC and the academy generally. We also plan to use the information we receive to drive the conversation at our business meeting in Toronto.

That said, we have tons of news to share.

First, congratulations to this year's winners of our teaching competition. Chip Stewart and Jonathan Groves took first prize for "Sunshine Law Project," Brett Johnson took second prize for "Be Jon Peters: Translating Communication Law for a Lay Audience," and Stacie Jankowski took third prize for "The Rowdy Poster Project: Creating a Culture of Excitement About Legal Research." Because the competition this year was so fierce – only *one point* separated third and fourth place – we are awarding an honorable mention to our fourth-place finisher, Jason Martin, for his "Artificial Intelligence and Ethics Action Plans." Thank you to all of our submitters and reviewers for making this competition possible, and thank you to Jared Schroeder for his hard work as Teaching Chair.

Registration is open for the Toronto conference. Here is a link to the conference microsite. The conference runs from Tuesday, Aug. 6 through Saturday, Aug. 10, at the Sheraton Centre Toronto.

On Tuesday, Aug. 6, our pre-conference programming runs from 1 to 5 p.m. From 1-2:15 p.m., we are honored to have Phil Tunley from the Canadian Journalists for Free Expression. The second session, from 2:25-3:40, will feature the winners

Head Notes, continued from 1

of our Teaching Competition. And the third slot, from 3:45-5, is titled "U.S. and Canadian Communication Law: Challenges and Opportunities in the Global Century." This panel, moderated by Kyu Ho Youm, features both U.S. and Canadian scholars and practitioners.

Our PF&R conference schedule can be found in this issue and the full conference schedule will be available in the next issue. Just a reminder that our division social will be on Thursday, Aug. 8, from 8:30-10 p.m. after our business meeting. This year, we have joined with the Newspaper and Online News and International Communication Divisions for our social. The social will be at Assembly Chef's Hall, a ***two-minute walk*** from the hotel. Thank you to our donors: the UNC Center for Media Law and Policy, the Tully Center for Free Speech, the University of Georgia, the Brechner Center for Freedom of Information, the Center for International Media Law and Policy Studies in The Media School at Indiana University Bloomington, Jon Peters, Nina Brown, Joe Mathewson, Jeffery Smith, Eric Easton, and Brett Johnson.

We are still hoping for more donations to cover the cost of this social. Donations of $25 or more can be used to welcome a new colleague to the division or congratulate a graduate student. With these **Amicus** donations, you can choose a personalized message to be displayed during the business meeting. You or your department can also be a sponsor at one of the following levels: **Cum Laude** ($100-199), **Magna Cum Laude** ($200-299), or **Summa Cum Laude** ($300 or more).

All sponsors will be recognized on event signage and on social media platforms. Summa Cum Laude sponsors will receive special recognition at the business meeting.

We look forward to seeing you, and continuing our discussions, in Toronto.

THUNDERDOME, continued from 1

Initially, the proposal was for more of debate between Tori and I, but as the plan unfolded in social media, the hype about the event also evolved, and the panel expanded to include Dr. Jared Schroeder taking the middle position and "Judge" Rachel Jones as the moderator.

The participants launched into an active debate over section 230 on social media (especially Twitter) ahead of the Thunderdome event. With an active hashtag, we used news and opinion pieces as the basis to stake out or support the various positions and in order to keep the conversation rolling. As the discussion continued, expanding to include participation by other stakeholders, interested parties and more academic contributions into the debate. The continuing exchange grew organically, and led to a series of high traffic/interaction threads, which in turn drew attention to our division, its membership and our collective scholarship.

As the panel met for breakfast in Columbia on the first morning of SE Regional, we discussed that that the hype we had created over the Thunderdome panel may have raised the stakes of the discussion. Regardless, the panel at SE Regional was very engaging, and not bound by the traditional time-limits or the regular model where a series of papers and short follow-ups occur. Instead it became a flowing discussion, engaging with multiple, directing opposing points of view, that incorporated not just the panel members, but also the audience that participated in the event.

THUNDERDOME, Continued from 2

Thunderdome panelists engaged in heated debate about the future of Section 230.

While we haven't resolved the positions that initially led to the Thunderdome, (and I still haven't quite convinced Dr Ekstrand that 230 is really, really important…yet), the conversation we started didn't end with the panel. It has continued in a piece (and a response) in CJR, it has continued on social media, and it has continued with members of the division accessing the audio we recorded at SE.

The panelists and other participants I have spoken with suggest that the Thunderdome format for a panel at SE should be continued as a regular event at our spring gathering. I speak for the collective in actively promoting this idea. Privacy, the need for clarity on what constitutes a digital public forum, and the future of the state action requirement have already been proposed as future disputes to be settled in the 'dome. I hope to see you there.

You can check out the audio from the first "Thunderdome Panel" at this link: https://drive.google.com/file/d/1tiZauzT9PeBvDKforiAH1DP_mZecZFzv/view?usp=sharing

Chris Terry is an Assistant Professor in the Hubbard School of Journalism at the University of Minnesota.

AEJMC National Conference in Toronto: PF&R Panels

Law & Gaming Issues in Tech
Wed., Aug. 7 11:45 a.m. - 1:15 p.m.

Co-Sponsoring Division: Electronic News

Panelists:
Lyombde Eko, Texas Tech
Trung Bui, University of Social Sciences & Humanities, Hanoi, Vietnam
Hyun Nguyen, Kansas State
Anthony Fellow, California State Fullerton
Clay Calvert, Florida

Moderator: Shaina Holmes, Syracuse

From Emma Goldman to the Marketplace of Ideas: Marking the 100th Anniversary of Free Speech at the Supreme Court
Wed., Aug. 7 3:15 p.m. - 4:45 p.m.

Co-Sponsoring Division: History Division

Panelists:
Brooke Kroeger, NYU
Jared Schroeder, Southern Methodist
Jeff Smith,Wisconson-Milwaukee
Erika Pribanic-Smith, University of Texas, Arlington

Moderator: Aimee Edmonson, Ohio

PANELS, Continued from 3

Information vs. Disinformation: Who's in Control?
Thurs., Aug. 8 11:45 a.m. - 1:15 p.m

Sponsoring Division: Law & Policy

Panelists:
John Fraser president and CEO, National News Media Council, Toronto
Dianne Garyantes, Rowan University
Jasmine McNealy, Florida

Moderator: Chip Stewart, Texas Christian

Law, Policy and International Reporting: Issues of Jurisdiction
Thurs., Aug. 8 1:30 p.m. - 3:00 p.m.

Co-sponsoring Division: International

Panelists:
Nikhil Moro, Kansas State
Kyu Ho YOUM, University of Oregon
Ed Carter, Brigham Young
Ryder Gilliland, DMG Advocates, Toronto
Iris Fischer, Blake, Cassels & Graydon LLP, Toronto

Moderator: Roy Gutterman, Syracuse

The Work Ahead: Law and Media Management in the Age of #Metoo
Fri., Aug. 9 1:15 p.m. - 2:45 p.m.

Co-Sponsoring Division: Media Management

Panelists:
Anne Kingston, senior writer, Maclean's
Ginger Blackstone, Harding University
Arien Rozelle. St. John Fischer

Moderator: Tori Smith Ekstrand, UNC

Going On the Record About Being Off the Record: The Debate: Confidential Sources vs. The Ethics of Anonymity

Co-Sponsoring Division: Media Ethics

Panelists:
Lee Wilkins, Missouri
Tom Devine, Government Accountability Project
Genelle Belmas, Kansas
Fred Vultee, Wayne State and Missouri

Mark Your Calendar: Important Dates for AEJMC 2019

Tues., Aug 6, 1:00 - 5:00 p.m. Law & Policy Pre-Conference

Thursday, Aug. 8, 6:00 - 8:00 p.m. Top Paper Session & Business Meeting

Thursday, Aug. 8, 8:00 p.m. Division Social @ Assembly Chef's Hall

Friday, Aug. 9, 8:00 a.m. WILD (Women in Law Division) Breakfast. Location TBD

10 Tips for Grad Students to Make the Most of Their Membership

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I have found profound professional fulfillment from the Law & Policy Division and the friendships I've made with other graduate students as well as more senior colleagues. I remember being nervous beforehand — especially about presenting — but everyone at the Southeast and national conferences was so wonderful and supportive of me.

1. I can remember the first question I had: What am I supposed to wear? Instead of just asking as any reasonable person would, I combed through photos from previous conferences. The overall feel for the conference is business casual, though many opt business attire when presenting. There's definitely a range, so don't stress too much.

2. Your presentation will be fine. You should practice ahead of time, but just remember: you wrote a whole paper on this topic; it got accepted to AEJMC; and you know what you're talking about. Also, people tend to smile and nod while you're presenting. It's one of the best parts of our division.

3. The faculty members are actually interested in you. Don't shy away when they engage with you. You could be talking to your next mentor and a lifelong friend.

4. Likewise, meet other graduate students. They are your future colleagues, and chances are, you're going to be seeing them at AEJMC for years to come.

5. Go to the business meeting. It's a great way to learn more about the division and its inner workings. Go to the Law & Policy division's social. It's one of the best ways to connect with members of the division and build relationships.

6. It's OK to not know things. No one knows everything there is to know about mass communication or even law and policy. You're an early career scholar still building your niche, and that's fine.

7. Don't let the conference program scare you. It's massive and can be overwhelming. I would recommend downloading the conference mobile app. That's how I keep up with all of the Law & Policy sessions and other interesting conference events.

8. While the conference will consume most of your time, don't miss the chance to take advantage of the city. This year's conference is in Toronto, eh? Get your passports ready and enjoy the poutine.

9. Just because the conference ends doesn't mean you're done. You'll want to take feedback from your discussant and others to improve your piece and submit it for publication. The Division's journal, Communication Law & Policy, is a great place to start.

10. Stay in touch. I've found a witty, engaging, and supportive community of Law & Policy Division scholars on Twitter. Just try searching the names of people you met to get connected. Don't forget to follow @AEJMC and @AEJMC_LP, too.

Austin Vining is a JD/ Ph.D student at the University of Florida.

R.I.P. MLR

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The Media Law Reporter is no more. The reporter published by BNA, and recently purchased by Bloomberg was discontinued on April 20, 2019. The service with its media law specific headnotes and searchable database was deemed no longer viable with content folded into other Bloomberg services.

This was part of Bloomberg Law's transition and migration of content to other products. Media law can now be found in Bloomberg's Tech and Telcom practice center. Other related content can be found in the Privacy and Data Security and Trademark and Copyright practice areas.

Initially, a weekly looseleaf service, the Media Law Reporter was born in January 1977 to provide full-text, indexed coverage of media law issues in state and federal courts, and, of course, the United States Supreme Court. Its first volume that year also included significant and historic Supreme Court cases.

In hard copy inserts that eventually became bound editions, the volumes included a topical index, classification guide, index digest and tables of cases and jurisdictions. These elements, in an era before Nexis-Lexis, Westlaw and other digital content, proved to be valuable to users, and something to justify the subscription fees.

The founding 16-member advisory board was like a Who's Who of media law, including, Floyd Abrams, the noted media lawyer, James Goodale, then executive vice president of the New York Times, and P. Cameron DeVore, noted lawyer as well as professors Jerome Barron and Benno Schmidt.

In its first edition, the MLR declared it was aimed at "the continuing commitment to better public understanding of media-related legal issues and to assist educators and scholars …" The Ford Foundation provided funding for the service and subscriptions by hundreds of law schools, journalism schools and other non-profits.

In the pre-internet era, looseleaf services were weekly subscription services, often put in three-ring binders during the year and then bound into book format. This was a way to stay current in legal areas often in flux. There were two main services, Bureau of National Affairs (BNA), which published the media law reporter, and Commerce Clearing House (CCH). They included reported opinions, headnotes, research guides and other materials processed by editorial staffs, according to J. Myron Jacobstein, Roy M. Mersky and Donald J. Dunn's Legal Research Illustrated (268-72).

Looseleaf services were so integral to legal practice and research they have their own Bluebook citation rules (18.1).

Bloomberg bought BNA in 2011 for $990 million. A Bloomberg press release said, "Together, Bloomberg and BNA would form a unique combination of premium content, deep subject matter expertise, proprietary data and world class technological capabilities to provide distinctive products and solutions for professionals and decision makers in law, government, business and finance."

The same press release went on to say that the purchase would "immediately strengthen Bloomberg's offerings in the legal information market." The BNA reporters and services were incorporated into Bloomberg Law.

BNA was founded in 1929 and by the time it was purchased by Bloomberg had more than 1,400 employees and recorded more than $330 million in revenues in 2010.

MLR suspended its paper edition years ago. I have a complete set of the 30 bound volumes, donated by my retired colleague and 1982-83 Law Division head, Jay Wright. Though the books look great on a shelf at the Tully Center for Free Speech, they may have outlasted their utility.

Times change, and legal research is no exception. Though some of us may miss the old MLR, there are other services out there at your fingertips.

Roy S. Gutterman is an associate professor and director of the Tully Center for Free Speech at the Newhouse School at Syracuse University and vice head of the Law & Policy Division.

Teaching Competition Award Winners

A BIG Congratulations to this year's winners. Come to the Law & Policy preconference on Tuesday, Aug. 6 from 1:00 - 5:00 p.m. to learn more about these ideas.

First Place: Chip Stewart and Jonathan Groves - "Sunshine Law Project"

Second Place: Brett Johnson - "Be Jon Peters: Translating Communication Law for a Lay Audience"

Third Place: Stacie Jankowski - "The Rowdy Poster Project: Creating a Culture of Excitement About Legal Research"

Honorable Mention: Jason Martin - "Artificial Intelligence and Ethics Action Plans"

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Annotated Bibliography: Spring 2019

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Marcelo Corrales, Mark Fenwick, Helena Haapio & Erik P.M. Vermeulen, Tomorrow's Lawyer Today? Platform-Driven LegalTech, Smart Contracts & The New World of Legal Design, 22 No. 10 J. Internet L. 3 (2019).

In this modern digital age, access to just about anything is only a few scrolls and double-clicks away. Gone are the days of leaving the comfort of home for things like shopping, socializing, or services. With a steady Wi-Fi connection, anything from food to furniture can be delivered to your door. Users can also retrieve and disseminate endless information, as well as to interact with a slew of services. The Internet has certainly transformed the way the world works and any business that hopes to endure this new era must adapt accordingly. Some services may find this task more challenging than others. In light of the evolving economy, this article explores the effect of digital developments upon the practice of law. The authors introduce growing technologies and their implementation in the legal profession, evaluate which skills are necessary for lawyers to best serve nontraditional clients, and encourage legal professionals to be conscious of the changing digital climate.

The article begins by identifying the growing dominance of platform-based business models—that is, "any organization[s] that uses digital and other emerging technologies to create value by facilitating connections between two or more groups of users." Major companies, such as "Amazon, Facebook, [and] Uber," serve as platforms for users to connect with each other to facilitate transactions, socialization, and services. The authors note that the success of such companies stems from their mobility, accessibility, and adaptability—which "has been made possible by the development and proliferation of a number of digital technologies." Many businesses have implemented similar models in their operations in order to compete. As lawyers have historically been integral to the formation and cultivation of business relationships between parties "with quite different but compatible interests," this article suggests that the legal profession must also undergo some adjustments in order to efficiently assist modern business clientele. The authors predict that future lawyers "will need to be aware of the way network technology, and other code-based technologies operate" to aid in the facilitation of technology-based transactions.

This article recognizes three types of "LegalTech"—that is, "platforms, IT services, and software that make firms and lawyers more efficient in performing their legal activities"—that are currently revamping the practice of law. The first type "includes start-up companies that offer a range of online legal services." Such companies allow users to access legal information without seeking professional consultations. The second type "involves online matching platforms that connect lawyers with clients." Clients no longer need to waste valuable time and energy scouring numerous firms to find which are best suited to their needs. Finally, the third type contains companies that utilize artificial intelligence in conducting legal research activities. The authors claim such innovative "applications will soon be able to perform much of the work of junior lawyers…without the imperfect human qualities that can result in mistakes and possible lawsuits." Work such as researching, interpreting, drafting, and reviewing legal documents will soon become predominantly automated.

One such example identified in the article is the growing use of Blockchain-based smart contract technology. The article defines a smart contract "as computer code that automatically executes all or parts of an [online trading] agreement." The agreement is stored on a Blockchain, which is "essentially a distributed ledger that can be configured to be accessible publicly or privately" while keeping an updated transaction history of all communications. Parties receive access (limited to their specific position in the transaction) to a network which allows them "to transfer, receive, and store value or information." The terms of the smart contract are coded to control automated performance. The authors offer the example of a car loan to explain this process: "If the borrower misses a payment (tracked *via* a Blockchain-like technology) then the contract/code would not allow the use and operation of the car, *i.e.*, the contract

would be 'enforced' *via* networked technologies that disable the car, rather than a 'repo man.'" The authors predict smart contracts will become more complex and popular over time and that legal designers will, thus, need to anticipate and prepare for the many ways such technology will impact how businesses transact with one another and with their customers.

This article warns of one present problem of online trading contracts that is sure to have serious consequences. Returning to the earlier notion that just about anything is only a few scrolls and double-clicks away, it has proven to be far easier for users to skip over a daunting block of fine print in an online "Terms & Conditions" agreement and speed ahead to a painless click of acceptance than to suffer through legal jargon. Too often, platforms are overwhelming users who prefer to mindlessly scroll through and "Accept" whatever it takes to reach their desired service faster. The authors demand something be done to better protect consumers. To serve those on *both* sides of modern contracts, the authors suggest "Legal Design"—an approach proposed "to improve how lawyers communicate, deliver services, and make rules and policies--all with the aim of enhancing the experience, comprehension, and empowerment of the users." They recommend merging LegalTech solutions with Legal Design in mind in order to help both producers and consumers to make fair and comprehensible contracts and disclosures. Some examples include the use of "legal design pattern libraries" for reference when creating contracts involving recurring issues resolved in prior transactions. Another standard for "build[ing] better interfaces and output [involves] supplementing text or code with layers of explanatory diagrams, examples, plain language translations, audio, or video." Overall, this article proposes that lawyers begin to implement "user-centric" methods to disseminate information more transparently with the goal of protecting unassuming users in their contracts with platform-based businesses.

Rick Aldrich, Privacy's "Third-Party" Doctrine: Initial Developments in the Wake of Carpenter, 15 No. 3 ABA SciTech Law. 4 (2019).

In his recent article, Cyber Security Policy and Compliance Analyst Rick Aldrich outlines the latest legal developments concerning the use of cell-site location information (CSLI) by law enforcement to obtain tracking information on potential suspects. Aldrich examines the Supreme Court's recent opinion in *Carpenter v. United States* and explores the impact this decision could have in the future as technologies continue to evolve. The *Carpenter* case involved "a series of robberies of Radio Shack and T-Mobile stores over a four-month period between December 2010 and March 2011 in Ohio and Michigan." Under the Stored Communications Act, the FBI acquired CSLI from MetroPCS and Sprint to track suspect Timothy Carpenter. Data signals from his cell phone were used to monitor his physical movements. This data linked him to the locations of the robberies and was used to convict him. "At trial, Carpenter moved to suppress the CSLI data" claiming that the government's method of collection constituted an unlawful search in violation of his rights under the Fourth Amendment. In his analysis of *Carpenter*, Aldrich briefly reviews similar cases that assisted the Court's decision.

As one consideration, Aldrich introduced the third-party doctrine which maintains that any information voluntarily conveyed to a third party, even if shared in confidence, does not constitute a prohibited search under the Fourth Amendment when said information is conveyed by the third-party to government authorities. In *United States v. Miller*, government subpoenas of business records collected by two banks were held to be excepted from Fourth Amendment protection. Aldrich explains that the Court considered the information from the requested personal accounts to be relevant and attainable as "'information voluntarily conveyed…in the ordinary course of business.'" He compared this rationale to the circumstances in *Carpenter*, pointing out that Carpenter choose to use a cell phone with obvious tracking capabilities. Following the reasoning in *Miller*, Carpenter voluntarily offered his location data to the cell service companies who, in turn, passed this "business" information to the government. There is cause to wonder, however, just how *voluntary* tracking information transmitted via cell phones can be if many people are blissfully unaware of such consequences when using their smart devices.

Another consideration Aldrich presented was whether Global Positioning System (GPS) tracking is constitutional in general. He mentioned the case of *United States v. Jones*, in which police officers manually attached a tracking device to the bottom of a suspect's vehicle without a warrant in order to track his movements in relation to drug transactions. Turning to the reasonable expectation of privacy test from

Katz v. United States, the government argued that the officers' efforts did not constitute "a search or seizure as Jones could not reasonably expect privacy on public streets." The Supreme Court rejected this reasoning, holding that any "modern technological device that would not have been envisioned by the Framers of the Constitution…constituted a search that required a warrant." Aldrich points out, however, that this decision does not mean cell phones are safe from searches. He clarifies that officers "just must get a warrant."

Combining these two deliberations, Aldrich finds the *Carpenter* case to be a unique mixture. Like in *Miller*, the "information [was] voluntarily provided to a third party." However, in light of *Jones*, although the authorities did not physically attach a tracking device to Carpenter's vehicle or person, GPS services operate in much the same way as that of the CSLI systems that were used to collect the data. In a 5-4 decision, the Court held in favor of Carpenter and "declin[ed] to extend the third-party doctrine to CSLI data." Identified as a search under the Fourth Amendment, the Court held acquiring such information requires a warrant. The *Carpenter* case has been cited in over 90 subsequent cases. Aldrich reveals, however, that the holding has been viewed quite narrowly.

The use of government cell site stimulators, for example, falls through the unanswered cracks. "Cell site stimulators (sometimes referred to as Stingrays)" connect to cell phone signals under the guise of cell towers. They exhibit a strong signal that tends to trick nearby phones, "allow[ing] law enforcement to obtain significant valuable information…including more accurate tracking of the user's whereabouts over time." Aldrich identifies several states that have legislation against such activity absent a warrant and notes that "the Department of Justice issued new guidance in 2015." Despite regulation, exigent circumstances may still allow such conduct without a warrant. Another issue arises when law enforcement seeks to track individuals via security camera footage. Aldrich describes that "video feeds from over 3,000 cameras can be combined with license plate readers and radiation detectors" to monitor the location of individuals and their vehicles for months. With the addition of technologies like facial recognition software, thermal imaging, and drones, there is not much public ground outside of the government's eye. Overall, Aldrich feels that the *Carpenter* holding was a step in the right direction but warns that there is "a staggering volume of constitutional violations, [already] beyond any possible remedy." He hopes courts keep the Fourth Amendment in mind when reviewing evidence collected via CLSI and other developing technologies.

Glenn R. Butterton, How Neuroscience Technology is Changing Our Understanding of Brain Injury, Vegetative States and the Law, 20 N.C. J.L. & Tech. 331(2019).

The chances of slipping into a coma or falling victim to a persistent vegetative state (PVS) are exceptionally slim. However, imagine for a moment that you have. Perhaps you were involved in a terrible accident and have been lying unresponsive in a hospital bed for close to a year. Should your loved ones pull the plug? If you have exhibited no responsive activity—or any activity you *do* exhibit is considered to be involuntary—for the entire period, many might say yes. In fact, individuals often draft and sign Advance Directives and other such instruments to make the choice for themselves. Through an Advance Directive "the patient is able to control and shape, in certain key respects, his or her quality of life, and make decisions in advance as to what treatment will be provided or withheld in case the patient falls into dire medical circumstances and is cognitively impaired in some specified fashion." Let's say that you signed such a directive and, once PVS was diagnosed by your doctor, it triggered the performance of an end of life protocol. But now imagine that you *are* cognitively responsive, just not in ways outwardly visible to your family and physician. Your brain is still sending and receiving signals, but the outside world is oblivious to this fact. Is this what you envisioned when you signed your Advance Directive? Would this change your mind?

In his article, Dr. Glenn R. Butterton suggests that recent clinical studies have shed significant light on present misunderstandings of the consciousness of patients in vegetative states. He describes what he calls the "Traditional Account," a set of common characteristics that tend to lead doctors to diagnose PVS if continued for a month. Under this system, a PVS patient is recognized as one that will typically go through "cycles of sleep and wakefulness, and may have open eyes," however, they will not "have what physicians call awareness, or what the average person might call consciousness." Surprisingly, even relatively active patients are placed in this category if a doctor deems the movements unintentional. For example, Butterton explains that even patients that "seem to

smile, or become tearful, and may sometimes make sounds normally associated with grunting, moaning, or screaming" may not pass a doctor's definition of consciousness. Patients are capable of improving from persistent vegetative states to the category of "Minimally Conscious State[s] ('MCS')," or, conversely, of deteriorating to a permanent vegetative state if there has been no change after one year. Dr. Butterton proposes that the current methods of testing patients' consciousness are inadequate. He claims that, based on recent studies, there is proof that some patients are misdiagnosed and that more must be done to protect the voiceless.

Dr. Butterton describes how many factors can cause diagnosis of vegetative patients to be "something of a moving target." Consistent standards of analysis are not easy to maintain. In a hospital setting, for instance, multiple physicians may assess a patient over time and, "even in optimal circumstances, the [patient's] behavior may be susceptible to conflicting interpretations." Further, "the patient's condition may be inactive during one examination, but active during another." Dr. Butterton introduces recent research in which "the use of various neuroscientific tools and methods including fMRI, PET, SPECT, and EEG" scans suggest that there is more going on in the brains of vegetative patients than meets the eye. He explains that a handful of studies have shown brain activity when patients have been prompted by specific instructions or stimuli. One experiment involved imagery tasks in which patients were asked to think of specific activities on command while their brain activity was monitored by a fMRI machine. One patient, who had been unresponsive for five months, showed the same brain area activations as healthy subjects asked to do the same task. A follow-up experiment on the same patient showed she was able to answer yes-no questions using the same mental imagery requests from the prior test. Another study involved projecting photographs in front of a comatose patient. Photographs of her family members alternated with unrecognizable images of distorted faces. The faces of her family members elicited brain activity that was picked up by a PET scanner. A similar study using an fMRI machine "exposed patients to recordings of simple sentences with nonsense sounds… [and] PVS patients showed the same fMRI activations in response to the recordings as healthy volunteers."

Based on these promising results, Dr. Butterton recommends that the current Traditional Account method be updated to include "fMRI and other technologies now available that serve to penetrate the knowledge barrier by permitting observations of patient behavior from a different point of view." He points out that other countries have already imposed legislation that requires government-run nursing homes to implement a multitude of specific task tests and more frequent assessment procedures before life support can be removed from vegetative patients. A doctor's Traditional Account diagnosis of PVS can sound like a death sentence to hopeful family members and could drill the final nail into the premature coffin. Therefore, Dr. Butterton recommends revisions are in order.

To reduce errors in diagnosis, he suggests that PVS-related statutes, government regulations, sample Advance Directive and living will literature, and any literature on the subject "distributed to patients and family members by physicians, hospitals, hospices, insurers and other participants in the healthcare delivery system" be altered to "reflect the current state of neuroscience research." Further, Dr. Butterton encourages such revisions "should be pursued in all jurisdictions." Finally, he advocates that all future technological advancements in this area "be communicated in a timely fashion through mass mailings and electronic distributions to" any facilities entrusted with the care of "prospective or actual PVS patients." Advance Directives and living wills are exceptionally helpful instruments used to convey a patient's wishes should they unfortunately enter a vegetative state. However, proper care should be taken to ensure that their intentions have truly been achieved. Dr. Butterton suggests that, considering advancements in neuroscience technology, an inability to outwardly communicate should no longer be the only and final indication considered when deciding between life or death.

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