Media Law Notes

AEJMC Law & Policy Division

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Deepfake limits raise questions

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Disinformation is likely to play a central role in the 2020 presidential election, and California and Texas lawmakers are trying to combat falsehoods with new laws that prohibit distribution of so-called deepfake videos.

Deepfakes, a word added to the Collins Dictionary in 2019, are digitally altered videos depicting real people doing and saying things they did not do.

"Deepfakes distort the truth, making it difficult to distinguish between legitimate and fake media and more likely that people will accept content that aligns with their views," wrote California State Rep. Marc Berman (D-Palo Alto), who sponsored new laws that took effect on Jan. 1.

In California, one law targets political deepfakes, while another targets pornographic deepfakes.

Experts say fake sex videos, in which people's faces are digitally transposed in sex scenes, comprise the majority of deepfakes to date.

The California laws follow action in Texas, where lawmakers passed a criminal law banning deepfakes within 30 days of an election.

The rise of deepfakes in mass communication comes as the "functioning of the marketplace of ideas is under serious strain" with the decline of traditional media and as "falsehoods spread like wildfire on social networks," law professor Danielle Keats Citron said at a House Intelligence Committee hearing in June.

Technological advances make it easier to produce sophisticated deepfakes. Because people tend to believe audio and video recordings, experts say deepfakes are more pernicious than other types of disinformation.

Citron said deepfakes have significant implications for individuals and society.

"Under assault will be reputations, political discourse, elections, journalism, national security, and truth as the foundation of democracy," Citron said.

We are only beginning to see the implications of deepfakes and their ability to go viral on social media.

In one high profile example, a video showing House speaker Nancy Pelosi slurring her

Deepfakes, *see page 10*

New resource to help division

Head Notes

Roy Gutterman
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When Katy Culver recently hit a wall writing an exam question on incitement, she reached out to the Law & Policy membership through the division's Facebook page. Her request for "something super creative," prompted immediate offers of assistance from several division members.

Katy, who teaches at the University of Wisconsin-Madison, where she also directs the Center for Journalism Ethics, generated comments from other members who thought there might be room for the division to step in and provide a venue to share materials, particularly hypotheticals, exams or other teaching materials.

An exam or material bank or exchange system would be "beautiful," wrote Erica Salkin, of Whitworth University, who also acknowledged the occasional exam writer's block.

After talking with our webmaster, Genelle Belmas, I am pleased to announce that the division's website will now offer a place to share these resources. "The Bank" will be a workable way to host and share these materials. Keep your eyes open for the upcoming changes to the website, aejmc.us/law. The bank will supplement materials and resources already available on the site, including postings of the division's teaching awards competition going back a decade.

If you have materials you want to share, you can email Genelle at gbelmas@ku.edu.

As professors, we spend hours each week in front of a classroom full of students. Many of our responsibilities also include faculty and committee meetings, student advising and other administrative tasks. However, when it comes to research and writing, much of our time is solitary. That includes all the time in front of a computer writing articles, books, briefs, exams and other teaching materials.

Some of us have the luxury of colleagues down the hall who can field questions or serve as a sounding board for our media law issues. Some of us do not have those colleagues and sometimes feel isolated as the only "law person" in the department or school.

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Media law issues taken on in writing assignment

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Secretary of State Mike Pompeo accused veteran NPR reporter Mary Louise Kelly of lying to him (twice) about the nature and scope of an on-the-record interview in January.

Without evidence or explanation, Pompeo said Kelly violated "basic rules of journalism and decency" when she questioned Pompeo about his role in the Ukraine scandal during an interview that focused primarily on Iran.

While NPR released e-mails between the two offices showing that Ukraine would be discussed, Pompeo maintained that the interview exemplifies "how unhinged the media has become."

A serious danger of Pompeo's accusations is that they come at a time when Americans' trust in media is eroding. One response available to mass communication and communication law educators lies in the pedagogies we use to help students explain the role and rigor of the free press to lay audiences.

Our profession helps develop public intellectuals who write across disciplines about issues that are fundamental to democratic health.

To meet this aim for his graduate media law class, Brett Johnson, assistant professor of journalism studies at the Missouri School of Journalism, created a capstone assignment to help students develop a long-form creative project about a media law issue.

According to Johnson, a core objective is to help students appreciate and emulate exceptional public-facing commentators like Law & Policy Division Members Jon Peters, Jane Kirtley, and Jared Schroeder, among others. Johnson's idea won second place in the 2019 Law & Policy Division Teaching Ideas Competition.

Scholar, ***see page 7***

Brett Johnson receives his second-place award from last year's teaching competition from Jared Schroeder, previous Law & Policy Division teaching chair, at AEJMC in Toronto last August. *Photo by Mike Martinez.*

2020 Teaching Competition

Law & Policy Division Call for Submissions: Teaching Ideas Competition

Key details
- **Deadline**: May 9
- **Prizes:** $100 for first, $75 for second, $50 for third.
- **For more information**: Brooks Fuller, bfuller7@elon.edu

The Law & Policy Division seeks submissions for its 11th Teaching Ideas Competition.

Submissions can focus on creative approaches for studying a case or cases; new ideas for incorporating emerging issues and technologies into courses; effective in-class group activities or assignments that help students synthesize key lessons; group projects that encourage collaborative learning; lesson plans or syllabi that reveal innovative approaches for a seminar or skills courses; ideas for experiential or service learning; or ideas from any other area of teaching and learning that will help others improve their courses.

Winning submissions will receive certificates and cash prizes: $100 for first place, $75 for second place, and $50 for third place. Winners will be invited to present their ideas as part of a pre-conference session and will be recognized during the Law & Policy Division's business meeting in San Francisco. Winning ideas will also be showcased on the division website and in Media Law Notes.

All submissions must be received by May 9. Submissions must be sent as an email attachment (preferably a Word or PDF document) to Law & Policy Division Teaching Chair, Brooks Fuller, at bfuller7@elon.edu. Please use "Teaching Ideas Competition" in the subject line.

Please provide two documents in the email:

1) In the first, include your name, affiliation, contact information, and the title of your idea.

2) In the second, describe your teaching idea in 1-2 pages (single-spaced) in this format:

Introduction of your idea, your rationale, an explanation of how you implement the idea, and student learning outcomes. Include any related links at the bottom of the submission. Please attach any relevant attachments to the submission email and label them clearly. This is the document that will be sent to the judges for blind review, so please make sure this document does not include identifying information.

A panel of judges will blind review each submission based on the idea's creativity, innovation, practicality, and overall value to students.

Submitters need not be Law & Policy Division members. Both faculty and graduate students are welcome to submit. Those who placed in the top three last year are not eligible to compete this year. Past entrants who were not awarded may revise and resubmit ideas from previous years.

Winners will be notified by mid-June. If you have questions, please contact Brooks Fuller at bfuller7@elon.edu.

Woodhull, Mozilla among cases to watch

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This column provides snapshots of three important legal challenges that are being considered by the courts:

Woodhull Foundation v. U.S.: Woodhull brought a challenge to FOSTA, which was dismissed for lack of standing. Woodhull led an appeal to the standing ruling, and in January the D.C. Circuit released a unanimous decision agreeing that the plaintiffs had standing to bring a challenge and remanded the case to the lower court.

The Woodhull Freedom Foundation (https://www.woodhullfoundation.org/about-us/) is non-profit organization devoted to education and public advocacy in support of the principle that consensual sexual expression is a fundamental human right. FOSTA, along with other laws and regulation that limit sexually related media content are in the Foundation's cross hairs. On FOSTA: "FOSTA chills sexual speech and harms sex workers. It makes it harder for people to take care of and protect themselves, and, as an organization working to protect people's fundamental human rights, Woodhull is deeply concerned about the damaging impact that this law will have on all people." — Ricci Levy, President & CEO of Woodhull Freedom Foundation

Why This Case Matters: Woodhull is the lead plaintiff in First Amendment challenge to FOSTA. FOSTA, when passed, resulted in many websites removing content as those sites had the protections provided by Section 230 of the Communications Decency Act reduced. If the court follow the precedent from Reno v. ACLU and applies a strict-scrutiny review to FOSTA, the law is likely to be declared unconstitutionally overbroad.

Mozilla v. FCC: Mozilla was the lead plaintiff in a challenge to the FCC's Internet Freedom Order, which repealed the Title II protections the FCC had passed in 2015 and successfully defended in court. The case is fundamentally about net neutrality protections. The D.C. Circuit, relying heavily on the precedent of Brand X and the Chevron Deference Standard, ruled in October that the FCC was free to make the change as a policy decision, but multiple appeals followed.

Why This Case Matters: The court's decision undermined the FCC's policy decision on the key issue of preemption, and with at least 22 states involved in the Mozilla challenge

Cases, *see page 10*

Teaching tools can help demystify media law

Graduate Student Liaison

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Graduate students are valuable teaching resources because our developing academic mastery, combined with our life-stage proximity to undergraduate students, allows us to demystify the esoteric process of legal research and analysis.

Much of the pedagogical literature aimed at higher-level academic instructors centers on concepts of "demystification" and "transparency." Undergraduates are well versed in information regurgitation — the model of scholasticism unfortunately rewarded by many American secondary schools.

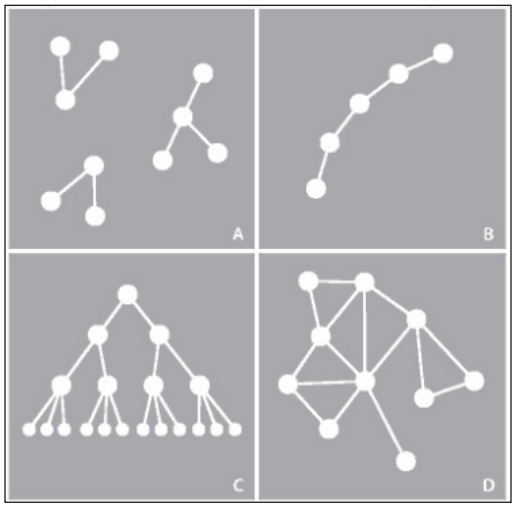
By the time high school students matriculate into the academy, they know how to digest information in a manner best suited to test-based recollection or short-answer recitation. Lacking, however, is their ability to critically apply their substantive knowledge to new circumstances or sets of facts.

Skills of metacognition—information procurement, issue identification, and theoretical explication—are crucial to success in the humanities generally and journalism specifically. Yet, these skills are seemingly mysterious because they are difficult to learn, teach, measure, and assess.

Media law pedagogy is notoriously challenging within the journalism and mass communication canon because students must identify, organize, and analyze complicated legal issues through an unfamiliar method of didactic instruction: case study investigation.

Many of my faculty superiors and instructor colleagues have developed wonderful tools to unpack the cryptic process of legal reasoning. Teaching Chair Brooks Fuller, in his Media Law Notes column "Avoiding the Media Law 'Spin of Doom,'" highlighted Professor Stacie Jankowski's "Rowdy Poster Project," where undergrads practiced using legal databases to mine topical case law and expound on scholarly discussions. PF&R Chair Jon Peters uses a Freedom of Information Act assignment, where student journalists create free accounts with the Reporters Committee's iFOIA online tool.

Based on a hypothetical scenario they are investigating, students craft narrowly tailored information requests to minimize government fees and expedite processing. Several of my GTA colleagues employ low-stakes assignments including one-minute summary papers and "think-ink-pair-share-square" exercises: where students think on a prompt, put their thoughts to paper, select a buddy to share their reflections, and repeat with another group pair.



"Examples of Knowledge Organizations" (Reproduced from How Learning Works, Figure 2.2, Page 50)

Despite these excellent and proven metacognitive exercises, one conspicuous problem remains as instructors unshroud the process of conducting good scholarly analysis: the expert blind spot.

In her co-authored primer "How Learning Works," a wonderful resource for GTAs and professors, Susan Ambrose discusses the pathway from noviceship to expertise.

Tools, *see page 9*

10 tips for a successful AEJ paper submision

Research Chair
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1. Pick a relevant topic: Papers should focus on issues related to communication law and/or policy. Potential topics include defamation, privacy, intellectual property, FCC regulations, obscenity, and freedom of information.

2. Choose a theoretical orientation and method: As a reminder, we accept a variety of methodologies, so don't feel you need to limit yourself to traditional legal analysis. Pick the method that makes the most sense for answering your research question.

3. Be original: Make sure your paper has not been presented or published anywhere else except the AEJMC Southeast Colloquium or the AEJMC Midwinter Conference.

4. Get your cites right: In addition to welcoming a variety of methodologies, we also accept papers that use APA, Chicago, or MLA citation formats, although Bluebook Style is preferred.

5. Go Goldilocks when it comes to length: Papers shouldn't be too long or too short. Make sure your paper is between 25-50 double spaced pages.

That includes your cover page, appendices, tables, footnotes and/or endnotes, and end-of-paper reference list, if applicable. Your footnotes maybe single-spaced.

6. Style is everything: Be sure to use 12-point font and one-inch margins. Word files are accepted but a PDF is strongly preferred.

7. Include a title and abstract: The title of your article should be printed on the first page of the text and on running heads on each page, as well as on the title page. You will also need to submit a 75-word abstract along with your manuscript so have it ready when you log-in.

8. Tell us why you're special: Are you a student? Or are you a junior faculty member submitting your debut paper to the Division? Be sure to indicate the status of your submission on your title page.

9. Hit the deadline: Papers are due by 11:59 p.m. (Central Daylight Time) on Wednesday, April 1.

10. Remove ALL identifying information: Including information that identifies the author(s) of a paper is the number one reason manuscripts are disqualified. To remove identifying information from a PDF in Adobe Acrobat, follow these steps:

Go to "Edit"
Select "Manage Tools"
Select "Redact"
Select "Remove Hidden Information"
If any items appear in the Results, click "Remove"
Save the file, note that identity information is not removed until the file is saved.

Finally, if you're not planning to submit a paper or you intend to submit but don't end up making the deadline, please consider serving as a reviewer for the Division.

To volunteer to review, please reach out to me directly at carlso42@seattleu.edu. I'm also available to answer any questions you may have about the paper competition and submission process.

Good luck everyone!

AEJMC 2020 Paper Call

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2020 AEJMC Conference in San Francisco.

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 other relevant 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 should be between 25–50 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. Bluebook citation format is preferred, but 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. Before submitting your paper, please make certain that all author-identifying information has been removed and that all instructions have been followed per the AEJMC uniform paper call. Take every precaution to ensure that your self-citations do not in any way reveal your identity. 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 as long as all authors are students. The Law and Policy Division will also cover conference registration fees for the top three

Paper Call, *see page 9*

2020 Southeast Colloquium

Below is the The Law & Policy Division's Southeast Colloquium schedule. The colloquium is from March 19-21. Go to https://www.memphis.edu/jrsm/southeast2020.php to register or for more information.

Friday

Privacy, Access to Information and Advocacy
8 a.m. - 9:15 a.m.

"Public Records Officers' Perspectives on Transparency and Journalism" - Brett G. Johnson, University of Missouri

"The Right to Know About the Right to Stay: Access to Information About Immigration Courts" - Jonathan Anderson, University of Minnesota

"Beyond Journalism about Journalism: Amicus Briefs as Metajournalistic Discourse" - Brett G. Johnson, University of Missouri, Ryan J. Thomas, University of Missouri and Jeremy Fuzy, University of Missouri

"An Analysis of Current Cyber Misbehavior Laws and Their Applicability to the Act of Doxing" - Kathryn A. Johnson, UNC Hussman School of Journalism and Media

Moderator: Michael T. Martinez
Discussant: Jared Schroeder

Threats to Speech and Association
10:45 a.m. - Noon

"Raising First Amendment Red Flags About Red Flag Laws: Safety, Speech and the Second Amendment" - Clay Calvert, University of Florida and Ashton T. Hampton, University of Florida

"Opting In: Free Expression Statements at Private Universities and Colleges in the U.S." - Erica Salkin, Whitworth University and Colin Messke, Whitworth University

"A Case of Statutory Construction: Carving Out the First Amendment Through Anti-Boycott Legislation" - Isabela Palmieri, The University of North Carolina at Chapel Hill

"Changing Times & (Un)Changing Judiciaries: Freedom of Association, Sexual Orientation and Discrimination in The Workplace" - Sydney Nicolla, The University of North Carolina at Chapel Hill

Moderator: Michael T. Martinez
Discussant: Christopher Terry

Censoring/Regulating Speech
1:45 p.m. - 3 p.m.

"Regulating the Political Wild West: State Efforts to Address Online Political Advertising" - Ashley Fox, The University of North Carolina at Chapel Hill and Tori Ekstrand, The University of North Carolina at Chapel Hill

"Running The Full-Court Press: How College Athletic Departments Unlawfully Restrict Athletes' Rights to Speak to the News Media" - Frank D. LoMonte, University of Florida and
Virginia Hamrick, University of Florida

"A Revised Approach to New Voices Legislation" - Olivia Pitten, Southern Methodist University

"Decisions & Justifications: Understanding What "Low-Value" Speech Means & Why The U.S. Supreme Court Classifies Sex Speech As Low-Value" - Kyla P. Garrett Wagner, Syracuse University

Moderator: Michael T. Martinez
Discussant: Clay Calvert

Entering the Thunderdome: Hate Speech and You!
3:15 p.m. – 4:45 p.m.

As the rhetoric in our country heats up heading into the 2020 national elections, new concerns about old types of problematic speech are back.

This panel will discuss what constitutes "hate speech", the Justice Potter-esque problems of subjectivity when defining the boundaries of such expression, explore the protections provided to, the criticisms of, and concerns about hate speech in the digital age.

The panel will explore the separation between hate speech and actions related to hate, what role the Internet has played in disseminating and amplifying hate speech and the campus speech codes designed to curtail it.

Panelists: "Judge" Rachel Jones, Tori Smith Ekstrand, The University of North Carolina at Chapel Hill, Jared Schroeder, Southern Methodist University and Christopher Terry, University of Minnesota

Colloquium, *see page 7*

Hannah Pham, *Standing Up for Stand-Up Comedy: Joke Theft and the Relevance of Copyright Law and Social Norms in the Social Media Age*, 30 Fordham Intell. Prop. Media & Ent. L.J. 55 (2019).

Hannah Pham, a dually-qualified Australian and New York attorney, has taken a stand for stand-up comedians. In her article, she explores potential avenues for restitution when comedians find their most prized possession has been stolen: their thunder.

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With the expansion of social media, Pham avers that joke theft has reached an all-time high and is no laughing matter. This conduct not only harms individual comedians but could have adverse effects on the entire industry. Pham argues it is high time comedians be taken seriously—at least insofar as their rights as artists are concerned.

The article describes the mounting menace of "joke aggregators," greedy prospectors that profit from picking nuggets of comedic gold from the mental mines of live performers. The real damage hits when aggregators disseminate the pinched puns and lifted laughs on social media.

For up-and-coming comedians, this behavior could be beneficial. A few unauthorized posts, if well-received, could transform a no-name into a viral sensation. However, this would require some degree of attribution, which is far from the norm. Even when attribution is offered, the joke still rapidly becomes old news.

A novel concept that could have enthralled multiple audiences for the duration of a start-up tour has now reached millions of users in a matter of minutes and has essentially expired as material for future shows. With every virtual viewing, the original joke diminishes in value.

Pham points out that jokes tend to have lifespans and do not maintain the same impressions as other creative works, like songs and movies. "Once a joke is heard, it cannot be unheard." More injurious are the aggregators that intentionally wipe jokes of all identity or context and siphon the credit. There is an entire economy based on this model, where pilfered material is circulated "in exchange for 'likes' and cash" at the expense of the originators. These "one-stop-joke-shop operation[s]" may disincentivize genuine creators.

Thus far, the industry has gotten by on self-regulation, functioning under an informal system of general social norms. In the comedy community, "joke stealing" is a mortal sin and, if discovered, is practically professional suicide.

Pham describes that joke thieves could face severe community backlash that could annihilate their careers: "[c]omedy room managers will refuse to book them, managers and agents will refuse to represent them, and comedians will refuse to work at the same club as them or even associate with them on any level." For those in the field, "[r]espect and credibility are" everything and the possibility of total ostracization can be quite daunting. This system works well in the comedy community; however, it is not successful in deterring outsiders. Intra-community social shunning is of little to no consequence to what has been coined "extra-community misappropriation."

Pham recommends original jokes be protected under either existing notice-and-takeover procedures under the Digital Millennium Copyright Act ("DMCA"). Under this approach, comedians can easily file reports when they come across stolen material online.

These reports require certain information, such as "identification of the copyrighted work; identification of the infringing work; a statement of good-faith belief; contact details; a statement confirming the accuracy of the information; and a signature of the copyright owner or a person authorized to act on behalf of the owner." If properly filed, the process requires social media platforms to issue takedown notices and take other reasonable steps to remove misappropriated content.

Additionally, Pham suggests there could be a viable route through the proposed Copyright Alternative Small-Claims Enforcement Act of 2016. This legislation, if enacted, would create a special board within the United States Copyright Office which would only handle small copyright claims (those seeking $30,000 or less in damages). This could serve as an efficient alternative to traditional federal court proceedings. Although Pham admits that neither the DMCA nor the copyright small-claims board offer complete protection, both are practical and promising. Though each carries its fair share of obstacles, both are a significant step up from the current state of the industry.

Ronald W. Nelson, *Ethical Obligations of Family Law Attorneys in Dealing with Social Media and Discovery*, 31 J. Am. Acad. Matrim. Law. 415 (2019).

In his article, Ronald Nelson offers advice for family lawyers as they traverse the tumultuous terrain of client presence and communications on social media.

He warns of impending issues bound to arise as clients continue to publicize their personal lives online. Nelson describes social media archives as a "gold mine" of evidence for family legal disputes. Although primarily focusing on the issues that arise in the context of family law, Nelson identifies concerns that are likely to materialize in multiple legal arenas.

Pointing out that "[t]here has always been fear of, resistance to, and avoidance of social media and other technological advances in society - all the more in the legal community," Nelson suggests that attorney aptitude in online interactions is not only beneficial to successful client relations but is obligatory under the American Bar Association Model Rules of Professional Conduct.

Under Rule 1.01, for example, "a lawyer shall provide competent representation to a client[, which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As society progresses toward total technological reliance, competence may not hold the same connotation it did before. In this digital age, Nelson asserts that the practice of law now "requires a level of competence that many lawyers never think about." In 2012, the comments to Rule 1.01 were amended to reflect the changing legal landscape. The rule now calls on lawyers to stay aware of "the benefits and risks associated with relevant technology." Additionally, Nelson avers that "ethics decisions in at least five states have specifically opined that competence in the law requires that lawyers understand social media in order to properly advise clients."

Nelson cites extraordinary, though not surprising, statistics on social media usage. According to the Pew Research Center, approximately 5% of American adults reported use of social media platforms in 2005. "In the first quarter of 2018, that share had risen to nearly 70% worldwide." The more people use social media, the more comfortable they feel with the services.

This feeling of security and confidence in sharing any and all ideas online and, often, receiving instant reactions from peers is part of what makes social media so enticing. As most users are aware, however, what may have been simple to

Bibliography, *see page 8*

Colloquium

from Page 5

Regulatory Policies
5 p.m. - 6:15 p.m.

"CDA 230 & its Quest for Liberty" - Sean Griffith, Southern Methodist University

"Docket #18110: The Inception of the Conceptual Relationship Between Competition and Viewpoint Diversity in Media Ownership Policy" - Christopher Terry, University of Minnesota

"Biometrics and Privacy: Regulating the Use of Facial Recognition Technology" - Kearston Wesner, Quinnipiac University

"Future of Financial Privacy and Digital Currency Regulation" - Alexa Vickaryous, Southern Methodist University

Moderator: Michael T. Martinez
Discussant: Genelle Belmas, University of Kansas

Saturday
Research in Progress
11:15 a.m. - 12:30 p.m.

Research in Progress Papers: "Constitutive Choice: Section 230 or FOSTA/SESTA" - Christopher Terry, University of Minnesota and Scott Memmel, University of Minnesota

"The Copyright Claim Generation" - Marlee Schlegel, University of Minnesota

"Protecting, Serving, and Suffering? Investigating the impact of media coverage of officer-involved shootings" - Nia Johnson, Samford University

"Freedom of Speech and Press in Muslim-Majority Countries" - Shugofa Dastgeer, Texas Christian University and Daxton R. Stewart, Texas Christian University

"Rise of the Copyleft Trolls: Arguing for Fair Use When Creative Commons Licenses Result in Litigation" - Daxton R. Stewart, Texas Christian University

"The Skin of a Living Thought": The First Amendment and How Words Matter" - W. Wat Hopkins, Department of Communication, Virginia Tech

"The Status of Communication & Law Research: A Work in Progress" - Kyla Garrett Wagner, Syracuse University and Tori Ekstrand, University of North Carolina at Chapel Hill

"Regulating the Use of Campus Property for Expression: A Case Study" - Ben Medeiros, State University of New York – Plattsburgh and Dylan McLemore, University of Central Arkansas

"Fake it, 'till you Make it: Making the Future Through Deepfakes" - Hannah Miller, Southern Methodist University

"The Effects of Cancel Culture on Social Networks" - Malayah Stewart, Southern Methodist University

Moderator/Discussant: Brett G. Johnson, University of Missouri

Scholar

from Page 2

Johnson named the idea "Be Jon Peters" in reference to Peters' work as Press Freedom Correspondent for Columbia Journalism Review (CJR).

The assignment builds on a series of critical reflections in which students analyze news and commentary to spot incorrect or incomplete explanations of core media law concepts. Leading up to the final assignment, Johnson asks students to reflect on how to repackage complex media law content into digestible long-form pieces as they work through their own research topics. This helps students tap into "one of the highest-level learning outcomes, which is creating" a piece fit for publication in an outlet like CJR.

One thing that sets this teaching idea apart is its emphasis interviewing subject matter experts. Johnson requires students to do at least two interviews with experts to help students practice interviewing and translating for multiple audiences.

What surprised Johnson was how strongly students found their own voices as journalists and feature writers. "I call it 'Be Jon Peters,' but there was so much variation in tone and scope. Some pieces were real policy wonkish, but there were some that were very personal," Johnson said. "It has piqued my interest in knowing what makes a good column, not just content, but the aesthetics. I have a greater appreciation for the art form."

Ultimately, Johnson hopes that assignments like this will help students make media law more accessible so that our field can better confront the crises of credibility that invite anti-press sentiment among administration officials who find themselves awash in investigations by dedicated watchdog journalists.

"I think Erik Ugland, in his Communication Law & Policy article last year did the best job articulating the feeling among media law scholars," Johnson said. "Freedom of expression is being both weaponized and polarized, and we need to learn how to be public intellectuals to address that."

Congratulations to Brett Johnson for being recognized during the 2019 teaching competition. If you have any questions about his teaching idea, he can be reached at johnsonbg@missouri.edu.

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post is not so easily retracted later. Nelson warns that "electronic communications have become so easy and people so free with their written comments, in both social media and other electronic communications, [that] people often send out messages before thinking about the consequences and without considering that those written comments can be later considered against them in highly charged interpersonal matters."

What the client may have perceived to be a justified venting session to a friend on Facebook messenger or a well-deserved yet snide comment to a tweet, for instance, could later be used as evidence to his or her detriment in a divorce proceeding. Likewise, seemingly harmless videos published on Snapchat, showing a client's children running amok at an ungodly hour, could potentially resurface in a custody hearing. Any number of things posted online could essentially tarnish a client's reputation or character, especially if taken out of context.

Due to social media's vast potential to paint clients in a bad light, lawyers must strive to become well-versed in the world of virtual communication. Nelson recommends that the topic of online communications and behavior be broached during the very first meeting with a client. He also suggests lawyers take time to review and even actively track their clients' social media accounts. Whether intentionally or otherwise, clients may not fully disclose all relevant information or may not even recognize that certain activity online could influence a judge's overall impression.

This article was specifically intended to inform family lawyers, however, lawyers in any specialty could benefit from Nelson's message. He illuminates the serious consequences lawyers could face for not taking time to properly advise clients about the risks associated with information posted on social media. One lawyer faced a sanction in excess of $500,000 and was suspended for five years after a court found that he had advised his client to delete compromising pictures on Facebook.

Although there were numerous offenses involved in the case beyond the deletion of the online pictures, the board condemned this conduct in particular as an obstruction of "access to known evidence and evidence that had potential evidentiary value." Thus, Nelson recommends that lawyers, when advising clients about online behavior, be especially mindful not to encourage hasty deletion as many prior posts may be relevant evidence.

Anthony L. Fargo, *A Federal Shield Law That Works: Protecting Sources, Fighting Fake News, and Confronting Modern Challenges to Effective Journalism*, 8 J. Int'l Media & Ent. L. 35 (2019).

Over the past four years, tensions between the government and members of the press have reached a record high, while public trust in the media has reached an all-time low. With phrases like "fake news" being carelessly tossed left and right, news outlets have struggled to maintain societal influence. Journalists fear prevalent political pressures, emanating chiefly from the Trump administration and its supporters, may erode the protections of the press under the First Amendment. In his article, Anthony Fargo, Associate Professor and Director for Indiana University's Center for International Media Law and Policy Studies, addresses these rising concerns.

Fargo sets the stage of his discussion by stating that President Trump has essentially announced a mission to crack down on informants "who leak classified or sensitive information to the press, which could chill potential news sources and, if leakers are prosecuted, possibly lead to journalists being subpoenaed to identify their sources or face contempt citations." To avoid this unsettling outcome, Fargo advocates for the enactment of a federal shield law to protect journalists' constitutional rights.

Fargo begins by reviewing the rocky history of reporter's privilege law in the American court system. Privilege in this context refers to the idea that journalists maintain a limited right under the First Amendment not to reveal information or be forced to testify about the identities of confidential sources in court.

By way of background, Fargo highlights the famed 1972 case of *Branzburg v. Hayes*, which "remains the only opinion from the Supreme Court about the existence of a journalist's privilege." The case consolidated three individual privilege cases in which journalists were withholding information pertaining to criminal investigations. Ultimately, the Supreme Court determined that, while journalists receive some protection under the First Amendment, this does not extend to retaliation against valid subpoenas ordered by a grand jury.

Fargo identifies that most courts do not apply the *Branzburg v. Hayes* decision outside of cases involving grand juries. What *is* often echoed, however, is Justice Stewart's dissent, which proposed a three-part test cited in subsequent federal cases: "[Stewart] advocated for a qualified privilege that would allow journalists to protect their sources' identities unless the government could clearly and convincingly show that the information it sought was critically important to its investigation, that the information was relevant to the investigation, and that the information could not be obtained elsewhere."

Despite relative success for a time after 1972, —as well as the enactment of pro-journalist laws in forty states — Fargo conveys that journalists suffered a number of losses throughout the 2000s and face ongoing challenges.

In response to journalists being jailed, fined, and threatened for standing by their professional convictions, Fargo explains Congress' efforts from 2005-2013 to pass a federal shield law. Congress attempted to narrowly (but not too narrowly) define "covered journalists" and struggled to balance the goals of First Amendment rights and a uniform judicial standard against government interests in national security and unhindered criminal investigations.

In 2011, Fargo points out, the United Nations Humans Rights Committee published a General Comment to the International Covenant on Civil and Political Rights (ICCPR) pronouncing that "the limited journalistic privilege not to disclose information sources" should be respected by all member countries—which would seemingly bind the United States absent a showing of a "necessary and proportional" exception. Fargo identifies similar principles adopted by multiple global and regional organizations around the world. Despite the progressions of the 2017 House bill, Congress has yet to successfully pass a federal shield law.

Considering the severe threat of "'real' fake news," as well as President Trump's intentional targeting of the media, Fargo proposes a possible, although unpleasant, compromise. In his article, Fargo attempts to "sketch out a bill that would be most favorable to journalists" by analyzing some of the principal issues, such as the extent of protection, the role of third parties (i.e., Internet service providers), and the careful defining of who is to be protected.

Essentially, he proposes that journalists consider making at least one concession: include "a provision in the law permitting judges to require persons seeking protection under the shield law to swear, under penalty of perjury, that their sources exist."

Although certainly not ideal and understandably offensive to the presumed fidelity of the press, Fargo opines that this concession more than offsets the alternative of sustained vulnerability in these trying times.

Tools

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Two frameworks characterize novices' developing academic masteries. First, they have sparse cognitive connections and a general inability to recognize relationships among pieces of knowledge (Panel A). In this situation, students absorb key case holdings, or key lecture points, without connecting the information to other cases or lectures. Second, novices tend to arrange information sequentially (Panel B). While this allows them to remember steps of a legal test, or the history of chronological events, their ability to recall and apply individual nodes fail if one link in the chain is broken. Panels C and D resemble knowledge taxonomies common among experts. Panel C's hierarchical model is a favorite among lawyers, legal educators, and law students—evidenced by our Pavlovian need to outline everything from course material to grocery lists (speaking personally). Panel D is an interwoven, highly connected model that facilitates information recall and linkage even when a specific connection fractures.

Altogether, expert instructors have amassed broad bases of substantive knowledge (individual nodes) and complex cognitive networks which allow them to organize information, interconnect ideas, and reason through scenarios in new and unexplored ways. Indeed, the degree to which knowledge is richly connected and the extent to which those connections are meaningful correlate positively to the quality of an expert's scholarship. However, the confluence of substantive knowledge and organizational pathways make experts forget how difficult it was to learn concepts initially. This phenomenon is known as the expert blind spot, and grad students are a key resource for treating expert blindness for two reasons.

First, grad students are in the process of building substantive knowledge and constructing interconnected cognitive pathways. The former allows us to explain doctrinal nuances and distinctions that make certain concepts difficult to absorb. The latter allows us to articulate the nebulous concepts of legal research that we ourselves labor to develop.

Second, GTAs can exhibit and distill practices requisite to building effective knowledge organization structures. We can show our undergraduate colleagues the importance of developing rich media diets. By consuming ideologically diverse news, interdisciplinary scholarship, and popular culture publications, we expedite the process of connection-making and theory-building. By continually writing prose—for trade publications, news outlets, or scholarly journals—we put into practice the metacognitive skills needed for legal scholarship: issue identification, situation, and analysis.

In sum, GTAs are acutely aware of the skills required for good scholarship and legal analysis because we are currently working to perfect those skills before entering the job market. By displaying those skills to undergrads in class-based and out-of-class contexts, we demystify the skills necessary to excel in media law and beyond.

Headnotes

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Though the advent of email, websites and social media has narrowed the gap, we still need ways to connect with others on these sometimes complicated First Amendment issues. Sometimes we hit a wall.

We are not alone. Part of the beauty and value of the Law & Policy Division is the wealth of talent and generosity of our colleagues.

Case in point: more than a dozen members responded to Katy's call for help and the discussion led to creating a place to share resources on the division website.

Further, the division membership has a long history of support, mentorship and professional networking. Years ago, the division established the Women in Law Division (WILD) subgroup to support and mentor female colleagues.

Our paper competitions provide authors with valuable insight, advice and criticism on articles for the annual conference as Research Chair Caitlin Carlson can attest.

Similarly, the upcoming Southeast Colloquium will provide authors with insight both through presentation and judges' comments. Thank you to Michael Martinez for organizing the upcoming Southeast Colloquium in Memphis.

Even if a paper is not accepted for presentation, the often detailed and sometimes constructive judges' comments can help an author polish a paper for subsequent submission or publication. This mission follows through with the PF&R panels, which are being organized by Vice Head Nina Brown and the quarterly Media Law Notes, edited by Jared Schroeder.

Even as you read this newsletter, you can recognize that you are not alone.

Paper Call

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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.

Instructions/Logistics

All research papers must be uploaded through an online server to the group appropriate to the paper's topic via a link on the AEJMC website: www.AEJMC.org. The following uniform call will apply to ALL AEJMC paper competitions. Additional information specific to an individual group's call is available at the end of the uniform call information.

1. Submit the paper via the AEJMC website link (www.aejmc.org) to the AEJMC group appropriate to the paper's topic. Format should be Word, WordPerfect, or a PDF. PDF format is strongly encouraged.

2. The paper must be uploaded to the server no later than 11:59 P.M. (Central Daylight Time) Wednesday, April 1.

3. Also upload a paper abstract of no more than 75-words.

4. Completely fill out the online submission form with author(s) name, affiliation, mailing address, telephone number, and email address. The title should be printed on the first page of the text and on running heads on each page of text, as well as on the title page.

Do NOT include author's name on running heads or title page.

5. Papers uploaded with author's identifying information will not be considered for review and will automatically be disqualified from the competition. All AEJMC divisions, interest groups and commision paper submissions will abide by this rule without exception. We encourage everyone to submit at least a day before the conference deadline so that there is time to do a final check of the documents for self-identifying information, and time for resubmission prior to the deadline if necessary.

We are also in need of reviewers. If you are not writing a paper, please contact Caitlin Carlson (information below) if you are willing to serve the division as a reviewer.

If you have questions, please contact Caitlin Carlson, Law and Policy Division Research Chair, Seattle University, Phone: (206) 220-8531; email: carlso42@seattleu.edu.

Deepfakes

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words while criticizing President Donald Trump during an interview spread quickly on social media, garnering millions of views within 48 hours.

The video altered Pelosi's appearance by slowing down the audio and video to distort reality. Experts say it was a crude example of what's likely to come.

The Pelosi video's distribution raised questions about what social media companies should be doing to stop deepfakes.

YouTube took down the video, while Facebook allowed it to be shared but labeled it as false. Under pressure, in January Facebook announced it would prohibit users from posting some deepfakes that deceive viewers.

The First Amendment creates a high hurdle for government censorship, even for falsehoods.

If California enforces its deepfakes law aggressively, the law is likely to be challenged as a violation of free speech.

While individuals can use existing libel and privacy law to combat harmful false speech, broader categorial bans on falsity are more problematic under First Amendment principles.

California's new law prohibits the distribution of "materially deceptive audio or visual media" done with "actual malice" and "with the intent to injure a candidate's reputation or to deceive a voter in voting for or against a candidate."

For example, in U.S. v. Alvarez in 2012, the Supreme Court struck down the Stolen Valor Act, a federal law that criminalized lying about receiving military honors.

In his controlling opinion, Justice Anthony Kennedy rejected the government's argument that false speech receives no First Amendment protection. He said the law did not satisfy strict scrutiny standards.

"The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth," Kennedy wrote.

Much of Kennedy's analysis focused on the harmless nature of Alvarez's lies, suggesting falsity could be punished if it was "used to gain a material advantage." And Kennedy only spoke for a plurality. Two justices would have applied a lower level of scrutiny, and three justices had no problems finding the falsehoods outside of First Amendment protection.

California's new law prohibits the distribution of "materially deceptive audio or visual media" done with "actual malice" and "with the intent to injure a candidate's reputation or to deceive a voter in voting for or against a candidate."

The law also requires the videos must falsely appear to be authentic and that they cause reasonable people to have a "fundamentally different understanding" than the original, unedited footage.

The law exempts materials that are identified as having been manipulated, and exempts news organizations and videos that constitute satire or parody.

The California News Publishers Association and the American Civil Liberties Union opposed the bill.

But Erwin Chemerinsky, dean of University of California, Berkeley's Law School, told the Legislature he believed the bill was narrowly tailored to meet First Amendment standards.

Deepfakes are just the latest problem in the post-truth era. Not only can deepfakes make people believe lies, they also may cause people to stop believing the truth.

Scholars have called this effect the "liar's dividend" – when people stop believing the truth because of past experience with deepfakes.

Case in point: President Trump suggested the Access Hollywood video of him bragging about assaulting women was a fake.

Leslie Stahl, the veteran CBS news journalist, said in 2018 she once asked Trump why he kept publicly attacking the press.

"I do it to discredit you all, and demean you all, so that when you write negative stories about me, no one will believe you," Trump said.

Jason M. Shepard, Ph.D., is professor and chair of the Department of Communications at California State University, Fullerton. A version of this column first appeared in the Winter 2020 edition of California Publisher.

Cases

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to the rules, further action in this case will involve significant regulatory concerns over intra and interstate communication.

The D.C. Circuit denied requests for a panel appeal brought by the Digital Justice Foundation and the en banc appeals brought by Mozilla and some of the other plaintiffs. As of this writing, Mozilla was considering an appeal to the Supreme Court and the FCC began a rule-making inquiry related to the remanded items from the decision.

Prometheus Radio Project v. FCC: The FCC's battle with the Third Circuit over media ownership policy extends into its sixteenth year. The FCC has tried four times, in 2003, 2007, 2016 and 2017 to develop media ownership rules that will pass judicial review, but has failed each time because the agency lacks empirical evidence to support its decision making. The Third Circuit panel also has ordered the FCC in three of the four Prometheus Cases to develop a working program to promote ownership by women and minorities.

The FCC's last minority ownership proposal, the 2018 Incubator Program, was the latest in a string of failures by the agency to resolve this longstanding issue, which has resulted in low levels of broadcast station ownership by minorities and women.

Prometheus Radio Project (https://www.prometheusradio.org/mission) is a non-profit organization founded by a small group of radio activists in 1998. Prometheus builds, supports, and advocates for community radio and LPFM stations that bring together and empower local, participatory voices and movements for social change.

Prometheus Radio Project was chosen by the panel on multi-district litigation as the lead plaintiff in a challenge to the FCC's 2003 Media Ownership rules, and has been the lead plaintiff in the continuing case, winning four times.

Why This Case Matters: Media ownership policy has been tied up by the mix of FCC mishaps and periods of inaction since 2003. After the latest decision, the FCC partnered with the NAB in seeking an en banc review, but it was quickly denied by the Third Circuit.

In early February both the FCC and NAB asked for a delay until March 19 to file an appeal of the latest decision at the Supreme Court.

It appears likely the FCC is gambling on an appeal to the Supreme Court as a mechanism to move the issue out of the Third Circuit.