

Media Law Notes

AEJMC Law & Policy Division

Volume 48, Issue 4

Summer 2020

AEJMC Schedule

All events are in the Pacific
Time Zone.

Pre-conference Wednesday, Aug. 5 1 p.m. to 2:15 p.m.

Strategies for Success as a
Researcher in Communications
Law and Policy: From Idea Gen-
eration Through Publication

Moderator: Clay Calvert
Panelists: Chip Stewart, Tori
Ekstrand, Amy Kristin Sanders,
and Leo Eko

2:25 to 3:40 p.m. Inclusivity and Teaching Sensitive Topics

Moderator: Jonathan Peters
Panelists: Jasmine McNealy,
Jason Shepard, Caitlin Carlson,
and Tori Ekstrand

3:50 to 5 p.m. Teaching Ideas Competition

Moderator: Brooks Fuller
Winners: Kriste Patrow, Shao
Chengyuan, and Tori Ekstrand
(1); Amy Kristin Sanders (2);
Frank LoMonte (3)

Panels
Thursday, Aug. 6
11:45 a.m. to 1:15 p.m.
Political Speech on Campus/
Online and Marginalized Stu-
dents – Preparing for the 2020
Election

Co-sponsor: Lesbian, Gay, Bi-
sexual, Transgender and Queer
Interest Group.

Teaching Panel Session

Moderating/Presiding: Jason
Martin, DePaul

Panelists
Jason Shepard, California State

Schedule, see page 3

2020 Stonecipher Award

Smolla, Kerr share honor

The Stonecipher Award for Out-
standing Research in Media Law and
Policy will go this year to Rodney A.
Smolla and Robert L. Kerr for their
jointly published essays marking the
centennial of the Marketplace of Ideas
Theory. Their articles were published
together in the Autumn 2019 issue of
Communication Law and Policy.

The committee felt that, when
read together, the articles offered “a
path-breaking new way to view the
marketplace theory” in the case of the
Smolla essay and “a guide to applying
that theory to a future of algorithmically
curated speech” in the case of the
Kerr essay.

One judge called the articles “a one-
two punch.” He concluded: “They most
broadly cover freedom of speech as a
whole, have the strongest theoretical
component, and have the greatest like-



Stonecipher Chair

Dean Smith
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Smolla



Kerr

lihood of having a lasting influence on
scholarship.”

Smolla’s article — “The Meaning
of the ‘Marketplace of Ideas’ in First
Amendment Law” — offers a succinct
tracing of the theory’s evolution over
successive decades and mounting Su-
preme Court decisions.

After showing how the metaphor
has permeated every conceivable area
of First Amendment law, he illustrates
the point with detailed explorations

Stonecipher, see page 8

Division in good hands as term ends

Over the past year, there
has been no shortage of issues
facing us in Law and Policy. Protests and seemingly never-
ending vitriolic debates on
many public issues and attacks
on the First Amendment itself
are constant reminders why
our discipline is important not
only to our respective academic
programs and AEJMC but the
larger world itself.

Things are flying by at break-
neck speed and it is hard to be-
lieve that my year as head of
the Law and Policy Division is
already up. None of us could
have envisioned our world
would be where we are today.



Head Notes

Roy Gutterman
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Our upcoming virtual confer-
ence will do its best to replicate
the in-person excitement of
paper panels and PF&R discus-
sions. We will all do our best.

As I get ready to return to
the ranks of Law and Policy di-
vision membership, I am con-
fident that leadership coming
up will take the ball and run
with it. I am proud to hand the
gavel to my colleague here at

Syracuse, Nina Brown. When
things get back to normal,
Nina can walk down to my of-
fice to talk AEJMC, just like I
did this past year.

Following Nina will be Cait-
lin Carlson, who ran this year’s
paper competition, operating
a seamless transition to virtu-
al and even accepting abstracts
rather than complete papers
way back in April. Jared Schro-
eder has done a fine job keep-
ing me in check on deadlines
and getting out our quarterly
newsletter on time.

Supporting leaders made
operations smooth, seamless

Headnotes, see page 7

Trio take top prize for idea about campus free speech

Media law pedagogy can be full of promises and pitfalls when trying to bring ancient concepts into conversation with developing issues.

Students seem to thrive in classroom environments that allow them to build relationships between foundational legal concepts and modern times on their own terms. The winners of the 2020 Law and Policy Division Teaching Competition have each created innovative approaches to media law pedagogy that successfully marry the past with the present.

These ideas will be showcased during an AEJMC pre-conference session, which will be from 3:50 p.m. to 5 p.m. (Pacific Time), Aug. 5.

Ph.D. candidate Kriste Patrow (University of North Carolina at Chapel Hill), post-doctoral fellow Shao Chengyuan (University of Tübingen), and associate professor Tori Ekstrand (UNC-Chapel Hill) won first prize for their idea “Comm. Methods and Campus Expression Research for Undergraduates,” in which the three collaborators developed plans for an undergraduate course focused on exploring free expression issues on college campuses. The idea was inspired partly by shifts the three have witnessed in campus speech environments, at UNC-Chapel Hill and more broadly.

The Comm. Methods and Campus Expression course provides an exceptional companion project to the researchers’ mixed-method project diving into the way students at a large flagship public university grapple with free speech and First Amendment issues. Most import-



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ant, it gives students an innovative opportunity to explore their community from within as they develop student-led research using qualitative methods such as interviews and surveys.

From the undergraduate students’ findings, they created original research, multimedia projects, and long-form journalism. The course creates a space in which

students can connect with their campus while gaining a better understanding of the First Amendment and how it is lived out among fellow students.

Associate professor Amy Kristin Sanders (University of Texas) won second place in the 2020 Teaching Competition with her idea “Teaching Others About Media Law.” Behind the humble name for this idea lies a tremendously engaging project designed to help students prepare training materials for the media entity of their choice surrounding global issues in speech and press freedom for journalists.



Patrow



Ekstrand



Chengyuan

Students are tasked with creating multimedia content for news and media outlets in the United States, Europe, and the Global South. The activity calls on students to use their knowledge of law and free expression to create materials that can effectively teach organizations about major media law concepts. Click here for one example of the type of work produced in Sanders’s class.

Frank LoMonte, director of the Brechner Center for Freedom of Information (University of Florida), won third place for his idea “Using ‘In The Dark’ to Shed Light on Coverage of the Legal System.” LoMonte’s special one-week-long, 1-credit hour class focused on teaching legal concepts using American Public Media podcast “In the Dark.”

The course focuses on providing students with a rich experience by showing how legal concepts such as public records, privacy dovetail with civil rights and politics.

One thread that ties these wonderful ideas together is that each asks students to interact with media law concepts in a way that makes their learning tailored, localized, and accessible.

Patrow, Chengyuan, and Ekstrand have built a course that helps students study the impact of speech in their daily lives during some of their most formative years. Sanders has created a series of assignments that situates student learning in a personal, global, and professional context.

LoMonte has leveraged the relatively new media format of podcasting to show how media law concepts touch countless areas of a particular genre and subject matter.

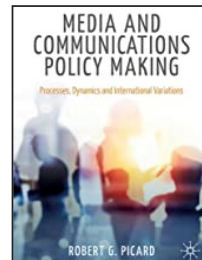
Book announcement

New book highlights policy concerns

Media and Communications Policy Making: Processes, Dynamics and International Variations, by Robert Picard, thrusts policy making into the forefront of law and policy research, providing much needed explanations about the nature of policy-making, factors that influence policy processes, policy studies, and policy advocacy.



Picard



It explains how political, cultural, and institutional factors affect policy making and how to contextualize and explore policy and law implementing it in different national, regional, and global settings.

The book focuses on institutions, processes, and structures that shape policy and the law and regulation that is subsequently established.

The book underscores the inherently political nature of policy making and how policy can be skewed to serve influential players and reflect dominant agendas.

It is filled with examples from policy making worldwide and explores how including policy studies theoretical and research approaches can improve media and communications policy and legal studies.

Schedule

from Page 1

Fullerton

Tori Ekstrand, North Carolina at Chapel Hill
Lisa Parks, Massachusetts Institute of Technology

Description: This panel aims to prepare educators for what is predicted to be a tense political climate full of disinformation and targeted speech and action against some of the most vulnerable segments of our student population.

3:15-4:45

Tell Me Your (Source's) Name: Leaks, Subpoenas, Search Warrants and the State of the Reporter's Privilege

Co-sponsor: Community Journalism Interest Group

PF&R Panel Session

Moderating/Presiding: Roy Gutterman, Syracuse

Panelists

David Snyder, executive director of the First Amendment Coalition

Bryan Carmody, Independent Journalist

Samantha Max, WPLN Nashville Public Radio

Frank LoMonte, Professor and Director, The Brechner Center for Freedom of Information, Florida

Description: The reporter's privilege is being tested today as much as it ever has.

Law enforcement agencies continue to serve subpoenas, execute search warrants and otherwise challenge the long-time practice of reporter's privilege and confidentiality.

From Earl Caldwell, whose case was consolidated in *Branzburg v. Hayes* (1972), to Josh Wolf to, most recently Bryan Carmody, the San Francisco Bay area has been the location of some of the highest-profile and most contentious cases testing the reporter's privilege.

This panel will cover these topics with local flair.

Friday, Aug. 7

1:30-3:00

Future Journalism Through Science Fiction

Co-sponsor: Communication Technology Division

PF&R Panel Session

Moderating/Presiding: Daxton "Chip" Stewart, Texas Christian

Panelists

Casey Fiesler, University of Colorado-Boulder

Robin Sloan, Bay-area based author (Mr. Penumbra's 24-Hour Bookstore), machine learning developer, co-author of EPIC 2014

Cyrus Farivar, NBC news tech reporter and author of *Habeas Data*

Description: Science fiction gives us a way of thinking about what the future of technology, communication, and journalism may look like as we prepare our students to go into that world. This panel brings together science fiction and future-thinking authors and journalists to talk about potential futures and their implications for communication and education.

3:15-4:45

Race and Racism in Media Law Scholarship

Co-sponsor: Media Ethics PF&R Panel Session

Moderating/Presiding: TBD

Panelists: TBD

Description: TBD

3:15-4:45

The Rise of Deep Fake: How Will Journalism Respond to the Ethical Challenges "Deep Fake" Videos Present in an Era of "Fake News"

Co-sponsor: Visual Communication

Moderating/Presiding: Ross Taylor, Colorado at Boulder

Panelists

Krishnan Vasudevan, University of Maryland

Tara Pixley, Loyola Marymount

Andrea Hickerson, University of South Carolina

Patrick Ferrucci, Colorado at Boulder

WILD schedules AEJMC meeting

The Women in Law Division (WILD) invites all women in Law & Policy to our annual conference gathering. The WILD subgroup was formed to help support and encourage the involvement of women in the division, their scholarship, and academic endeavors. This year, the WILD group will meet at 10 a.m. (Pacific Time), Aug. 7.

Please join us virtually at <https://zoom.us/j/3154439330> to connect with an amazing group of women. It promises lively conversation, mentorship opportunities, engaging breakouts, and more. For questions or more information, email Nina Brown at nmibrown@syr.edu.

Jared Schroeder, SMU

Nina Iacono Brown, Syracuse

Description: It's imperative as educators that we take a lead in the discussion on this new form of video alteration, and prepare our students in how to respond (both as consumers, as well as a producers of content). The discussants could address the ethical quandaries it presents, as well as provide tools for educators to address them in the classroom.

Saturday, Aug. 8

8:15 to 9:45

Scandal, Stigma, and Sexualization: How Sharing Sensational and Sensitive Information Relates to Calls for Privacy Protection

Co-sponsor: Media Ethics

Moderating/Presiding: Kearston Wesner, Quinnipiac

Panelists

Genelle Belmas, University of Kansas

Erin Coyle, Temple

Jasmine McNealy, University of Florida

Deborah Dwyer, University of North Carolina

Description: Free expression and privacy both can be ethical issues as well as legal issues. Freedom of expression relates to individual autonomy.

Undesired exposure of sensitive or personal information, however, can undermine personal autonomy and personal dignity and contradict ethical norms.

For decades, journalists have

considered whether it is ethical to release identities of survivors of rape and sexual assault even when it may be legal to do so. In the age of Me Too, journalists also must consider under what conditions it is ethical to reveal identities of people who have been sexually harassed or otherwise victimized.

Threats to privacy sometimes come from internet users who have posted revenge porn, doxed individuals, or used virtual reality for virtual sexual relations with non-consenting individuals.

Members of this panel will discuss threats to privacy from undesired publication of sensitive personal information and how communicators ought to protect privacy rights and free expression rights.

3 to 4:30

The Top 10 Legal Mistakes Com Professors Make in Class (You Won't Believe #4!)

Co-sponsor: Small Programs Interest Group

Moderating/Presiding: Jason Martin, DePaul

Panelists

Nina Brown, Syracuse

Kalen Churcher, Wilkes

Maria Fontenot, Tennessee

Description: This panel will answer common legal questions that arise from colleagues and students across the journalism and mass communication spectrum, and effective teaching strategies for addressing some of these nuanced legal issues.

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Schedule

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Paper sessions

Thursday, Aug. 6

8:15 - 9:45 a.m.

Oh the Places Free Speech Will Go: Looking at Expression on Television, Online, and In Court

There's Probably a Blackout in Your Television Future: Tracking New Carriage Negotiation Strategies Between Video Content Programmers and Distributors

Rob Frieden, Penn State University, Krishna Jayakar, Penn State University, Eun-A Park, Western Colorado University

What are anti-disinformation laws for? - Analyzing anti-disinformation laws from an "information disorder" perspective
Wei-ping Li, Maryland**

Virtual assemblies: Exploring problems of private spaces and press protections
Jonathan Peters, Georgia

Right to Know About the Right to Stay: Access to Information About American Immigration Courts
Jonathan Anderson, University of Minnesota*

*First Place Student Paper Award Winner

**Second Place Student Paper Award Winner

Moderator: Genelle Belmas, University of Kansas

Discussant: Carol Atkinson, University of Central Missouri

Friday, Aug. 7

8:15 - 9:45 a.m.

Freedom of Information: Examining Access at the State, Federal, and International Levels

Piercing the Veil: Examining the Demographics of State FOI Law Administration
A. Jay Wagner, Marquette

Policy Liberalism and Access to Information in the American States
Jonathan Anderson, University of Minnesota & David Pritchard, University of Wisconsin-Milwaukee

Pandering, Priority or Political Weapon: Presidencies, Political Parties & the Freedom of Information Act
A. Jay Wagner, Marquette

Restoring Access to Information - Can the U.S. Learn From Other Countries?
Amy Kristin Sanders & William Kosinski, Texas

Moderator: Nancy Whitmore, Butler University
Discussant: Aimee Edmonson, Ohio University

5-6 p.m.

Top Paper Panel

A Public Good: Can Government Really Save the Press?****
Patrick Walters, Kutztown University of Pennsylvania

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

When is a First Amendment Case Not a First Amendment Case?***
Clay Calvert, Florida

Division sets business meeting

The Law & Policy Division will recognize award winners, elect leadership, and address other matters during its annual business meeting. This year's meeting will be from 6:45 to 8:15 p.m. (Pacific Standard Time), Aug. 7.

Challenges to the Conventional Wisdom About Mergers and Consumer Welfare in a Converging Internet Marketplace*
Rob Frieden, Penn State

****Debut Faculty Paper Competition Winner

*** Third Place Faculty Paper
** Second Place Faculty Paper
* First Place Faculty Paper

Moderator: Tori Eckstrand, University of North Carolina
Discussant: Jane Kirtley, University of Minnesota

Saturday, Aug. 8

1:15 - 2:45 p.m.

Free Speech, Hate Speech, and Obscenity: The State of Communication Law Today
Meiklejohn, Absolutism and Hate Speech
Wat Hopkins, Virginia Tech University

Decisions & Justifications: Untangling the Supreme Court's Low-Value Approach to Sexually Explicit Speech
Kyla Wagner, Syracuse & Brooks Fuller, Elon

Freedom of speech and press in Muslim-majority countries
Shugofa Dastgeer & Daxton "Chip" Stewart, Texas Christian University

Traditional but Open: Research Paradigms in Communications Law, 2010-2019
Brett Johnson, Leslie Klien, &

Jeremiah Fuzy, Missouri

Moderator: Kyu Ho Youm, University of Oregon

Discussant: Jason Shepard, California State University, Fullerton

Sunday, Aug. 9

11 a.m. - 12:30 p.m.
Press Freedom: Past, Present, and Future

Free Papers and Free Speech: Home Delivered Free Newspapers as Litter
Eric Robinson, University of South Carolina

The End of the Affair: Can the Relationship Between Journalists and Sources Survive?
Anthony Fargo, Indiana

Clinical Journalism Education: Legal and Ethical Implications of Faculty-Led Reporting Laboratories
Kathleen Culver, University of Wisconsin-Madison, Frank LoMonte, University of Florida

A Prophet Without Honor: William Ernest Hocking and Freedom of the Press
Stephen Bates, University of Nevada, Las Vegas

Moderator: Jason Martin, DePaul University

Discussant: Eric Easton, University of Baltimore School of Law

Annotated Bibliography

Sahar F. Aziz & Khaled A. Beydoun, Fear of A Black and Brown Internet: Policing Online Activism, 100 B.U. L. Rev. 1151 (2020).

Social media is changing the ways we view, understand, and communicate information and ideas. Social media sites are the simplest and most accessible



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outlet for sharing diverse points of view. However, while social media offer a promising channel to many that were previous-

ly voiceless, it also serves as a prime tool for those in power to monitor and curb political dissidence.

In their recent article featured in the Boston University Law Review, professor Sahar F. Aziz and associate professor Khaled A. Beydoun discuss the evolving consequences of virtual surveillance by law enforcement.

Highlighting the disproportionate policing of minorities online, the authors aim to expose the harmful consequences of continued racial profiling and political targeting. The article focuses specifically on police efforts to oppress online activism—"the phenomenon where-

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by individuals transform social media platforms into forums for organized dissent and advocacy”—by Muslim and Black populations in America.

Local police departments may purchase software or create fake accounts to monitor and infiltrate groups on social media. The posting or sharing of #MuslimLivesMatter or #BlackLivesMatter, for instance, could easily invoke attention. The article investigates two policing programs in particular: Countering Violent Extremism (CVE) and Black Identity Extremism (BIE).

The CVE program was established under the Obama administration and aims to counter terrorism through community engagement and education for groups perceived to be vulnerable to terrorist recruitment. The BIE program is purportedly designed to prevent violent retribution against police officers. The authors underscore that, when utilized on social media, these programs automatically target and label individuals as prospective terrorists without concrete incriminating evidence or criminal records. Online activity alone is sufficient to institute an investigation.

The article begins by offering a brief history of the emergence of online activism and the impact of social media. Emphasizing the role of social media in the beginning of the Black Lives Matter (BLM) movement, the authors attest that “[w]ithout the galvanization of online voices exposing injustices against Black lives, it is highly likely that the ground movement would have never taken form.”

In a similar way, Muslims have turned to social media to combat Islamophobia following terrorist attacks by mobilizing hashtags such as #MuslimLivesMatter and #TakeOnHate.

However, as the authors point out, social media is also utilized by Al-Qaeda, ISIS, white

supremacists, and other extremist groups for recruitment and ideological dissemination. For this reason, “racial and religious minorities are the first and most frequent targets” of government surveillance online. Based on the rationale that social media users voluntarily disclose personal information to third party sites (i.e., Facebook and Twitter), police departments and federal agents are legally permitted to peruse and collect logs of individuals’ activity online.

In fact, “[p]rivate companies receive tens of millions of taxpayer dollars annually to operate social media monitoring software for police departments.”

Although young activists may be aware that their online activity is being surveilled, the authors fear such activists may still be ignorant to efforts by law enforcement agents to incriminate their comments or private messages.

Further, the authors warn that certain language may be more susceptible to suspicion and, thus, young activists need to be educated on common “triggers” that can lead to CVE and BIE investigations. Even when activists are aware, such surveillance efforts ultimately lead to the chilling of free speech.

In addressing mounting concerns, the article explores the ways in which Fourth Amendment jurisprudence has failed to shield online speech from unwarranted government surveillance.

First, the authors explain the limitations of the open fields doctrine, which courts have determined allows law enforcement to collect information left in a publicly available (“open”) social media site. Second, the authors turn to the misplaced trust and third party doctrines.

Under these rationales, information gathered from informants is still fair game—thus, personal information trusted to Facebook, Twitter, and other privately-owned sites may serve as incriminating evidence when disclosed to the police by said

sites.

Finally, the authors discuss the established reasonable expectation of privacy doctrine, which holds that an expectation of privacy must be both subjectively and objectively reasonable to preclude admission of evidence.

In the social media setting, it could understandably be difficult to assert a reasonable expectation of privacy on an internationally accessible outlet.

In addition, the authors reiterate the failings of Congress to update the Stored Communications Act—“passed twenty years before Twitter and Facebook were publicly launched”—within the Electronic Communications Act of 1986.

The authors identify local community efforts to combat government exploitation as well as a national coalition called the Community Control Over Police Surveillance (CCOPS). However, the article pushes for the adoption of a federal systemic approach to better protect the free speech of minority activists online.

Mihailis E. Diamantis, *The Extended Corporate Mind: When Corporations Use AI to Break the Law*, 98 N.C. L. Rev. 893 (2020)

From recommendations on Netflix based upon a user’s viewing habits to the automatic spam folder on every email account, AI technology is evolving exponentially and is incorporated in many diverse aspects of everyday life.

Although AI may not yet be at the level of fully automated free-thinking anthropomorphic robots, it has come a long way. In fact, AI is incorporated in major corporate decision-making processes. For instance, a company can use AI to identify, compare, and choose new hires.

Using predetermined criteria, AI can help employers distinguish and assess competing candidates to narrow down the best person for an available po-

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sition. Similarly, AI can assist a bank in determining whether to grant an applicant a loan or mortgage.

Although a process incorporating AI typically entails increased efficiency, AI can sometimes falter and prove to be as fallible as its human programmers. In his recent article featured in the *North Carolina Law Review*, professor Mihailis E. Diamantis warns, despite its many benefits, “[t]he move toward automation does not alter the fact that discrimination, price fixing, . . . reckless driving [and other negative results due to corporate AI applications] leave victims in their wake.” Diamantis explains that corporate misconduct is still a recurring issue where AI has been deployed.

He proposes that the law must be updated to account for mechanical mistakes.

Diamantis highlights the algorithmic accountability gap: the fact that an algorithm is not subject to suit even though its human predecessor would have been liable for an equivalent offense.

He describes, for instance, a hypothetical in which an employee at a bank uses nonpublic information to predict stock fluctuations and then uses this knowledge to unfairly invest in a company and make a major profit for his employer. The employee could be found guilty of insider trading, as could his employer by default.

However, the chain of liability does not extend to the employer in a hypothetical where an algorithmic trading program purchased by the bank makes the same informed and illegal decision. This is due to the present legal doctrine of respondeat superior—liability on an employer for an employee’s misconduct—which requires evidence of a corporation’s mental state prior to extending responsibility for an offense.

Although relatively well-de-

termined in classic situations involving human employees, Diamantis points out that the doctrine is inapplicable to algorithmic errors. He explains, “the law is not equipped to address corporate liability when the ‘thinking’ behind corporate

“Diamantis highlights the algorithmic accountability gap: the fact that an algorithm is not subject to suit even though its human predecessor would have been liable for an equivalent offense.”

misconduct has been offloaded to automated systems.”

If unaddressed, the algorithmic accountability gap “all but guarantees that corporations will become increasingly immune to liability as their operations require less and less human intervention.” Ultimately, Diamantis proposes that corporations using algorithms to fulfill roles traditionally filled by human employees be held to the same liability standards as corporations still using human personnel for comparable tasks. Based on the present legal theory of treating corporations like individuals with mental culpability, Diamantis proposes that the ideal and least complicated solution here is to further extend the allusion to recognize “that algorithms can [also] form part of the corporate mind.”

Thus, a corporation taking the calculated risk of entrusting an algorithm with an important decision should bear equal and direct liability to that of a corporation taking the same calculated risk of entrusting a human employee with the same decision. Overall, victims of corporate wrongdoing deserve restitution regardless of whether the transgressor was human. The path to justice must remain clear.

Rebecca Hanner White, *Ageing on Air: Sex, Age and Television News*, 50 *Seton Hall L. Rev.* 1323 (2020)

In her article published in the *Seton Hall Law Review*, Dean

and J. Alton Hosch Professor of Law Emerita Rebecca Hanner White discusses the outdated double-standard faced by female television news anchors across the United States. She begins by briefly describing the famous 1983 case of Craft

v. *Metromedia, Inc.* This case, she explains, involved a sex discrimination claim. Christine Craft sued *Metromedia, Inc.*, the owner and operator of *KMBC-TV, Channel 9* in Kansas City, Missouri after she was demoted from co-anchor to reporter based allegedly on her on-air appearance. The station had organized several focus groups to gauge viewer reactions to Craft’s overall image. Results were not stellar.

A follow-up telephone survey showed further devastating ratings. Overall, Craft fared poorly when ranked against her female competitors. During her reassignment, Craft claimed her news director described her “as too old, too unattractive, and not deferential enough to men.” Despite arguing not that her appearance was irrelevant to her eligibility as a news anchor but instead that the appearance standards were more harshly applied to her than to her male counterparts, Craft lost at trial and on appeal. The courts determined that certain required feminine characteristics were no more than incidental to the station’s legitimate economic interests.

Considering the *Craft* case, White highlights the growing claims still recurring almost forty years later. Female anchors across the country are claiming age and gender discrimination after being replaced by younger talent. White asserts, “[t]he situation in television news and advertising is so pronounced that the Association of Nation-

al Advertisers has launched a #SeeHer initiative aimed at ensuring that the women we see on air reflect women in our society at large.” Sadly, little progress seems to have been made in the average newsroom environment. She explores an additional hindrance that may further account for this unsettling cycle. While “Title VII prohibits discrimination on the basis of sex, and the [Age Discrimination in Employment Act (ADEA)] prohibits discrimination on the basis of age against workers age forty or above[.]” White acknowledges that this may not fully protect female anchors with claims falling under both statutes (i.e., a “sex plus age claim”).

A woman will prevail on a disparate treatment claim “[if she] is intentionally treated differently than she would have been treated if she were a man, even if the employer claims he has good business reasons for treating her differently.” White explains that courts have recognized a handful of sex plus claims, especially “when the ‘plus’ involves an immutable characteristic or fundamental right.”

However, sex plus age claims have continuously failed. Most courts believe that the ADEA’s lack of an explicit combined age plus sex discrimination claim suggests that Title VII cannot be separately added as a bundle. Dean White points out that although “Title VII permits mixed motive claims[.]” the ADEA does not.

White further explores whether television, given its unique position as a visual medium, is in some ways justified in disparate treatment of older female employees. For instance, White recognizes one “judicially-created exception for dress and grooming codes.” Essentially, if the requirements are relatively comparable in application between the genders, courts permit differential grooming and appearance standards. When the factor of

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Headnotes

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and efficient: Mike Martinez, Southeast Colloquium; Genelle Belmas, on the website; and Kriste Patrow, on social media; Jon Peters on PF&R and Brooks Fuller, teaching chair.

In short, the division is in great hands. Maybe even better than a year ago!

Similarly, as we look forward, I would be remiss to not mention the division heads I worked with in the past years on the leadership ladder: Kearston Wesner, Jason Martin and Courtney Barclay, as well as the other past heads and active division members who not only provided insight and advice but often stepped up when help was needed.

For example, in March, when it became obvious some of our colleagues might have difficulty completing full papers by the deadline, one of our members reached out and the proposal

for abstract submissions was developed, which AEJMC adopted.

Similarly, when law enforcement targeted journalists covering protests, one of our members drafted an advocacy letter and many division members signed on, adding our voices to the debate.

Some colleagues exchanged class lessons via our network and on our website and another did a series of online interviews with our experts on various com law topics.

And, when we learned that some of our colleagues were seeing reductions in their travel budgets and were likely to forego the virtual conference, our members stepped up to help create a fund to cover the costs for some of our colleagues.

Division goals for growing our membership, expanding diversity and developing active engagement programs will continue and I look forward to being part of it along with many of you.

Conference Sponsors

The Division would like to thank those who helped sponsor registration funding for our colleagues who might not otherwise have been able to attend this year's virtual conference:

- Chip Stewart/TCU
- Tori Smith Ekstrand
- Tony Fargo
- Jane Kirtley/Silha Center for the Study of Media Ethics and Law
- Hubbard School of Journalism and Mass Communication
- Derigan Silver
- Dan Kozlowski
- Clay Calvert
- Wat Hopkins
- Brooks Fuller
- North Carolina Open Government Coalition
- Elon University
- Tully Center for Free Speech

Bibliography

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age is thrown into the mix, however, White queries if a station could successfully defend claims by countering that "youth and beauty is essential for its female, but not male, anchors[.]"

White further dissects bona fide occupational qualification (BFOQ) defenses, which allow an employer to discriminate if reasonably necessary to the normal operation of that particular business. She asserts that, although television is a visual medium, the primary objective is to inform the public by delivering the news. Finally, White addresses the customer preference defense and asks whether customer preference should justify discrimination.

White deduces that "[t]here seems appreciably little difference between an employer who refuses to hire a female because he believes his customer will react adversely to a woman and an employer who knowingly fires the woman because his customers do." However, she does admit that reliance on rankings can be a reliable defense is shown to be a viable business necessity.

Overall, the article aims to expose the repetitive cycle of discrimination against female talent on-air and, further, seeks to poke holes in the long-accepted rationale that unintentional discrimination is permitted if it is "good for business." Women should not be judged by imaginary expiration dates. Real change is what is truly overdue.

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The AEJMC Board and staff are preparing for the AEJMC 2020 Virtual Conference. This promises to be an extraordinary experience for AEJMC attendees. vFAIRS will host our online virtual event. The AEJMC Virtual Conference will be August 6-9, with a pre-conference day beginning on August 5. In the meantime, click on the video link below to view a demo of the virtual conference experience from vFAIRS. We look forward to your virtual attendance!

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Stonecipher

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of its operation in commercial speech, libel law and campaign finance regulation.

Smolla challenges head-on critiques of the theory and its uses to justify court-made innovations, specifically those of Associate Justice Clarence Thomas, who has called for overturning *New York Times v. Sullivan*. “As to his complaint that (the case) is judge-made law, not connected firmly to either the text or original understandings of the meaning of the First Amendment,” he counters, “that critique is valid as to virtually all modern First Amendment law.” Further, he rightly points out that Thomas himself often invokes judge-made doctrines such as strict scrutiny.

Besides Smolla’s erudition, the committee was impressed that he could take a century-old theory and come up with a novel conceptual framework through which we might see it with fresh eyes. He describes it as “helix-shaped, curved in three-dimensional space.”

He defines the intertwining strands of the helix as the “order and morality theory” and the “marketplace theory,” then traces those competing conceptions through seminal cases running from *Chaplinsky* to *Beuharnais* for the first and from *New York Times v. Sullivan* to *U.S. v. Stevens* for the second.

Inspired by recent events, Smolla concluded the way to reconcile those competing conceptions is to consider “carve outs” where the unbridled marketplace must yield to other societal concerns.

The carve outs, not to be begrudged, act as the twine that binds those theories because they are reflections of society at any given moment.

“The boundary lines separating the two theories shift over time,” Smolla writes. “Holmes called the law ‘the witness and

external deposit of our moral life.’ That observation is as true for First Amendment law as for any other.”

Kerr’s article — “From Holmes to Zuckerberg: Keeping Marketplace-of-Ideas The-

harness Artificial Intelligence to create tools to weed out disinformation and magnify factual information.

As challenging as that sounds, Kerr retains faith in the theory’s future. “But,” he concludes,

Kerr maps out computer-generated distortions to the marketplace that thwart, or even make impossible, the discovery of truth: data collection that turns users into targets so that messages can be aimed at them to “push their buttons.”

ory Viable in the Age of Algorithms” — responds to the challenges created for a theory based on the assumption that ideas compete in the marketplace on a level playing field. How can the theory retain meaning in a mediasphere in which powerful actors such as Facebook and Google channel and filter, even censor, information in ways that few users understand?

“Those practices,” he writes, “have the potential to effectively replace any legitimate metaphorical understanding of a level-field marketplace — in which falsity and truth compete — with something that would have been incomprehensible through most of the theory’s first century.”

Kerr maps out computer-generated distortions to the marketplace that thwart, or even make impossible, the discovery of truth: data collection that turns users into targets so that messages can be aimed at them to “push their buttons”; microtargeting that can create “information cocoons” around users; and, most troubling to Kerr, the ability of algorithms to “artificially magnify the impact of false ideas.”

He concludes that current efforts to combine new government regulations — such as the EU’s General Data Protection Regulation of 2018 — and industry innovations will be necessary to rein in profit-oriented online gatekeepers.

That could include efforts to

“that history will be shaped, for better or worse, by how law and policy respond to the challenge of marketplace-nullifying practices in digitally networked algorithmic communication.”

The committee intended this joint award to salute the continuing contributions of two of the field’s most well-known thinkers.

But it also intended it to salute the important role played by CL&P and longtime editor W. Wat Hopkins in maintaining a forum for the type of scholarship this award seeks to recognize. It should not be seen as a coincidence that three of this year’s finalists were published in that journal. (Hopkins did not participate in this year’s judging.)

This year’s committee included Dean Smith, High Point University, chair; Katie Blevins, University of Idaho; Victoria Ekstrand, UNC-Chapel Hill; Emily Erickson, California State, Fullerton; Patrick File, University of Nevada, Reno; Roy Gutterman, Syracuse University, and Jasmine McNealy, University of Florida.

Special Mention

The committee also admired the thorough and timely scholarship of RonNell Anderson Jones in her article “Press Speakers and the First Amendment Rights of Listeners,” published in *University of Colorado Law Review*.

By exploring the application of listeners’ rights in expanding

areas of First Amendment law, she proposes seeing the institutional press not as a mere conduit of information to listeners but as a special type of speaker in a symbiotic relationship with those listeners — a relationship that requires stronger speech/press protection. In this era of “fake news,” she makes a strong argument to justify placing the institutional press in a heightened position under the First Amendment.

As one judge put it: Anderson Jones “recognizes the rather profound cultural shifts taking place and considers new thinking about the role of the press.”

We are going to need much more thinking about listener rights relative to the First Amendment. This article is an important contribution in that direction.”

Citations

Rodney A. Smolla, *The Meaning of the “Marketplace of Ideas” in First Amendment Law*, 24 COMM. L. & POL’Y 437 (2019).

Robert L. Kerr, *From Holmes to Zuckerberg: Keeping Marketplace of Ideas Theory Viable in the Age of Algorithms*, 24 COMM. L. & POL’Y 477 (2019).

Finalists

P. Brooks Fuller, *Words, Wounds, and Relationships: Why Social Ties Matter for Free Speech in High-Conflict Protests*, 21 JOURNALISM & COMM. MONOGRAPHS 1 (2019).

RonNell Anderson Jones, *Press Speakers and The First Amendment Rights of Listeners*, 90 UNIV. OF COLO. L. REV. 499 (2019).

Joseph Russomanno, *Tribalism on Campus: Factions, iGen and the Threat to Free Speech*, 24 COMM. L. & POL’Y 539 (2019).

Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 327 (2019).