
MEDIA LAW NOTES

Volume 49, Issue 4
AEJMC Law & Policy Division

**This issue is dedicated to the
2021 Annual Conference**



Winners of the Teaching Ideas Competition

The Law & Policy Division is pleased to announce the winners of the 2021 Teaching Ideas Competition.

Roy Gutterman (Syracuse University) won first place with his submission “Say (Swiss) Cheese: Lawyer and litigate this article.” The assignment calls for students to assume the role of a journalist, editor, or press photographer, and to dissect a news piece for potentially defamatory or privacy-violating content. Students then craft legal arguments around the issues from unique perspectives.

Alan Goldenbach (Hood College) won second place for his submission “Objection!” He invites his students to pick a case they disagree with and write a short paper arguing why the case is wrong based not only on precedent but on historical facts and context.

Brett Johnson (University of Missouri) won third place for his submission “Read and Reflect on Your School’s Speech Policies,” which invites students to do just that. Students learn about key student speech precedents and apply them to their university’s policies.

“All three of the winners found a way to take classic teaching techniques and apply a new lens to help students learn in a different way,” said Brooks Fuller, teaching chair of the Law & Policy Division. “It’s so great to see our colleagues experiment in the classroom to help students learn challenging concepts.”

The winners will showcase their ideas during a pre-conference panel Tuesday, August 3, at 4:30 p.m. (CDT) during the annual conference.

Stonecipher Award winner, special mention, finalists all demonstrate potential to have lasting influence

By Dean Smith
High Point University



Genevieve Lakier

The title of this year's Stonecipher Award-winning article, "The First Amendment's Real *Lochner* Problem," raises the question: What is *not* the First Amendment's real *Lochner* problem?

The author, Genevieve Lakier, an assistant professor of law at the University of Chicago, answers: The Supreme Court today is repeating the mistake of relying on a wholly negative-rights approach to the Fourteenth Amendment, a crabbed view that she sees in the First Amendment realm, too.

"Current doctrine obscures the difficult questions posed when the government restricts the freedom of some in order to protect the freedom of others by making the analysis unduly formalistic," she writes in the article, published in 2020 in the *University of Chicago Law Review*. "As a result, it fails to effectively vindicate free speech values by focusing to its detriment on only a subset of the interests at stake when the government regulates speech."

Judges must, she argues, move beyond their laissez-faire, negative-rights approach that "fails to sufficiently protect the independence of the public sphere against repressive government regulation." Why? Because "in a society characterized by tremendous inequality in economic and social power, simply pushing the reconciliation of competing rights to the subconstitutional arena of private law means creating a First Amendment jurisprudence that cannot possibly vindicate the freedoms it serves."

The Stonecipher judges applauded Lakier's ability to breathe new life into the long-running debate about negative and positive rights by giving it "a genuinely new and nuanced perspective that can reframe and reinvigorate the conversation." They felt her approach and conclusions were "compelling, convincing and inspiring."

This is the second time Lakier has received the award, which is given by the Law & Policy Division and honors the legacy of Harry W. Stonecipher, who died in 2004. He was an acclaimed and influential First Amendment educator who nurtured a number of distinguished media law scholars during his 15-year career at Southern Illinois University, Carbondale, beginning in 1969.

Special Mention

The Stonecipher judges were also highly impressed by Steven Shiffrin's article "Morality and the First Amendment," published in the *First Amendment Law*

Review. He grapples with thorny issues at the intersection of the Establishment and Free Exercise Clauses, especially those in the context of generally applicable anti-discrimination laws.

In trying to answer daunting questions (“Does the Constitution and the government formed by it require a moral citizenry in order to flourish?”), he argues that traditions embedded in our history show that

courts have swung too far toward the Establishment Clause at the expense of the Free Exercise Clause. Perhaps provocatively, Shiffrin writes that he “would reluctantly side with the religious claimants in the wedding cases,” despite disagreeing with them personally.

“Conservative evangelicals are a substantial minority of the population, and they are surely in the process of losing the culture wars,” he writes, adding that “this is a limited context in which a compromise honoring religious liberty for the religion with which we profoundly disagree has merit.”

The Stonecipher judges said the article was “sweeping in scope” and brought unusual “heart and soul” to First Amendment analysis. Honoring the goals of the award, they agreed, the article is sure to spark lively discussion and further scholarship.

Citations

Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. Chi. L. Rev. 1241 (2020).

Steven Shiffrin, *Morality and the First Amendment*, 18 First Amend. L. Rev. 65 (2019-2020).

Finalists

Edward L. Carter & Rosalie Westenskow, *Freedom of Journalism in International Human Rights Law*, 25 Comm. L. & Pol’y 113 (2020).

Erin Coyle, Elisabeth Fondren & Joby Richard (2020) *Advocacy, Editorial Opinion, and Agenda Building: How Publicity Friends Fought for Louis D. Brandeis’s 1916 Supreme Court Confirmation*, 37 American Journalism 165 (2020).

Lyombe Eko, *Mimicking the Sacred: Advertising Parody, Religion and Freedom of Expression in the United States and France*, 25 Comm. L. & Pol’y 145 (2020).

H.M. Rosenthal, *Speech Imperialization? Situating American Parrhesia in an Isegoria World*, Int. J. of Semiot. in Law (Nov. 2020).

Nancy Whitmore, *Extending the Roberts Court’s Affirmation of Individual Expressive Rights to the First Amendment Claim in Masterpiece Cakeshop*, 12 Elon L. Rev. 105 (2020).

Sharon Yadin, *E-Regulation*, 38 Cardozo Arts & Ent. L. J. 101 (2020).

Stonecipher Judges

This year's committee included Dean Smith, High Point University, chair; Katie Blevins, University of Idaho; Eric Easton, University of Baltimore Law School, retired; Tori 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.

Law & Policy Division Programming for 2021 Annual Conference

*****All times are CDT*****

TUESDAY, AUGUST 3

Preconference

Increasing Diversity, Equity and Inclusion in Media Law & Ethics Curricula

1:30—2:30 p.m

Moderator:

Katy Culver, University of Wisconsin-Madison

Panelists:

Mariam Alkazemi, Virginia Commonwealth University

Ammina Kothari, Rochester Institute of Technology

Ryan Thomas, University of Missouri

Preconference

Securing Grant-Funding for Collaborative Research in JMC

3:00—4:00 p.m.

Moderator:

Amy Kristin Sanders, University of Texas-Austin

Panelists:

Rachel Davis Mersey, University of Texas-Austin

Jasmine McNealy, University of Florida

Deen Freelon, University of North Carolina-Chapel Hill

Preconference

Teaching Competition Winners

4:30—5:30 p.m.

Moderator:

Brooks Fuller, Elon University

Winners:

First place: Roy Gutterman, Syracuse University

Second place: Alan Goldenbach, Hood College

Third place: Brett Johnson, University of Missouri

WEDNESDAY, AUGUST 4

Refereed Paper Session

Emerging Questions in Free Expression and the Exchange of Ideas

9:00—10:30 p.m.

Moderating/Presiding:

Genelle Belmas, University of Kansas

The Arab Winter: How Privacy Norms, Social Media and Dissent Spurred Increasing Government Repression of Free Expression in the Decade Following the Arab Spring [EA]

--- Amy Kristin Sanders, University of Texas-Austin

--- William Kosinski, University of Texas-Austin

Liabe, Naaht: The Mockumentary: Litigation, Liability and the First Amendment in the works of Sacha Baron Cohen

--- Roy Gutterman, Syracuse University

Nearly Extinct in the Wild: The Vulnerable Transparency of the Endangered Species List

--- Benjamin W. Cramer, Pennsylvania State University

Social Media and the Economy of Hate**

--- Hayley Rousselle, Syracuse University

Discussant:

Jason Shepard, California State University-Fullerton

* Third Place Top Faculty Paper

** Second Place Top Student Paper

[EA] = Accepted as an extended abstract

PF&R Session (LAWP/ LGBT)

Librarians as Lawbreakers: Criminalization of Story Hours and Other Attempts to Restrict Library Materials and Services

11:00—12:30 p.m.

Moderator:

Karen Markin, Director of Research Development, University of Rhode Island

Panelists:

Vera Eidelman, Staff Attorney, ACLU's Speech, Privacy & Technology Project

Jonathan Hamilt, Executive Director, Drag Queen Story Hour, New York

Jason Shepard, California State University-Fullerton

Kyla Garrett Wagner, Syracuse University

Description:

Libraries have become battlegrounds for local disputes over freedom of expression issues. Each year libraries across the country face efforts to ban books that some members of the community deem controversial. In addition, local groups have attempted to quash Drag Queen Story Hours in library children's rooms, and a bill in Missouri would criminalize them. Recently, legislatures in some states introduced legislation to create parental advisory boards to replace librarians' work in developing collections and services. Some would even impose fines and jail time for librarians who did not comply with these boards. This panel would explore the various threats to intellectual freedom occurring at libraries and how librarians are dealing with them.

Special Session

Drag Queen Story Hour

1:00—2:30 p.m.

Featuring:

Harmonica Sunbeam

Refereed Paper Session

Looking Back to Look Forward: Theory, History, and Pedagogy

5:00—6:30 p.m.

Moderating/Presiding:

Kearston Wesner, Quinnipiac University

Beyond Positive & Negative: Developing a Complementary Framework for First Amendment Theory

--- Patrick Walters, Kutztown University

Thirty Years After *Chandler v. Florida*: Chauvin Trial Shows Flaws in 'Cameras in the Courts'

--- Michael Martinez, University of Tennessee

Is Defamation Law Outdated? How Justice Powell Predicted the Current Criticism [EA]

--- Kirk von Kreisler, University of Texas-Austin

Too Many Cases, Too Little Time: What Instructors Choose to (Not) Teach in Media Law Courses [EA]

--- Genelle Belmas, University of Kansas

--- Tori Ekstrand, University of North Carolina Chapel Hill

--- Daxton Stewart, Texas Christian University

--- Kyla Garrett Wagner, Syracuse University

Discussant:

Roxanne Watson, University of South Florida

[EA] = Accepted as an extended abstract

Women in the Law Division (WILD) Happy Hour

6:30—7:30 p.m.

Attend via Zoom

<https://seattleu.zoom.us/j/94952210552>

Meeting ID: 949 5221 0552

THURSDAY, AUGUST 5

Refereed Paper Session

Untangling New Questions in Access and Use of Likenesses

9:00—10:30 a.m.

Moderating/Presiding:

Brett Johnson, University of Missouri

Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry

--- Daxton Stewart, Texas Christian University

Copyright Versus the Right to Copy: The Civic Danger of Allowing Copyright to Override State Freedom-of-Information Law

--- Frank LoMonte, University of Florida

Feeling the Bern: Commercial Speech Protections for Memes [EA]

--- Courtney Barclay, Jacksonville University

--- Kearston Wesner, Quinnipiac University

Discussant:

Kathy Olson, Lehigh University

Research Session (LAWP/ ETHC)

Data Scraping: Legitimate news gathering or privacy nightmare?

11:00 a.m. —12:30 p.m.

Moderator:

Sarah K. Wiley, University of Minnesota

Panelists:

Kearston Wesner, Quinnipiac University

Casey Fiesler, University of Colorado-Boulder

Victoria Baranetsky, General Counsel, Center for Investigative Reporting

Jeremy B. Merrill, Investigative Data Journalist

Jane Kirtley, University of Minnesota

Description:

In January 2020, the *New York Times* published an article detailing the practices of Clearview AI, a technology company that created a groundbreaking facial recognition app in which a user can upload a picture of an individual and obtain a trove of online photos of that person, along with links to where those photos appeared. Clearview's app relies on a massive database of more than 3 billion images that Clearview claimed to have scraped from public-facing websites such as Facebook, YouTube, Venmo, and millions of other sites. The *Times* article spurred several individuals and privacy advocacy groups, including the ACLU, to file lawsuits against Clearview AI's data-scraping practices. In response, Clearview has argued that its data scraping and sharing practices are protected by the First Amendment and has hired Floyd Abrams for representation. This panel will take a closer look at these arguments and discuss the growing concerns over data scraping and the potential conflict between privacy and legitimate information gathering. Specifically, this panel will focus on the legal, as well as the ethical, issues surrounding the growing use of data scraping for journalistic purposes.

Teaching Session (LAWP/ SPRT)

State of the Law: NCAA and the Use of Athletes' Name, Image, and Likeness

3:00—4:30 p.m.

Moderator:

Jason Martin, DePaul University

Panelists:

Katie Lever, University of Texas-Austin

Lauren Smith, Indiana University

DeWayne Peevy, Director of Athletics, DePaul University

Taylor Stapleton, Senior Associate Athletics Director, DePaul University

Claudine McCarthy, Editor, *Campus Legal Advisor & College Athletics and the Law*, Wiley

Research Session (HIST/ LAWP)

Media Law Research in a Time of Crisis

5:00—6:30 p.m.

Moderator:

Wat Hopkins, Virginia Tech University

Panelists

Cayce Myers, Virginia Tech University

Qinqin Wang, Louisiana State University

Kyu Ho Youm, University of Oregon

Jonathan Peters, University of Georgia

Jasmine McNealy, University of Florida

FRIDAY, AUGUST 6

PF&R Session (LAWP/ CCSD)

Twitter Mobs and Out of Jobs: Squaring Cancel Culture and the Marketplace of Ideas

1:00—2:30 p.m.

Moderator:

Meredith Clark, University of Virginia

Panelists:

Jessica Maddox, University of Alabama

Guy Harrison, University of Tennessee

Amy Gajda, Tulane Law School

Jared Schroeder, Southern Methodist University

Description:

Cancel culture has been implicated as a threat to freedom of expression. Critics often contend more speech, rather than less, is best for democratic society. The marketplace of ideas, the Supreme Court's dominant tool for rationalizing protections for widespread safeguards for expression, even hateful, indecent, personally damaging, or otherwise unpopular speech, has led to wide-ranging speech protections. The theory, however, carries its own set of problematic theoretical baggage. This panel will bring First Amendment and critical and cultural scholars together in a roundtable format to discuss the conflict between the cancel culture phenomenon and the marketplace of ideas. Does cancel culture damage the marketplace, or does it merely provide an express lane for rejected, false ideas?

Teaching Session (LAWP/ GSIG)

When Gas Masks and Body Armor Are in the Journalists' Toolkit: Training Future Journalists to Responsibly, Legally, and Safely Cover Protests and Racial Injustice

3:00—4:30 p.m.

Moderating/Presiding:

Genelle Belmas, University of Kansas

Panelists:

Bobbie Foster-Bhusari, University of Maryland

Candace Perkins Bowen, Kent State University

Erin Coyle, Temple University

Lindsie Rank, Foundation for Individual Rights in Education

Sohana Nasrin, University of Maryland

Description:

Reporting is an important job with serious potential consequences for journalists as well as for the people we cover. Journalists were arrested when covering protests in Ferguson, Missouri, in 2014, and in Baton Rouge, Louisiana, in 2016. Getting plucked off the street and placed in jail is only one challenge reporters have endured during 2020. Journalists recently have endured sprays of foam bullets and tear gas while covering protests addressing police brutality and racial inequality. Even non-journalists have endured serious consequences for sharing information related to public safety. For example, Georgia high school students were suspended for tweeting photographs of mask-less students crowding in a school in August 2020. These problems raise important questions about how we ought to educate future generations of journalists about their legal and practical rights as

well as their responsibilities to address systemic racism and underrepresented populations.

Refereed Paper Session

Top Paper Panel

7:00—8:30 p.m.

Moderating/Presiding:

Kyla Garrett Wagner, Syracuse University

The Positive First Amendment in Constitutional History, Law, and Theory

--- Stephen Bates, University of Nevada-Las Vegas*

Perilous in Seattle: The Dangers of Covering Protests and Implications for the Journalist's Privilege

--- Anthony Fargo, University of Indiana**

The *ReDigi* Case and the Digital Challenge to the First Sale Doctrine

--- J. Patrick McGrail, Jacksonville State University***

--- Ewa McGrail, Georgia State University***

A Meta-Analytic Review of the Effects of Pretrial Publicity on Jury Perception

--- Morgan Band, University of Florida****

Discussant:

Jane Kirtley, University of Minnesota

* Top Faculty Paper

** Second-Place Faculty Paper

***Top Faculty Debut Paper

**** Top Student Paper

Business Meeting

8:45—10:15 p.m.

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