

MEDIA LAW NOTES

Volume 36, No. 4

Law Division, AEJMC

Summer 2008

Head Notes

Beth Blanks Hindman
Division Head
Washington State University
ehindman@wsu.edu

Like you, I imagine, I'm not quite ready to think about August. With spring semester just over, the kids not yet out of school, committee work still ongoing, and summer vacations yet to plan, it's hard to gear up for the AEJMC annual conference and fall semester. Nevertheless, I am looking forward to Chicago. We have, as always, many great panels and research sessions planned.

For example, we've joined with the Mass Communication and Society Division to sponsor a panel on advertising regulation and childhood obesity. While it's likely that no one favors childhood obesity, proposed legislation would have allowed the FTC to regulate certain types of marketing to children, a topic with first amendment overtones. Other panels include a look at Hazelwood 20 years later, and how to promote diversity in ownership of broadcasting.

One of my tasks this year as division head is to write a report on the "state of the field" from the perspective of Law and Policy. Each division is supposed to do this; fortunately for me, Tony Fargo had

(Continued on page 4)



Field Tripping

Amy Gajda
Division Research Chair
University of Illinois
agajda@uiuc.edu

I took my media law students on a field trip a few weeks ago. We rode the subway to ABC News in Manhattan and watched *World News with Charles Gibson* live from a viewing platform above the studio. I was spending a term teaching at Brooklyn Law School and had with me a bunch of second- and third-year law students, 20-somethings likely on the final school field trip of their lives.

The story of how we got to ABC News begins a few years ago, when I first started teaching media law-related courses. Many of my students had never met a real working journalist and therefore had very little on which to base in-class discussion. It was tough to get the students to purge the Hollywood stereotype of the narcissistic, hard-assed, paparazzi-like reporter. I was stunned when one law student suggested earnestly that ethics played no role in journalism and balked when I told him that many reporters would quit a job rather than report a story that was not true.

So I invited some real-life reporters in to talk with my students. The students heard about journalism work, journalism ethics, and the very real role law played in journalists' lives.

But when it came time to focus more on the unique issues facing broadcasters – how a rush to air or ratings issues might affect story judgment and lead to legal trouble, for example – there was little I could do but describe my own experience as a former anchor. So I took my first class trip to a television news studio. I now return every year.

We usually get a quick tour of the news station, including the newsroom, studio control, and master control. Then we get to sit in on a newscast. This usually means

(Continued on page 4)

INSIDE THIS ISSUE

- 2 AEJMC Research Sessions
- 3 Teaching Media Law Online
- 5 Media Law Bibliography
- 11 The "Full Ambit" of the First

AEJMC Conference Research Sessions

Guns, Death, the Environment, and More: New Issues in Access to Information, 11:45 a.m.-1:15 p.m. Aug. 6

Packing Heat: A Gun Battle Between Privacy and Access, Aimee Edmondson, University of Missouri

No Two States Alike: A Statutory Analysis of Survivor Privacy Rights, Ana-Klara Hering, University of Florida

The Human Right to Information, the Environment, and Information About the Environment: From the Universal Declaration to the Aarhus Convention, Benjamin W. Cramer, Pennsylvania State University

The Cherokee Nation Freedom of Information Act: Context and Analysis for an Open-Records Law in Indian Country, Dan Lewerenz, University of Wisconsin-Madison

University Foundations, Donors and Open Records: A 50-State Study of Access to Foundation Records, Adrianna C. Rodriguez, University of Florida

What's Online Today?: Changing Legal Restrictions in Cyberspace, 8:15-9:45 a.m. Aug. 7

A Question of Where in Cyberspace: Background and Conflicts of Jurisdiction Online, Lynette Holman, University of North Carolina-Chapel Hill

COPA's Last Stand? Revisiting the Child Online Protection Act Following the 2007 ACLU v. Gonzales Ruling, Christina Malik, University of North Carolina-Chapel Hill

Crowdslapping the Government: First Amendment Protections for the Crowd in Government Crowdsourcing Ventures, Daren Brabham, University of Utah

Online Defamation: Protection Scope of the Communications Decency Act, Sherine El-Toukhy, University of North Carolina-Chapel Hill *****Top Student Paper*****

Transforming Productive Use: The Ninth Circuit's Fair Use Analysis of Visual Search Engines in Kelly and Perfect 10, Kathy Olson, Lehigh University

Scholar-to-Scholar Session, 12:15-1:30 p.m. Aug. 7

What is News?: The FCC and the New Battle Over the Regulation of Video News Releases, Clay Calvert, Pennsylvania State University

Advertising Parody, Intellectual Property and Defamation in the United States and France, Leo Eko, University of Iowa

In the Zone: Forum Analysis and Free Speech Zones on College Campuses, Michele Jones, University of North Carolina-Chapel Hill

Inclusion or Illusion? An Analysis of the FCC's Public Hearings on Media Ownership 2006-2007, Jonathan Obar, Pennsylvania State University and Amit Schejter, Pennsylvania State University

The Politics of Power: A Social Architecture Analysis of the 2005-2007 Federal Shield Law Debate in Congress, Cathy Packer, University of North Carolina-Chapel Hill

The Beginning of the End?: The Federal Reporter's Privilege Five Years After McKeivitt v. Pallasch, Jason Shepard, University of Wisconsin-Madison

Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems, Daxton Stewart, Texas Christian University

Cutting Edge Constitutionalism: Evolving Issues in First Amendment Jurisprudence, 3:30-5 p.m. Aug. 8

Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?, Ruth Walden, University of North Carolina-Chapel Hill and Derigan Silver, University of North Carolina-Chapel Hill

Freedom of Speech & the High Price of College Textbooks: Do New Laws Affecting Disclosure of Textbook Information Go Too Far and Violate the First Amendment?, Clay Calvert, Pennsylvania State University

Friends of the First Amendment? Amicus Curiae Briefs in Free Speech/Press Cases During the Warren and Burger Courts, Minjeong Kim, Colorado State University and Lenae Vinson, Hawai'i Pacific University

The Functional Equivalent of Ultimate Victory for the Corporate Free-Speech Movement: The Watershed Significance of FEC v. WRTL, Robert Kerr, University of Oklahoma *****Top Faculty Paper*****

(Continued on page 3)

Research Panels (continued from page 2)

Newsgathering, Autonomy and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom, Erik Ugland, Marquette University

Libel, Privilege, and the FCC: Old Legal Doctrines with New Applications, 8:15 to 9:45 a.m., Aug. 9

The “Neutral Reportage” Doctrine in English Law, Kyu Ho Youm, University of Oregon

Shades of Truth, Harm, and Malice: The Emergence of the Subsidiary Meaning Doctrine, Carolyn Edy, University of North Carolina-Chapel Hill

First Amendment Reporter’s Privilege: Interpretation and Application of the Exhaustion Requirement, Kristin Simonetti, University of North Carolina-Chapel Hill

Preventing the Next Price v. Time: Legal and Historical Arguments for Action, Dean C. Smith, University of North Carolina-Chapel Hill

Broadcast Fairness as a Public Interest Principle: Finding Intent in the 1927 and 1934 Acts, Mark R. Arbuckle, Pittsburg State University

New Legal Bounds in Cyberspace: Ever-Changing Media Law, 10 to 11:30 a.m., Aug. 9

Equal Protection Challenges to Legal Protections for Newsgathering: Would Bloggers Have a Claim?, Laura J. Hendrickson, Texas House Research Organization

Perfect 10 v. Visa, MasterCard, et al: A Full Frontal Assault on Copyright Enforcement in Digital Media or a Slippery Slope Diverted?, Pamela Laucella, Indiana University and Ryan Rodenberg, Indiana University

A Model Law to Prosecute Information Society Libels, Nikhil Moro, Central Michigan University

Privacy and Accountability: Reexamining Bartnicki v. Vopper, Rich Powell, Indiana University

Defining Defamation: Plaintiff Status in the Age of the Internet, Amy Kristin Sanders, University of Minnesota

Teaching Media Law Online

David Cuillier, Teaching Standards Chair
University of Arizona
cuillier@email.arizona.edu

Is virtual learning just that? Virtual?

Teaching media law online can be more time consuming, challenging, and less effective than teaching in-person, but with creativity and hard work we might be able to come up with better methods that serve diverse populations and engage students.

Distance learning is increasingly important in higher education because of demands by non-traditional students for classes that work around their careers. And who wouldn’t want to work from home and save a little gas? Although often relegated to professional degrees, certificate programs, and diploma mills, online classes have some advantages.

For example, classes open to people outside the program or university often attract students from different backgrounds, regions, and eras to provide perspectives and alternative views that challenge and enrich the thinking of their homogenized 19-year-old classmates.

Teaching media law online can reach more people who need it, particularly the growing numbers of citizen journalists and bloggers spread throughout the country who are unfamiliar with libel, privacy, and copyright law.

Also, an online class can be effective for specialized law seminars or electives, especially if they are taught during special sessions during winter break or in the summer. Often, for special-session classes, universities will give a cut of the tuition to departments and a little extra money for the professor.

Last winter break I taught a three-week online class on government secrecy and freedom of information and it worked well. Students had time for the class because most didn’t have a job or internship, and the course provided a good reason for them to excuse themselves from family holiday obligations (“Aunt Mae, I would love to talk more about your trip to Bermuda, but darn it I have to work on this class assignment that is due tonight”).

The class was effective, in part, because assignments could be done from home. For example, in addition to short papers, reading summaries, and daily discussion board posts, I assigned each student to use public record

(continued on page 11)

Head Note (Continued from page 1)

the foresight to schedule a pre-conference workshop *last year* on this very topic, and Rick Peltz thought to videotape C-SPAN's coverage of that workshop. I'll use that video to write my report, but if you have anything you'd like me to cover, please let me know before August.

As you may know, the position of division head is actually the final year of a three-year leadership rotation, following a year as clerk/newsletter editor and a year as program chair. What you may not know is that this year has been by far the easiest of those three, partly because there's not that much to do, and partly because I've had what is undoubtedly the best leadership team around. I want to thank each of them for making my year as division head a breeze.

Ed Carter as program chair and Amy Gajda as research chair have been absolutely brilliant...both are kind, organized, cheerful, truly the best folks I can imagine in those positions.

Charles Davis deserves all of our thanks, as he

stepped in to the position of newsletter editor at the last minute. He is an excellent pinch hitter, and I know he'll do well as program chair next year.

David Cuillier did a fine job as teaching chair—something he should know about, as he's only a second-year professor and he's already won teaching awards. Michael Hoefges, who served as Professional Freedom and Responsibility chair, also did an excellent job.

Finally, Kathy Olson was (once again!) our webmaster. Our website looks great (check it out at www.aejmc.net/law/index.html) and provides valuable information for division members and, through its speakers' bureau, anyone who needs to find an expert in media law and policy.

If you'd like to get involved in the Division, either in one of the positions outlined above or in another way, contact Ed Carter at ed_carter@byu.edu. I'm sure he'll be happy to hear from you.

See you in August!

Field Tripping (continued from page 1)

means half of us sit in the studio itself and the other half sit in studio control. We switch out during a commercial break. The students get an up-close look at television news production, including the frazzled, stressed atmosphere of a studio control room, an ever-changing story rundown, and the quick news decisions that sometimes must be made to shorten or lengthen a newscast.

We talk afterward with a news director, a producer, a reporter, an anchor, or a mix of news professionals. We sometimes discuss cases that I've asked both the students and the journalists to read: How would you have handled that touchy situation that led to a lawsuit? What similar situations have you faced yourself? How much did you know about the law when you made your decision?

One time my students took a journalist to task when she said she found no privacy implications in a story involving a man who had been arrested for sexually abusing a child who lived in his home. The law students questioned why that potentially identifying detail had been added and the journalists had to explain their thinking, both ethically and legally.

Another time a news director criticized a news decision to go forward with a rape story, including graphic footage, that had been the basis for a lawsuit, and explained the law and ethics behind her thinking. The professionals talk about how they review a script for potential liability, when they've called in professional legal help to determine what needed to be edited and why, and how difficult it is to keep up with the law.

I know what you're thinking: A class trip to a television newsroom is an easy addition to a syllabus when one teaches in a small or medium-sized market.

But it can work in New York City too. I mentioned my annual newsroom visit to some of my non-media-law students in Brooklyn. One of them had been an intern at ABC News the summer before; she set things in motion. A few weeks later, we watched Charles Gibson anchor the news. We talked afterward with employees who drafted legal releases and with a producer who explained to the students her concerns about privacy and defamation in the news stories she accepts and ultimately sends on to affiliates.

These visits, I hope, make media law come alive for students. Plus, the excitement of live television is something most students, even journalism students, haven't seen before. It makes even hardened law students sparkle.

But an additional goal of mine is to introduce law students to real-life journalists, people similar to those they may defend someday. For those law students who will go on to represent plaintiffs against media, I hope to teach them that most journalists aren't the blood-thirsty, selfish, pompous wolves many initially think they are. For those who will be judges someday, I hope that they come to better understand the process of journalism and remember the many decent people within it when they analyze and decide a journalism case.

There's an additional benefit. The visit helps me as an educator to better understand the changing nature and pressures of broadcast journalism, and how legal concerns play an ever-increasing role.

I went to Manhattan to ABC News with my media law class a few weeks ago. I think that my students left with a much better understanding of journalism and that I left a more informed professor. I suggest that you try a media law field trip too.

Media Law Research Bibliography

Mike Martinez
University of Missouri
mtmartinez@mizzou.edu

Free speech

Becnel, A. J. (2008). "Friday Night Lights Reach the Supreme Court: How a Case About High School Football Changed the First Amendment." 15 Sports Lawyers Journal 327.

In 1997, the football coach at Brentwood Academy in Nashville, Tennessee, sent a letter to the 12 boys coming into the school as freshmen inviting them to spring practices. This spawned three trips to the United States Court of Appeals for the Sixth Circuit and two rulings by the United States Supreme Court. The result was a dramatic curtailment of the free speech rights of those who participate in state organizations.

Benton, D. (2008). "A License Plate For Debate." 7 Appalachian Journal of Law 287.

By creating specialty license plate programs states have created a limited public forum and may not discriminate on the basis of content or viewpoint. This paper examines the denial of Pro-Life and Pro-Choice organizations access to specialty license plate programs.

Chemerinsky, E. (2008). "How Will *Morse v. Frederick* Be Applied?" 12 Lewis & Clark Law Review 17.

In 2007, the Supreme Court decided *Morse v. Frederick*, a 5-4 decision in which Chief Justice Roberts, writing for the majority, decided that a student could be punished for displaying a banner with the words "BONG HiTS 4 JESUS" on a public sidewalk. The author suggests that the opinion was misguided and – from a First Amendment perspective – highly undesirable.

Fischette, C. (2008). "A New Architecture of Commercial Speech Law." 31 Harvard Journal of Law and Public Policy 663.

The commercial speech doctrine reflects a tension between the desire to protect speech from improper or discriminatory restriction by the government and the recognition that a large sphere of enterprise regulation appears to be in the public interest. Neither position has proved dominant, perhaps because the historical impetus to abandon entirely one side or the other is lacking. As a result, commercial speech doctrine is the constant subject of reinterpretation and revision.

Garnett, R. W. (2008). "Can There Really Be Free

Speech in Public Schools?" 12 Lewis & Clark Law Review 45.

The Supreme Court's decision in *Morse v. Frederick* leaves unresolved many interesting and difficult problems about the authority of public-school officials to regulate public-school students' speech. Given what we have come to think the Free Speech Clause means, and considering the values it is thought to enshrine and the dangers against which it is thought to protect, is it really possible for the freedom of speech to co-exist with the "mission" of the public schools?

Gaxiola-Viss, M. (2008). "The Hard Line Between Stopping Child Pornography and Protecting Free Speech: *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), Cert Granted (U.S. March 26, 2007) (No.06_694)." 9 Rutgers Journal of Law & Religion 15.

Congress has attempted to address the issue of virtual child pornography, computer-generated images versus photographs of actual children. The 11th Circuit Court of Appeals held in *United States v. Williams* that the act violated the First Amendment because it was overly broad and vague. The Supreme Court has agreed to hear the case and will be faced with a tough choice of upholding free speech in the strictest sense or giving the government a powerful tool to fight child pornography.

Houle, A. L. (2008). "From T-shirts to Teaching: May Public Schools Constitutionally Regulate Antihomosexual Speech?" 76 Fordham Law Review 2477.

In applying the First Amendment in the public school context, courts are faced with the challenge of balancing the constitutional rights of students against the discretion of schools to control speech and conduct on school grounds. This article focuses on the specific issue of public schools regulating antihomosexual speech and ultimately argues for a comprehensive standard permitting schools to regulate both private and school-sponsored student speech.

Kane, D. A. and D. J. Rosenberg (2008). "Employment and the Blogosphere: Risks For Employer In The New Communication Era." 75 Defense Counsel Journal 174.

Blogging has become a popular method of communicating in the modern electronic age. Many employees now have blogs, and for most, the blog is devoted to

(Continued on page 6)

(Continued from page 5)

something of personal interest to the employee. Sometimes, however, those blogs are used to discuss or criticize their employer, supervisor or other employees, or even clients and competitors. There are many instances where the content of an employee's blog may be of concern to the employer, and may even expose the employer to potential liability. So what is an employer to do in these situations? This article reviews the risks to an employer when employees operate blogs or other personal Internet spaces (i.e. MySpace pages), typically outside of work, and what an employer can do to protect itself and reduce the risks created by employee blogs and use of other "new media."

Kanter, S. (2008). "BONG HiTS 4 JESUS as a Cautionary Tale of Two Cities." 12 Lewis & Clark Law Review 61.

In September of 1987, several high school students in Tigard, Oregon wore various T-shirts allegedly promoting the use of alcohol. In January of 2002, a number of students in Juneau, Alaska held up a banner with the words "BONG HiTS 4 JESUS" on it while the Olympic torch passed by their school. Both groups of students claimed their First Amendment rights were violated when they were summarily punished for their actions; however, the processes and the end result in each case were quite different. This article recounts how the Tigard High administration turned the situation into a learning experience. A mock Supreme Court was convened, with high school students acting as attorneys on both sides of the issue. The author then compares the treatment and outcome of the Oregon T-shirt incident with that of the Alaska banner incident, concluding that the administration in the "Bong Hits" case missed a valuable learning opportunity, ultimately resulting in dire consequences for student speech.

Kenyota, G. (2008). "Thinking of the Children: The Failure of Violent Video Game Laws." 18 Fordham Intellectual Property, Media and Entertainment Law Journal 785.

The Grand Theft Auto series is arguably one of the most controversial video games released in recent years. Not surprisingly, it has been the lynchpin of recent legislative efforts to prevent the sale of violent and sexually explicit video games to minors by both the federal and state governments. In the past four years, at least seven states passed statutes regulating the sales of violent video games to minors, and the federal courts in those states subsequently invalidated each one by striking them down or granting a preliminary injunction as a violation of the First Amendment right of free speech. This has not stopped state legislatures from continuing to pass statutes that would prevent the sale of violent

and sexually explicit video games to minors. This article attempts to analyze the statutes passed by different states trying to regulate the sale of violent video games to minors and looks at how self-regulation compares as a solution.

Kroczyński, R. J. (2008). "Are the Current Computer Crime Laws Sufficient or Should the Writing Of Virus Code Be Prohibited?" 18 Fordham Intellectual Property, Media and Entertainment Law Journal 817.

This article examines why current computer crime laws are ineffective in preventing the damage caused by virus and worm computer programs unless significant changes are made. It presents an alternative approach to fighting cybercrime that would prohibit the writing of virus and worm programs. A major consideration that has prevented the prohibition of virus writing is whether the First Amendment protects computer programs as protected forms of speech. Arguments have been made for both sides, but the Supreme Court has not yet directly addressed protection for computer virus code.

Lavarias, J. (2008). "A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools." 35 Hastings Constitutional Law Quarterly 575.

A central theme of all First Amendment jurisprudence is whether the government regulation under review is an attempt to suppress a message because of the message or who the messenger is. Essentially there are two approaches to achieving tolerance concerning freedom of speech in public schools. One is to allow all perspectives to be heard and to teach everyone to respect different ideas, even if one strongly disagrees with an opposing view. The second approach is to ban dissenting ideas so that no one feels challenged or offended, thereby avoiding tension. Some argue that the latter approach is repugnant to American law. However, although the government should not set up a debate, take sides, and then ban those with different beliefs from responding, in the K-12 public education system minority groups do need protection from hate speech.

Laycock, D. (2008). "High-value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts." 12 Lewis & Clark Law Review 111.

This article assesses the alarming proposition at the core of the school's argument in *Morse v. Frederick*: that a school has constitutional power to suppress any speech inconsistent with its self-defined "basic educational mission." The phrase was taken from an earlier opinion upholding punishment of the "vulgar and lewd" manner in which an idea was expressed. It would be a very different thing to extend this concept to suppression of the idea itself.

(Continued on page 7)

(Continued from page 6)

Sharma, M. (2008). "Money as Property: The Effects of Doctrinal Misallocation of Campaign Finance Reform." 41 University of Michigan Journal of Law Reform 715.

By applying First Amendment jurisprudence to campaign finance measures, this article argues that the Supreme Court has misallocated campaign finance within its doctrinal scheme. This doctrinal misallocation has stymied the ability of legislatures to enact effective reforms to reduce the role of money in politics. This article argues that money in the political process more closely resembles property than speech and should therefore be analyzed under a less stringent property review.

Starr, K. W. (2008). "Speech and the Public Schools After *Morse v. Frederick*." 12 Lewis & Clark Law Review 1.

The Supreme Court's decision in *Morse v. Frederick*, otherwise known as the "Bong Hits 4 Jesus" case, highlights the non-realization of Chief Justice Roberts's goal of greater cohesion and unanimity among the nine Justices. Bong Hits is an example of the Chief Justice appearing increasingly among the majority, Justice Stevens speaking vigorously for the minority, and Justice Thomas's iconoclastic approach to constitutional issues. Importantly, the case also reveals a trend of alliance between Justices Kennedy and Alito and their shared Hamiltonian skepticism of local power, as well as Chief Justice Roberts' unsuccessful attempts to limit constitutional questions to narrow grounds of decision. This article explores the divided factions of the Court through the lens of Bong Hits and offers further insight into the Justices' constitutional jurisprudence.

Totten, C. S. (2008). "Quieting Disruption: The Mistake of Curtailing Public Employees' Free Speech Under *Garcetti v. Ceballos*." 12 Lewis & Clark Law Review 233.

This article critiques the United States Supreme Court's 2006 decision in *Garcetti v. Ceballos*, which restricted public employees' free speech rights. Building on more than fifty years of jurisprudence, the Court created a new threshold test denying First Amendment protection for speech made pursuant to duties. The author argues that this new rule creates more problems than it solves. The flaws in the Court's reasoning include suggesting its formulation be a per se rule, trapping employees in a winless corner, and vaguely directing employers to not respond to the pursuant-to-duties formulation by writing very broad job descriptions.

Wilson, R. (2008). "Free Speech v. Trial By Jury: The Role of the Jury in the Application of the Pickering

Test." 18 George Mason University Civil Rights Law Journal 389.

The American concept of civil rights prizes the majoritarian influence of the jury so much that the Constitution guarantees a right to trial by jury. However, the Founders realized the dangers inherent in a majoritarian system. As a remedy, they drafted a Bill of Rights to protect individual rights, including the right of free speech, from being overrun by the popular will. This paper explores the conflict in the context of the application of a balancing test propounded by the Supreme Court in *Pickering v. Board of Education*. In the decision, the Court reaffirmed its position that public employees do not, merely by accepting government employment, completely relinquish their right as citizens "to comment on matters of public interest." This paper analyzes the role of the jury in applying the Pickering balancing test among several federal circuit courts of appeal.

First Amendment

Higginson, S. (2008). "Thurgood Marshall: Cases in Controversy." 15 George Mason Law Review 741.

Justice Thurgood Marshall utilized the compressed dialogue of courtroom controversy to propound simple and illuminating truths that drove constitutional outcomes. This compression involves a process that may be termed constitutional reductionism. This article explores how cases, during controversy, reveal this constitutional compression, whereas, these same cases, in announced doctrine, do not fully articulate the reductionist logic that was pivotal to each outcome. When hearing Justice Marshall's constitutional reductionism during the frank exchange of ideas that occurs in courtroom controversy, one hears a blunt and powerful explanation of First Amendment protection built on impatience.

Mialon, H. M. and P. H. Rubin (2008). "The Economics of the Bill of Rights." 10 American Law and Economics Review 1.

This article elucidates, connects and synthesizes the literature that employs economics to study the individual rights and freedoms that are protected by the Bill of Rights. Economics is uniquely suited to study decisions involving tradeoffs, and each of the amendments requires a tradeoff. While this article examines all ten amendments, there is a significant section on the First Amendment.

Intellectual property

Chik, W. B. (2008). "Lord of Your Domain, But Master of None: The Need to Harmonize and Recalibrate the

(Continued on page 8)

(Continued from page 7)

Domain Name Regime of Ownership and Control." 16 International Journal of Law and Information Technology 8.

Traditional conceptualization of property and proprietary material susceptible to exclusivity such as ownership and control were largely confined to real and personal property. At the dawn of the industrial revolution, the economic rewards through the manifestation of ideas and the results of human creativity nurtured the growth of expansion of the concept of intellectual property and the ownership of the intangible information and ideas in various forms of expression. It took yet another revolution, this time the technological movement, to spawn the concept of the third form of property. The rapid digitization of, first, the mode of transaction and interaction through information technology, and second of products and services, has led to a conception of property known as virtual property. Although many forms of virtual property, including the Domain Name System (DNS), have largely been treated as a form of intellectual property, we have seen that sometimes as in the case of domain names, the protection of such property rests on quite a different set of principles.

Frieden, R. (2008). "Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers." 18 Fordham Intellectual Property, Media and Entertainment Law Journal 633.

This article examines the current debate about Internet neutrality in terms of its impact on intellectual property rights, including consumers' fair use opportunities. It assesses whether and how ISPs might lose their safe harbor for copyright infringement liability based on new technological means to know about the content they carry. Additionally, the article considers whether ISPs have an affirmative duty to conduct packet inspection absent a legislative mandate. It also examines the applicability of litigation over mandatory processing of broadcast television "flags," which specify consumer use options, but which require equipment processing on user premises.

Lee, C. (2008). "*Golan v. Gonzales*: Capitalizing on Eldred's Defeat." 16 Tulane Journal of International and Comparative Law 505.

Section 514 of the Uruguay Round Agreements Act of 1994 (URAA), codified in 17 U.S.C. § 104A, restores copyrights in certain foreign works that had passed into the public domain. As a result, artists and purveyors of restored works, such as Sergei Prokofiev's Peter and the Wolf, Dmitri Shostakovich's Symphony No. 5, and works by Igor Stravinsky, must pay higher royalties to

perform or otherwise use these works. In some cases, these royalty costs are prohibitive. Following the Supreme Court's holding in *Eldred v. Ashcroft*, it appeared that limits to Congress's power to grant copyright protection were nearly nonexistent. Under the protection of this precedent, Congress continued to expand the scope of copyright protection.

McGhee, D. (2008). "Looking Beyond "Use" in Predicting Advertiser Liability for Using Competitors' Marks in Online Advertising " 10 No. 4 Intellectual Property & Technology Law Journal 9.

Internet search providers like Google and Yahoo derive significant revenue from the sale of advertisements linked to user searches. It is perfectly acceptable, and likely effective marketing, for the owner of a trademarked term to sponsor a link to its Web site when that term is searched, but questions of trademark infringement arise when an advertiser pays for a link to a rival's term. The prevalence of untested legal claims and defenses in key word infringement and dilution claims and the a circuit court split over the definition of "use" in infringement claims makes predicting potential infringement liability a difficult proposition.

Libel

Krogh, W. M. (2008). "The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff." 15 George Mason Law Review 839.

This article addresses the public figure doctrine and in particular its "limited purpose" variety. In the seminal case of *Gertz v. Robert Welch, Inc.*, the Supreme Court defined limited purpose public figures as persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." A defamation plaintiff who is a limited purpose public figure must prove actual malice, but only with respect to statements that pertain to the public controversy within which he or she is a public figure. The difficulty is in determining who is a limited purpose public figure. This article addresses the question of whether notoriety is a necessary condition for public figure status. If influence alone may be sufficient, then the possibility of an "anonymous public figure" emerges. If notoriety is required, then the notion of an anonymous public figure must be rejected as self-contradictory.

Obscenity

Dionne, E. H. (2008). "Pornography, Morality and Harm: Why *Miller* Should Survive *Lawrence*." 15 George Mason Law Review 611.

(Continued on page 9)

(Continued from page 8)

In 2003, a divided Supreme Court in *Lawrence v. Texas* declared that morality, absent third-party harm, is an insufficient basis for criminal legislation that restricts private, consensual sexual conduct. In a strongly worded dissent, Justice Scalia declared that this “called into question” state laws against obscenity (among others), as such laws are “based on moral choices.” Justice Scalia does not specifically reference *Miller v. California*, the last case in which the Supreme Court directly addressed the issue of whether the government may suppress obscenity. However, if, as Justice Scalia suggests, obscenity laws have their primary basis in private morality, the governing case that permits such laws must countenance such a moral basis. The logical conclusion is that *Lawrence* calls *Miller*, which provides the legal test for determining obscenity, into question.

Privacy

Mulligan, C. M. (2008). "Perfect Enforcement of Law: When to Limit and When to Use Technology." 14 Richmond Journal of Law and Technology 13.

This article has cataloged and explored several concerns one might have about using technology to enforce law, embracing the use of technology in some cases and repudiating it in others. Each concern was illustrated with examples ranging from traffic cameras to web crawlers to identification cards. Yet, the use of such a catalog is not principally in its application to these particular cases, but in what might be learned and applied to those we encounter in the future. One question among several raised is: Might the use of the technology trigger a First or Fourth Amendment violation?

Troiano, M. A. (2008). "Striking a Balance Between Reporting Online Child Exploitation and Protecting Users' Privacy Rights: A Survival Guide for Social Networking Sites." 11 No. 10 Journal of Internet Law 3.

Social networking sites, such as MySpace and Facebook are faced with the difficult task of striking a balance between protecting young users from inappropriate material and unwelcome contact from adults and maintaining the privacy rights of adult subscribers. This paper addresses the many inconsistencies in the law that currently exists.

Privilege

Freedman, E. (2008). "Reconstructing Journalists' Privilege." 29 Cardozo Law Review 1381.

Any qualified reportorial privilege, which depends on judicial balancing of the importance of disclosure in individual cases, is inherently structurally defective.

This article argues that the appropriate model for journalists is the same as that of communications between attorney and client.

Kovner, V. (2008). "Are Journalists Privileged?" 29 Cardozo Law Review 1363.

This article suggests that we are well on the road to the recognition of a federal common law privilege. Based upon the two leading cases in the field now, *In re Grand Jury Subpoena, Judith Miller and New York Times v. Gonzalez* – there is one court of appeals judge (Sentelle) in the negative, two (Tatel and Sack) in the affirmative, and three that did not reach the question, but went on to find that the privilege could be overcome. Kovner said he does not know whether we are going to recognize it there first judicially, or if we are going to get to a federal shield law first, but we are going to one way or the other.

Rudenstine, D. (2008). "A Reporter Keeping Confidences: More Important Than Ever." 29 Cardozo Law Review 1431.

As a society, we must resolve the issues surrounding a reporter's privilege. And yet, so many of the normative claims – though surely not all – relevant to deciding the scope of protection a reporter should be afforded in protecting a source cannot be empirically assessed with precision. Rather these claims rest on complicated political, social, and economic factors not reliably quantified or calculated. It is within this context of fundamental values and assumptions regarding government and the exercise of its power that we must decide the narrow question of a reporter's privilege. In doing so, we are, whether we recognize it or not, assessing our willingness to trust our free institutions to make us strong, our capacity to perceive danger in measures promoted allegedly to advance security, and our collective commitment to individual liberty and vital democracy within the rule of law.

Smolla, R. A. (2008). "The First Amendment, Journalists and Sources: A Curious Study in "Reverse Federalism"." 29 Cardozo Law Review 1423.

To extend a newsgathering privilege to our federal court system is not a radical proposition. The fact that some 49 states and the District of Columbia have extended some form of newsgathering privilege to citizens is a “national referendum” attesting to this country's sense of the critical role that a vibrant press plays in a free society. The experience of the states and the District of Columbia have served as a valuable proving ground for the value of a reporter's privilege, and the possibility of crafting such a privilege in a nuanced manner that balances the competing societal interests.

The “Full Ambit” of the First Amendment

Ed Carter, Division Vice Head
Brigham Young University
ed_carter@byu.edu

On a recent trip to Washington, D.C., I paused on Pennsylvania Avenue at Sixth Street—as many of you undoubtedly have done—to admire the huge First Amendment engraving outside the Newseum.

The engraving is impressive for its size, and yet the power of its message is most effectively conveyed to me in more subtle ways. The meaning of the First Amendment has been defined not only through loud public protests and screaming headlines but also through quiet conversations in classrooms and courtrooms. Members of this Division, through scholarship and teaching, have greatly contributed to understanding of the First Amendment.

On the same day I saw the engraving, I had lingered in the Supreme Court chamber thinking about the great First Amendment debates that have taken place there. One of the most poignant exchanges, to me, took place on the afternoon of Monday, Jan. 6, 1964, as Columbia Law Professor Herbert Wechsler appeared on behalf of *The New York Times* to appeal the Alabama libel award to L.B. Sullivan:

MR. WECHSLER: . . . [W]e are actually making here, in relation to this rule of law, the same argument that James Madison made and that Thomas Jefferson made with respect to the validity of the Sedition Act of 1798.

MR. JUSTICE BRENNAN: How far does this go, Mr. Wechsler? As long as the criticism is addressed to official conduct?

MR. WECHSLER: Yes.

MR. JUSTICE BRENNAN: To official conduct? Are there any limits whatever which take it outside the protection of the First Amendment?

MR. WECHSLER: If I take my instruction from James Madison, I would have to say that within any references that Madison made, I can see no toying with limits or with exclusions.

MR. JUSTICE BRENNAN: The First Amendment gives it, in effect, an absolute prudence to criticize –

MR. WECHSLER: The First Amendment was precisely designed to do away with seditious libel, the punishment for criticism of the government and criticism of officials.

MR. JUSTICE GOLDBERG: And this applies not only to newspapers but to anybody?

MR. WECHSLER: Exactly; of course.

MR. JUSTICE GOLDBERG: In other words, you are not arguing here for the special rule that applies to newspapers?

MR. WECHSLER: Certainly not. We are talking about the full ambit of the First Amendment. . . .

The “full ambit” of the First Amendment extends to the prestigious national daily newspaper no more than to the small-town political gadfly. The First Amendment protects liberal expression no more than conservative speech, the unpopular voice no less than the prevailing wisdom.

Yet we teach our students the First Amendment does not provide absolute freedom from all consequences resulting from speech. Justice Brennan’s term, “absolute prudence,” presents an apparent contradiction. “Absolute” does away with government limits while “prudence” suggests some personal judgment.

In the end, I guess, the meaning of the First Amendment is personal to each of us. That reality—even more than a 50-ton, 74-foot monolith on Pennsylvania Avenue—may be what makes it so great.

Speakers Bureau Update

Tony Fargo, Indiana University
alfargo@indiana.edu

A couple of years ago, the Law and Policy Division started a Speakers Bureau to make our members more visible and accessible to the media when sources were needed for stories about communication law.

The Speakers Bureau is up and running, as you may know. Kathy Olson of Lehigh University is now the contact person if you want to submit information for

inclusion on the searchable database. Her e-mail address is kko2@lehigh.edu. Kathy and Randy Reddick of AEJMC did all the heavy lifting on this project, including dealing with the technical issues.

Check out the Speakers Bureau at www.aejmc.net/law/bureau.php. If you want to be part of it, send Kathy a brief bio (100 words), full contact information and a list of the subjects from the list on the Speakers Bureau page about which you are available to speak. I plan to ask AEJMC’s public relations person, Mich Sineath, to alert the media that this tool is available.

Teaching Media Law Online (continued from page 3)

searches to background a house for sale in the towns they were staying in during the break. I also provided a computer simulation game in gathering public records that they could do from home.

But teaching media law online can be challenging, particularly because it is so crucial in this subject to work through legal reasoning in person. Students have a tough time understanding how to think like a lawyer and applying legal tests to hypothetical cases. Seeing a puzzled face and responding immediately is something best done face-to-face.

In a December e-mail through the Law & Policy Division listserv, Dr. Paul Siegel, a professor of communication at the University of Hartford, wrote that the online media law course he taught was fun but time consuming. He also missed the live in-class oral arguments session and wished he would have had the first session in person to get to know some of the students.

Dr. Clay Calvert of Penn State University agrees. Penn State teaches one section of media law online in the spring, in addition to the several sections taught year-round in-person.

“The in-person version of an undergraduate media law class is, in my mind, more valuable in that it allows for real-time discussion and interaction in which I, as the instructor, can tell from the students’ facial reactions and body cues how much they are tracking,” Calvert wrote via e-mail. “I teach the marketplace of ideas theory in my media law classes and, suffice it to say, it is much easier to foster and facilitate a marketplace of ideas when the students are in front of me, I have their attention, I can field their questions and comments, and I can ask other students for their thoughts.”

The online media law section at Penn State, initiated by Calvert, is now taught by Dr. Matt Jackson, who continues to change his teaching methods to help students learn.

The class ranges from 15 to 38 students a semester and includes students from the main University Park campus, from other campuses around the state, and some students from abroad.

Jackson said he posts assignments and homework on the university’s Angel distance learning system, which is similar to Blackboard. Students upload their work to individual folders in the system. He e-mails his students often to remind them of upcoming assignments and legal topics in the news.

This past spring he broke the class into groups of four, and for each of the semester’s eight topic units (e.g., libel, copyright) he required students to post at least two substantive comments on a group discussion board.

Jackson doesn’t give tests or quizzes, or require a final term paper, but instead requires short assignments, such as finding news stories for each of the eight units and writing two-page summaries tying in the legal aspects learned from the text and posted lecture notes. Jackson said next year he’ll post PowerPoint lectures, about 10-15 minutes each, that include audio voice-over so he can emphasize key points.

“I did find in the first half of the semester that it was a very big challenge to get them to think like a lawyer and understand the law,” Jackson said. “They are used to using language very loosely. They are used to not paying attention to factual distinctions. That’s a real challenge online.”

Do the students learn better online than in person? No, Jackson said. And I agree. At this point the face-to-face discussion is invaluable for teaching media law, especially when working through complicated cases and application of legal tests.

“Students probably don’t leave the online course better than they would if they had taken it in person,” Jackson said. “I’m sad to say even the students who do really well probably are not learning as much as if they took the class in person.”

It’s even more troublesome for correspondence courses offered by community colleges or similar institutions.

For example, a media law course offered by Canyon College of Caldwell, Idaho, requires students to simply read the *Mass Media Law* textbook by Don Pember and Calvert, watch the PowerPoint lectures provided by the authors and then take a test comprised of 100 multiple-choice and true-false questions at the end of the term provided by the text. I doubt students leaving that class would be able to apply the Branzburg test if subpoenaed or counter dubious public records request denials.

So we still have more work to figure out ways of engaging discussion in the virtual world for teaching media law. Some professors have started using Second Life for online class gatherings. Others try group chats online with Skype, Facebook, or chatrooms. Our division should encourage more experimentation and foster sharing of methods.

We also should assess the learning outcomes of students who take media law courses online, and compare the results to in-person media law courses. While distance learning has potential for media law, ultimately the focus should always be on learning, not on technological gee-gaws and convenience.

Law Division Officers

HEAD

Beth Blanks Hindman
Washington State University
Tel: 509-335-8758
E-mail: ehindman@wsu.edu

PROGRAM CHAIR, VICE HEAD

Edward L. Carter
Brigham Young University
Tel: (801) 422-4340
E-mail: ed_carter@byu.edu

PF & R CHAIR

Michael Hoefges
University of North Carolina - Chapel Hill
Tel: (919) 843-0971
E-mail: mhoefges@email.unc.edu

TEACHING CHAIR

David Cuillier
University of Arizona
Tel: (520) 626-9694
E-mail: cuillier@email.arizona.edu

RESEARCH CHAIR

Amy Gajda
University of Illinois
Tel: (217) 333-5461
E-mail: agajda@uiuc.edu

NEWSLETTER EDITOR

Charles Davis
University of Missouri
Tel: (573) 882-5736
E-mail: davisnc@missouri.edu

NON-PROFIT ORGANIZATION
U.S. POSTAGE PAID
COLUMBIA, SC
PERMIT NO. 198

Media Law Notes
234 Outlet Point Blvd., Suite A
Columbia, SC 29210-5667