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Mass Communication Law and Policy Research and the Values of Free Expression

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Twenty-five years ago, on the 200th anniversary of the Bill of Rights, *Journalism Quarterly* published a special issue on the First Amendment that contributed to a modern theory of mass communication freedom of expression. Under the title "The First Amendment—the Third Century," the special issue contained eight articles that, collectively, articulated values of mass communication law and policy distinctly identifiable within the general theory of freedom of expression. For example, drawing on the work of Chafee, Emerson, Blasi and Baker, the special-issue author Elizabeth Blanks Hindman (1992) outlined a public-service role of the press. Ideally, the press would spread truth by expanding opportunities for diverse discussion. It would acquire information about government and publicly critique official action. The press should maintain independence without violating ethical standards. It should provide a non-government source for information and entertainment while checking government abuse of power. Hindman employed a doctrinal approach (Bobbitt, 1982) to analyze the academic commentary and construct her argument.

The 1992 special issue serves as a benchmark for mass communication law and policy research in *Quarterly* and generally, including research focused on free speech values and theory. This essay's purpose is to argue that, among several important objectives, mass communication law and policy scholars seek to understand and create meaning about the societal and individual values of mass communication freedom of expression. Scholars may vigorously critique the values and even advocate reformation or rejection. Previously neglected values may be given new attention. Developing mass communication law theory is never finished because of changes in society, including technological advances, emerging global influences, and evolution in government action and the nature of civic participation. While freedom of

expression theory is the subject of broad scholarly discussion in political science and law school journals, among others, mass communication law scholars have the particular opportunity and perhaps even responsibility to analyze values of mass communication free expression with the possibility of the analysis growing into mass communication law theory and even shaping law itself.

Like Hindman, several other authors in the 1992 *Journalism Quarterly* special issue used the doctrinal approach to assess the state of the First Amendment. Simon (1992) criticized the traditional logical argument method of communication law scholarship, contending researchers could make a more significant contribution by doing something lawyers and judges were not already doing, namely providing factual data and analysis. Teeter Jr. (1992) despaired that some long-standing battles for freedom of the press had not yet been won, but he saw hope in the individual self-fulfillment value as well as the marketplace of ideas. Hale (1992) combined a doctrinal analysis with a systematic approach to quantify the legal wins and losses of mass media.

Other special-issue authors utilized different types of constitutional argument. Blanchard (1992) and Cobb-Reiley (1992) took historical approaches to examining freedom of speech and press, and Cobb-Reiley in particular related her historical research to First Amendment theory. Parramore (1992) adopted a textual, historical and structural hybrid approach to show that some states protected mass media freedoms more vigorously than the federal system. The contribution of one special-issue author stood out: Walden (1992) criticized the focus on freedom of expression theory because, she argued, it distracted from the effort to keep government action from abridging speech and press rights. She advocated instead a focus on the government's purpose or intent in taking action affecting free expression.

For about a decade following the special issue, mass communication law scholars writing in *Journalism Quarterly* and its successor title, *Journalism & Mass Communication Quarterly*, continued to develop theory within structural, historical, textual and sometimes doctrinal approaches to constitutional analysis. But then, for nearly 15 years, mass communication law research in the pages of *Quarterly* slowed. Only in 2016 did authors in the journal return to mass communication law research and theory in greater numbers and depth. This essay examines that chronology and then makes observations about future directions for analysis of free-expression values and First Amendment theory in mass communication law and policy research.

Values of Freedom of Expression in Mass Communication

In the 1992 *Journalism Quarterly* special issue on the First Amendment, Blanchard and Cobb-Reiley demonstrated that historical free-speech values can inform contemporary understanding. Accordingly, a good place to begin discussion of the values of freedom of expression is ancient Greece. The Greeks esteemed *parrhêsia*, "the courageous expression of one's beliefs, however unpopular they may be" (Sluiter & Rosen, 2004). An important characteristic of *parrhêsia* was to stop self-censorship of true statements but only as long as the speaker had a good-faith belief in their truthfulness. The related concept of *isêgoria*, equality of speech rooted in aristocratic opposition to tyranny, promoted individual autonomy and development but not solely as an individual matter. Rather, *isêgoria* prioritized individuals pursuing their own welfare as citizens because doing so resulted in a better society (Raaflaub, 2004).

In the Athenian view of *parrhêsia* and *isêgoria*, "community interests came first" (Wallace, 2004). Freedom of speech strengthened civic self-confidence and courage, including in battle. Demosthenes, for example, argued that citizens in absolute government systems who

failed to fulfill their civic and military duties feared their rulers but not their peers. Meanwhile, idle citizens in a democracy did not have reason to fear their governors but did fear the reproach of fellow-citizens exercising their freedom of speech (Balot, 2004). Among societal values of freedom of expression, ancient Greeks underscored social cohesion. Equality, including of speech, allowed individuals of different ranks to form a cohesive new colony, and free speech in democracy could not only facilitate decision-making but also could "broaden the civic base in order to reduce factional strife and achieve political stability" (Raaflaub, 2004).

Modern American values of freedom of expression draw on the ancient wellspring as well as philosophers such as John Milton, in his 1644 *Areopagitica*, and John Stuart Mill, in his 1859 *On Liberty*. In the common retelling, the development of modern American freedom of expression values began with Justice Oliver Wendell Holmes, Jr.'s dissent in *Abrams v. United States* (1919). The 1992 *Journalism Quarterly* special issue offered a more comprehensive view. Blanchard (1992), for example, documented the efforts by journalists in the Revolutionary War, War of 1812, Mexican-American War and Civil War to fight government censorship, secrecy, propaganda and efforts to suppress dissent. Cobb-Reiley (1992) showed that Progressive Era scholars by 1914 already had moved beyond a narrow Blackstonian view of freedom of speech as a mere prohibition against prior restraint. Instead, Progressive Era scholarship by Schofield used a historical-structural approach to show the First Amendment represented the people's power over the government and "liberty of the press included the right to shame or intimidate oppressive officers into more honorable and just modes of conducting affairs" (p. 42).

An early and influential article argued against the excesses of the press. Warren and Brandeis did not completely discount the role of free speech and press, but they began with an assumption that "[t]he press is overstepping in every direction the obvious bounds of propriety

and of decency" (1890, p. 196). Their view of the societal values harmed by the press invasion stemmed, at least in part, from personal negative experiences with journalists (Gajda, 2008).

The articulated basis, however, included extensive doctrinal review of precedent cases in Great Britain and the United States. The authors analogized values and associated rules from other legal doctrines, including libel and copyright. In the end, Warren and Brandeis expressed a view of the value of privacy that has resonated for more than a century:

> Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people (1890, p. 196).

Although quaint, the argument by Warren and Brandeis deserves consideration as an ethical value against the excesses of freedom of speech and press. Free expression can both advance societal learning and slow or stop it. In John Stuart Mill's view, government censorship of even false speech hindered the search for truth, but Mill nonetheless suggested that individual freedom of speech could be curtailed by society if speech caused sufficient harm (2002). In line with Mill's marketplace of ideas theory, communication law and policy scholars do well to consider the values that disfavor free speech, in order to reexamine and either adjust or strengthen their own views.

The articulation of free-expression theory picked up steam via Alexander Meiklejohn in the mid-20th century. It developed further with late 20th century scholars after the Supreme Court's decision in *New York Times Co. v. Sullivan* (1964). Several nuanced versions of the development exist (Bollinger, 1983; Gray, 1994; Redish, 1982). In a nutshell, scholars canonized a set of free expression values that mostly focus on societal benefit. Freedom of expression enables the search for truth in the marketplace of ideas (Abrams v. United States,

1919). Free expression facilitates democratic decision-making (Meiklejohn, 1961), promotes tolerance, especially for minority voices (Bollinger, 1988), serves as a societal safety valve (Emerson, 1970) and provides a check on government abuse of power (Blasi, 1977). An individual value of free expression focuses on self-fulfillment and autonomy (Richards, 1974).

In an article later named a top 50 classic in *Quarterly*, Hindman (1992) focused on four theorists who discussed the marketplace of ideas model. Although Chafee, Emerson, Blasi and Baker agreed to some extent with the liberal theoretical conclusion that individual journalists had the right to be irresponsible, Hindman found in each of them notions that the press as a whole had certain democratic and even constitutional responsibilities. She recounted that Chafee, a First Amendment scholar and member of the Hutchins Commission, argued the press had a public service role to facilitate truth by expanding opportunities for expression of diverse viewpoints. According to Chafee, the press role was not legally enforceable but stemmed from moral and professional roots. Still, if the press failed to ensure diversity, the government could step in to make market corrections.

Emerson, meanwhile, perceived mass media had a responsibility to promote four values of freedom of expression. In his view, as interpreted by Hindman, broadcast media could be compelled, while print media should be expected but not compelled, to promote self-fulfillment, advance knowledge, inform citizens and establish a stable society. For Blasi, the marketplace of ideas would not likely lead to truth and yet he generally opposed government intervention to fix it. He emphasized the checking value of freedom of the press, in that news media should gather information, pass judgment on official conduct and disseminate their judgment to the public. Hindman said Blasi would afford nearly absolute protection to criticism of public officials in

their official duties, but he believed the actual malice rule of *Sullivan* served to guarantee some press accountability and, thus, credibility in the eyes of the public.

Hindman then wrote that Baker's liberty theory "protects the speaker in the act of speaking, rather than the speech and its content" (p. 59). Baker believed the process, rather than outcome, of speech deserved protection under a self-fulfillment and autonomy rationale. For Baker, though, the institutional press did not merit protection under the liberty theory, which he applied only to individuals. While the press had a role, in his view, to serve as a check on government abuse of power and to provide information, the functioning of the press in its role determined whether it actually enjoyed the privilege of serving the public interest.

Methodological Approaches of Mass Communication Law and Policy Research

This section outlines, in broad terms, the methodological approaches common to law and policy scholarship in *Journalism & Mass Communication Quarterly*, including articles published under the former title *Journalism Quarterly*. Although mass communication law and policy research appears in other mass communication journals and law school law reviews, a comprehensive review of those journals was not undertaken. Nor did the review encompass the contents of *Communication Law and Policy*, a 20-year-old peer-reviewed journal that straddles the fields of mass communication and law (Pasadeos, Bunker & Kim, 2006). Instead, *Quarterly* was chosen because of its longstanding history, dating to 1924, as a general-interest mass communication journal and flagship of the Association for Education in Journalism and Mass Communication. For nearly a century, *Quarterly* has been a primary outlet for mass communication law research.

Researchers employ several methodological variations to conduct law-oriented scholarship in *Journalism & Mass Communication Quarterly*. Scholars frequently choose

qualitative methods, not surprisingly including legal analysis of statutes, judicial opinions and historical-legal documents. Although scholars may not label their work, much mass communication law research falls into archetypes of constitutional argument articulated by Bobbitt (1982). He contended that five archetypes—historical, textual, structural, prudential and doctrinal—were common, and he advocated for recognition of a sixth he called ethical but clarified was about American identity and conscience rather than morality.

Bobbitt criticized the narrow historical approach that would purport to understand the intent of the Framers of the Constitution. The narrow historical approach may be identified with originalism (Silver, 2011). But Bobbitt saw the value in a broader historical approach, one divorced from specific texts and aimed at providing context rather than trying to "establish a single meaning conclusively" (Bobbitt, 1982, p. 21). Smith (1984) used a historical approach in *Journalism Quarterly* to demonstrate the early American colonial death of seditious libel at the hands of newspaper publishers who saw the press as a protection against tyranny. Similarly, Nord (1985) concluded the 1735 John Peter Zenger case showed an American commitment to the right to speak truth, including religious truth, rather than a libertarian commitment to individual freedom.

Textual arguments purport to be powerful and simple but they may miss the point. Constitutional meaning sometimes hinges on what was not said or on language that has either changed over time or failed to change appropriately over time in line with the concepts being represented. If language and concepts are in alignment over time, then textual approaches have the potential to serve as "a valve through which contemporary values can be intermingled with the Constitution" (Bobbitt, 1982, p. 36). Structural argument is a macro-textual approach, and it relies on examination of the relationships among constitutional actors and entities. The structural

approach, according to Bobbitt, helps resolve intergovernmental disputes but does not protect human rights. Structuralism, though, is for Bobbitt the most compelling justification for incorporating the First Amendment's Speech Clause against the states.

The prudential approach emphasizes current political and economic factors, and thus may be particularly suited to incorporation of contemporary values. Prudentialism sees itself in Chief Justice John Marshall's famous quote from *McCulloch v. Maryland* (1819, pp. 407, 415) (emphasis in original): "…[W]e must never forget it is a *constitution* we are expounding. . . . This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."

A doctrinal approach relies on precedent, or *stare decisis*, and logical reasoning. Doctrinal research can apply the values and purposes behind a legal doctrine but, according to Bobbitt, cannot effectively provide those values and purposes. The limitations of the doctrinal archetype present challenges in constitutional argument because the dispute often centers on constitutional values and purposes. Doctrinal approaches effectively perpetuate values and may allow slow evolution in those values as part of the common law process. The doctrinal approach is well-suited to incorporate scholarly commentary. Using a doctrinal approach, a top 50 classic *Quarterly* article by Drechsel (1990) analyzed the Supreme Court's *Hustler v. Falwell* decision and perpetuated an underlying checking value of free press.

A long-standing approach of law-oriented articles in *Journalism & Mass Communication Quarterly* uses doctrinal and textual analysis to give practical guidance. Some scholars set out to educate mass communication faculty and students about the laws and regulations governing their professional work (Middleton, 1979). Scholarship has addressed mass communications faculty about their teaching and research, such as the legality of recording television programs under the

U.S. Copyright Act (Francois, 1980). Advising faculty how to instruct their students about the vagaries of copyright law persists (Bunker, 2010). In providing instruction and guidance, *Journalism & Mass Communication Quarterly* tracks its peers. For example, authors in a Broadcast Education Association journal have long given practical instruction on conducting research, including primers on legal concepts and guides for finding and interpreting legal materials (Foley, 1973; Le Duc, 1973).

Fundamentally, mass communication law scholarship makes a legal argument, generally including logical reasoning supported by citations to precedent cases and other authorities. Researchers in *Journalism & Mass Communication Quarterly* employ various constitutional argument archetypes, sometimes in hybrid fashion within a single article. The argument may go against the weight of legal authority (Riley & Shandle, 1974). Scholars in *Quarterly* have not been reluctant to criticize the work or argue against the logic of Congress (Chaney, 1978; Hanks & Coran, 1986), the Federal Communications Commission (Gleason, 1991), other prominent scholars (Boyer, 1975), and, of course, judges (McCarthy, 1979; Leeper, 1993). At times legal scholarship plays a direct advocacy role with regard to changes needed in legislation or proposed legislation (Atwater, 1983; Cooper, 1991; Pritchard & Sanders, 1991).

One useful doctrinal approach examines lower-court interpretations of a seminal U.S. Supreme Court case (Bunker, 2010; Kozlowski, Bullard & Deets, 2009; Hovland & Taylor, 1990). Some authors opt for a relatively straightforward textual explanation of the application of a statute (Collins, 1987; Middleton, 1979). Others analyze a single court decision (Pritchard, 2013; Gross, 1973) or administrative agency adjudication (Gleason, 1991) and then discuss the implications. Still other doctrinal articles collect and analyze a series of lower-court cases on an issue the U.S. Supreme Court has not addressed directly (Stevens, 1989), and they may impose a

time frame for their analysis—a decade, for example (Sneed & Stonecipher, 1986). Scholars apply existing legal concepts to technological developments (Hightower, 1975; Collins, 1987; O'Neill, 1994).

Reinard & Ortiz concluded the overwhelming majority of *Communication Law and Policy* articles and AEJMC Law and Policy Division conference papers adopted qualitative methodological approaches, specifically "conceptual pieces, historical studies, or legal interpretations" (p. 601). The lack of empirical research in mass communication law scholarship prompted Reinard & Ortiz to suggest the field may suffer from "methodological parochialism" (p. 621). However, their examination did not include *Journalism & Mass Communication Quarterly*. Further, in part because the legal system has its own detailed process for admitting and weighing evidence, including expert-witness testimony (Robbins, 1972b), the empirical challenges associated with law are general and not confined to mass communication.

The relationship between law and empiricism presents difficulties (Reynolds & Barnett, 2006), and some have contended mass communication law and policy research needs to increase and improve its empirical work (Cohen & Gleason, 1990). While the modern empirical legal studies movement is of relatively recent vintage (Eisenberg, 2011; Sisk, 2008), scientific approaches existed within U.S. law even before the 1908 "Brandeis Brief" made famous the use of voluminous social science data to support a legal argument (Morag-Levine, 2013). Empirical work on mass communication law and policy questions exists both in *Communication Law and Policy* (Pritchard, 2009) and *Journalism & Mass Communication Quarterly* (Buss & Malaney, 1978).

A particularly fertile area for empirical legal research in *Journalism & Mass Communication Quarterly* concerns the tension between free press and fair trial (Hightower,

1975; Tankard, Jr., Middleton, & Rimmer, 1979; Jennings II, 1982). Researchers employed surveys and experiments to understand other mass communication law and policy questions. For example, two researchers surveyed student media advisers, student editors and school principals, and the researchers concluded those groups needed more training to accurately decide the outcome of media law dilemmas (Broussard & Blackmon, 1978). While that research gauged the accuracy of the respondents' conclusions about hypothetical situations, a similar survey during the same era measured attitudes, beliefs and opinions in a more straightforward way (Trager & Dickerson, 1980).

The critical legal studies movement (Unger, 1983) has had little impact on mass communication law and policy research in *Journalism & Mass Communication Quarterly*. At least one study, however, did apply a critical approach to examine differences in the treatment of men and women within the law of defamation (Borden, 1998). The critical legal studies movement influences certain other communication law and policy scholarly associations. Critical methods in general have been analyzed in *Journalism & Mass Communication Quarterly* (Rakow, 2011).

Law and policy scholarship in *Journalism & Mass Communication Quarterly* invokes theories of freedom of expression relatively frequently, in comparison with law reviews published in law schools (Pasadeos et al., 2006). Pasadeos et al. also discussed other important differences between mass communication law and policy research published in peer-reviewed journals such as *Quarterly* and law reviews, which are edited by law students with some faculty input. Prominent legal research databases include law reviews but not *Quarterly*. Mass communication law scholars have long been preoccupied with First Amendment theory (Robbins, 1972a), but the examination here focuses on the last 25 years of *Journalism & Mass*

Communication Quarterly. The next section traces the outline of mass communication law theory discussions in the journal since the 1992 special issue on the First Amendment. Bobbitt's archetypes of constitutional argument provide a useful analytical tool.

Mass Communication Law Values in *Quarterly* Since 1992

In the decade following the First Amendment special issue (1993-2002), scholars published at least 40 law and policy-oriented articles in *Quarterly*. A relationship emerged between constitutional argument archetypes and First Amendment theory. Articles using a structural approach, even in concert with other approaches such as textual and doctrinal, always related their research to First Amendment values or theory. Seven articles involved a structural archetype, and all seven discussed values or theory (Leeper, 1993; Bush, 1994; Burrowes, 1997; Najjar, 1998; Bunker, 2000; Perkins, 2001; Kerr, 2002). Two historical articles also contextualized their work with theory (Ross, 1998; Mizuno, 2001). Meanwhile, articles taking a purely doctrinal approach relatively rarely connected their work to First Amendment values or theory. This phenomenon matches the conclusion of Bobbitt, who said doctrinal approaches could perpetuate values but not create, innovate or extend them effectively. Of 20 articles using the doctrinal argument archetype, only five mentioned theory or values, and all five perpetuated existing values without intending significant innovation or extension (Bunker, 1993; Hopkins, 1996; Bunker & Davis, 1998; Bunker & Tobin, 1998; Ekstrand, 2002).

The doctrinal articles that did touch on values or theory deserve additional consideration. Hopkins (1996) noted scholarly criticisms of the marketplace metaphor, including by Barron (1967). Barron said the marketplace model may be naïve in its assumptions that truth will actually exist in the marketplace and will rise to the forefront, and that rational people will have non-discriminatory access to ideas in the market. Hopkins found Supreme Court justices

frequently and uncritically used the marketplace of ideas value as a rhetorical tool. A total of 125 different opinions in 97 cases referenced the marketplace of ideas, and 47 references came without authority or citation. Hopkins concluded, however, that technology and other factors had not killed the marketplace but had divided it into multiple mini-marketplaces. Thus, even with a doctrinal approach, Hopkins did extend the marketplace model somewhat.

Meanwhile, two doctrinal articles argued for extension of First Amendment free expression values to private, corporate contexts. Bunker and Davis (1998), for example, analyzed the privatization of public records and advocated a public function approach that would treat corporate handling of public records as state action. Ekstrand (2002), meanwhile, showed the irony of freedom of speech values in the context of news organizations' restrictive online user agreements. She advocated application of First Amendment values in that context, thus adding to the chorus about freedom of speech in the increasingly prevalent modern corporate climate. The two articles advocating application of First Amendment theory to corporations would seem to fall outside the scope of Walden's call for a narrow focus on government action, unless Walden's call expanded to include the public function test of Bunker and Davis.

All 15 of the other articles using a doctrinal approach, however, seemed squarely within the Walden invitation to focus on state action rather than values or theory (Bunker & Splichal, 1993; Youm, 1993; Bunker, Gates & Splichal, 1993; Splichal & Chamberlin, 1994; O'Neill, 1994; Dupagne, 1994; Chang, 1994; Bunker, 1995; Bunker, 1996; Packer & Gower, 1997; Rivera-Sanchez & Ballard, 1998; Koehler, 1999; Bunker, 2001; Halstuk & Chamberlin, 2001; Ross, 2002). In a doctrinal examination of student expression, Ross (2002) explained lack of theory in doctrinal articles. Since the Supreme Court rarely invokes First Amendment theory and focuses instead on analytical frames or categories such as disruptive speech, low-value

speech or school-sponsored speech, those frames and similar categories stand in for values and theory in scholarly doctrinal analyses, Ross suggested.

In summary, from 1993-2002 *Quarterly* published seven structural-theoretical articles, two historical-theoretical articles, five doctrinal-semi-theoretical articles and 15 doctrinal articles with little or no intent to discuss theory. In addition, the journal published three quantitative or policy articles on law-related topics with varying degrees of First Amendment theoretical grounding (Gleason, 1993; Lipschultz & Hilt, 1993; Lawson, 1994). Finally, *Quarterly* in that same time period also published eight articles on legal topics that did not use legal research methods, and several of those involved mass communication theories other than First Amendment theory (Jones, 1994; Mason, 1995; Thompson, 1995; Grimes & Drechsel, 1996; Knudson, 1996; Voakes, 1998; Borden, 1998; Wyatt, Kim & Katz, 2000).

After 2002, *Journalism & Mass Communication Quarterly* experienced a drop in the number of law and policy articles as well as in the percentage of those articles that focused on First Amendment theory. Further research would be needed to determine why, but one possible explanation is the advent of *Communication Law and Policy* in 1996. Given that both journals are housed within the Association for Education in Journalism and Mass Communication, it seems reasonable that some of the articles published in *Communication Law and Policy* would have been published in *Quarterly* if written prior to 1996. Although this study did not systematically examine *Communication Law and Policy*, a cursory review discovered five articles published in that journal with the word "theory" in the title and authored by Bunker or Bunker and coauthors. Thus mass communication law and policy scholars apparently still made contributions to theory and free-expression values, but just not in *Journalism & Mass Communication Quarterly*. Of course, similar work could also be happening in law reviews.

The preceding discussion is speculative, but what is known is that from 2003-2015, at least 18 law and policy articles were published in *Quarterly*. As stated earlier, 40 law and policy-oriented articles had been published in *Quarterly* from 1993-2002. Further, of the 18 law and policy articles published in *Quarterly* from 2003-2015, only three (17 percent) used a structural, historical or structural-historical approach and discussed values or theory (Uhm, 2005; Uhm, 2008; Mizuno, 2011). That represented a small decrease from the nine of 40 law and policy articles (23 percent) published from 1993-2002 that used a structural or historical approach and discussed theory. In the period 2003-2015, five articles used a doctrinal approach and touched on theory or values of freedom of expression without significant innovation or extension of First Amendment theory (Bunker & Bolger, 2003; Carter & Clark, 2006; Carter, 2008; Kozlowski, Bullard & Deets, 2009; Silver, 2011). In the same period, five additional law and policy articles adopted a doctrinal approach with little or no explicit theory discussion (Carter, 2005; Bunker, 2010; Kozlowski, 2011; Stewart, 2013; Pritchard, 2013).

In addition, from 2003-2015 *Quarterly* published two policy or historical articles that did not attempt to engage First Amendment theory significantly (Hawkins & Hawkins, 2003; Bates, 2011). During that same time frame, the journal published three articles on legal topics that did not use legal research methods and did not engage First Amendment theory (Reader, 2012; Relly, 2012; Bernhard & Dohle, 2014).

Although it remains too early to tell if it was a blip or start of a trend, the year 2016 marked a change. In that year, partly due to a special issue of *Quarterly* titled "Information Access and Control in an Age of Big Data," law and policy articles surged. At least six articles published in 2016 could be considered squarely within mass communication law and policy. Three articles used structural approaches and discussed theory or values (Camaj, 2016; Ginosar

& Krispil, 2016; Youm & Park, 2016), while two other articles used doctrinal approaches and at least mentioned theory or values (Bunker & Calvert, 2016; Stewart & Littau, 2016). A sixth article used a non-legal research method but nonetheless made a significant contribution to understanding the chilling effect related to one's perception of being subject to online government surveillance (Stoycheff, 2016).

The most significant conclusion to come out of this review of law and policy articles in *Quarterly* after the 1992 special issue may be the relationship between structuralism and theory. Doctrinal articles in *Quarterly* rarely tackle mass communication law theory head-on, while structural articles frequently do. Of course, mass communication law researchers who intend to explore First Amendment theory may consciously choose a structural approach. Some doctrinal articles touched on theory or values but did not significantly advance First Amendment theory. Instead, those doctrinal articles merely perpetuated existing values and purposes of legal doctrines. Researchers who wish to make a mark within mass communication law theory, then, would be well-advised to use structural, historical, textual and possibly prudential constitutional argument archetypes.

It is noteworthy, however, that Hindman's 1992 article used a doctrinal approach to advance mass communication law theory in significant ways. Hindman avoided the situation identified by Ross in which First Amendment frames or categories take the place of values and theory in adjudication. Hindman's doctrinal analysis applied to scholarly discusions rather than judicial precedents. The content of those scholarly discussions focused on theory and so Hindman's doctrinal analysis followed suit. Accordingly, a doctrinal approach applied to discussions of theory can produce substantive theoretical developments.

The Value and Challenges of Mass Communication Law Values

Mass communication law and policy research that analyzes free expression values can make a valuable contribution to the development of theory and, perhaps, the law itself. Compared to other constitutional topics, free speech and free press appear to be strong candidates for scholarly discussion of values: "Freedom of speech is not only a value that, like other societal values, is created through the use of language: in this case, the value is also *about* language, and one's view of language and the way it works may influence one's views on First-Amendment protection" (Sluiter and Rosen, 2004).

Walden (1992) argued against scholarly focus on values because, she said, it could distract from the effort to stop government abridgement of free speech. Instead of asking, "What do we want the First Amendment to accomplish?" she advocated asking, "What do we want the First Amendment to prevent?" (p. 65). Walden is of course correct that the First Amendment itself was written in negative terms as a prohibition on state action rather than as an affirmative grant or recognition of rights. But that does not mean free expression values are irrelevant. Walden argued the focus should not be on the content of speech to determine whether that speech should be protected. Instead, she advocated placing focus on the purpose or intent of the government in acting to restrict speech. However, such a focus does not eliminate consideration of values from the equation. Instead, it merely eliminates the pro-speech values while keeping in view the values of privacy, national security, bureaucratic secrecy or other official undertakings that would oppose free-speech values. Thus, it would seem, both free-speech values and government intent could be taken into consideration.

While conducting research involving First Amendment values, scholars should consider the importance of alignment between research and writing processes. Just as judges make decisions and then, separately, justify those decisions in written opinions (Aldisert, 1996),

researchers engage in separate processes for research and writing. The values, motivations and reasons behind decisions reached in research should be reflected in writing. In an article directed at law students but relevant for mass communication law researchers, Volokh advised to "do your research with an open mind" (1998, p 249). Reaching conclusions based on preconceived notions or before examining all the evidence is not a shortcut worth taking.

Worse yet is beginning a research project with an argument already formulated and then seeking evidence to justify the argument. Instead, research requires suspension of early conclusions, at least definitive ones. Volokh advised, "Be willing to make whatever claims your research and your thinking lead you to, and even be willing to change or refine the problem itself" (p. 249). Volokh further sugested scholarly claims should be novel, nonobvious and useful. The quality of original contribution to the scholarly conversation is paramount. Part of that contribution in mass communication law and policy scholarship is the alignment between a researcher's decision-making values and decision-justifying values.

After a lull of more than a decade, *Journalism & Mass Communication Quarterly* authors seem to have returned to discussion of mass communication law values and associated theory. That effort should continue. Threats to mass communication free expression today continue to surface in traditional areas such as defamation and privacy invasion as well as in relatively new areas involving technology and Big Data, government surveillance and anti-terrorism legislation. Research in mass communication law and policy is beginning to account for contemporary changes in the characteristics of citizenship (Nelson, Lewis & Lei, 2017; Balkin, 2004). Further research is needed on these issues as well as the power of corporations—Facebook, for example—over freedom of expression, and on the role of mass communication in a "post-truth" or "alternative facts" world, among other topics. Given that not even legal research methods are

static (Podboy, 2000), scholars in mass communication law and policy should continually reexamine their approaches and application of free expression values.

One fruitful area for exploring free-speech values involves foreign, international and comparative law. While just one international-structural article with discussion of theory (Perkins, 2001) appeared in *Journalism & Mass Communication Quarterly* from 1993-2002, and none from 2003-2015, three international-structural or foreign-structural articles appeared in the year 2016 (Camaj; Ginosaur & Krispil; Youm & Park). The future of mass communication law and policy scholarship's analysis of values and theory is likely to involve international, foreign and comparative law. Researchers would do well to heed lessons from cross-cultural communication so First Amendment exceptionalism does not become First Amendment imperialism (Zick, 2014). An example of an international-structural approach that would lend itself to examination of free-expression values and theory in mass communication law follows. The example also illustrates challenges.

In the international law context, researchers need familiarity with various United Nations treaties, treaty monitoring bodies, special rapporteurs, international and regional human-rights tribunals and reporting mechanisms for the fundamental international human right to freedom of expression. The right was recognized in the Universal Declaration of Human Rights (UDHR) in 1948, but it did not appear in enforceable form until the implementation of the International Covenant on Civil and Political Rights (ICCPR) in 1976. As a result, many issues are only now developing with respect to the application of freedom of expression under Article 19 of ICCPR and are ripe for research. For example, it is only now becoming clear what standard of fault Article 19 requires a public official to show when suing for defamation (Carter, 2016).

Perhaps the foremost value of free expression under the UDHR and ICCPR is facilitation of the entire international human-rights law system with its various mechanisms. The value was discussed during deliberation of the UDHR in the 1940s (p. 6). In a 2011 authoritative interpretation of Article 19 ICCPR, the United Nations Human Rights Committee adopted the facilitating-human-rights rationale as chief among the values animating freedom of expression. The Committee's General Comment 34 links freedom of expression under international law to the ability of people to exercise their rights to vote, assemble and associate with others (UN Human Rights Committee, 2011). Nobel laureate Amartya Sen even suggested a free press is one of the best guarantees against famine (Sen, 1999). The Committee felt so strongly about the value of enabling human rights that it virtually prohibited the 168 ICCPR nations, including the United States, from restricting free expression about human rights even though free expression on other topics may be curtailed under certain circumstances (UN Human Rights Committee, 2011, ¶ 23).

Another value of mass communication freedom of expression in the international law context is preservation of life. In an effort to assess risk of genocide, the Office of the UN Special Adviser on the Prevention of Genocide produced an "Analysis Framework" made up of eight categories: (1) inter-group relations; (2) capacity to prevent genocide; (3) presence of arms; (4) motivation of leading actors; (5) dynamic factors that facilitate genocide; (6) genocidal acts; (7) evidence of intent to destroy a particular group; and (8) triggering factors. Mass communication plays a central role in the "Analysis Framework," both in furtherance of possible genocide and prevention of possible genocide. For example, category two mentions "independent media" as one of the factors affecting the capacity to prevent genocide. Meanwhile, category four lists "propaganda campaigns and fabrications" as evidence of leading

actors' motivations toward genocide. Similarly, "inflammatory rhetoric or hate propaganda" are listed in category five as circumstances that facilitate genocide because they suggest impunity. Finally, hate speech is also classified in category seven as evidence of intent to destroy a particular group (Office of the UN Special Adviser).

Although freedom of expression protects some undesirable speech, the inclusion of independent media in category two, as a barrier to genocide, is critical. An independent and responsible press corps can counteract the effect of hate speech and genocidal propaganda. The role of independent press in modern liberal democracy to serve as a watchdog on government and fulfill the checking value is critical here. Although the "Analysis Framework" does not discuss the point at length, review of mass communication messages is central to virtually all of the categories the Special Adviser on the Prevention of Genocide has delineated. The idea is made clear in a report prepared for the Special Adviser by Woocher in 2006. Under various models of early warning discussed by Woocher, social-science research coding and analysis of news articles is an important method of detection of genocide warning signs.

It is critical for effective early warnings that news articles themselves be accurate and independent from would-be human rights violators and propagandists. Of course, these results are difficult to ensure. But since independent news media not only serve as a check on abuse of power, as indicated in "Analysis Framework" category two, but also independent and accurate news accounts are used to assess risk factors relating to other categories in the "Analysis Framework," it must be recognized that a vital part of a nation's responsibility to protect human rights is ensuring freedom and responsibility of the press.

The idea that mass communication functions to preserve life and prevent violence may not be easily accepted within a traditional view of free press under the First Amendment. But in

the international law context, it seems relatively uncontroversial. Further research would be needed to explore the role of mass communication in the international human rights law sphere. A structural approach could be taken to analyze the relationships among state actors, mass media and others as envisioned in international human rights law treaties such as ICCPR. Challenges could include language and cultural differences as well as differences in government structures, the role of mass communication and expectations of and by citizens. As is evident from the example, press independence could be threatened in various ways by reliance on mass communication to facilitate human rights and preserve life.

Conclusion

This research has outlined some methodologies in mass communication law and policy research, particularly in *Journalism & Mass Communication Quarterly*. The examination of previous research includes work on the values of freedom of expression. The values themselves should be continually critiqued and reformed, in line with the nature and purposes of scholarly research and the public interest in learning and progress. Mass communication law and policy scholars who analyze values in their work may contribute to building a distinct mass communication law theory within the larger field of freedom of expression theory.

An examination of law and policy articles in *Journalism & Mass Communication Quarterly* demonstrates that historical, textual and structural approaches to constitutional argument lend themselves to discussion of free expression values. Meanwhile, doctrinal approaches generally do not result in development of values and theory, unless the doctrinal approach is applied directly to scholarly discussions of theory rather than practical jurisprudence. There were not sufficient examples of prudential and ethical archetypes to draw conclusions about their relationship to values and theory. International-structural and foreign-structural

approaches seem to be of emerging importance to examine free expression values in the pages of *Journalism & Mass Communication Quarterly*.

While purely doctrinal analyses that do not contribute to theory development may still make valuable contributions to mass communication law scholarship and practice, the ultimate contribution of mass communication law scholars could lie in differentiating their work from that of legal scholars generally. In emphasizing textual, historical and structural approaches applied to mass communication law, scholars could find opportunities to contribute to the advancement of mass communication law free expression values and theory in ways other scholars do not. Although scholars like Walden make valid counterpoints that should not be disregarded, the work of Hindman and others who followed speaks to the value of the effort and demonstrates the way forward.

References

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Aldisert, R.J. (1996). *The judicial process: Text, materials and cases*. St. Paul, Minn.: West.

Atwater, T. (1983). Newsroom searches: Is 'probable cause' still in effect despite new law? *Journalism Quarterly, 60*, 4-9. doi:10.1177/107769908306000101

Balkin, J.M. (2004). Digital speech and democratic culture: A theory of freedom of expression for the information society. *New York University Law Review*, *79(1)*, 1.

Balot, R.K. (2004). "Free speech, courage, and democratic deliberation," in *Free Speech in Classical Antiquity*. Leiden: Brill.

Barron, J. (1967). Access to the press—A new First Amendment right. *Harvard Law Review*, *80*, 1641-1678.

Bates, S. (2011). The prodigy and the press: William James Sidis, anti-intellectualism, and standards of success. *Journalism & Mass Communication Quarterly, 88,* 374-397. doi:10.1177/107769901108800209

Bernhard, U. & Dohle, M. (2014). Do even journalists support media restrictions? Presumed political media influences and the consequences. *Journalism & Mass Communication Quarterly, 91*, 250-271. doi:10.1177/1077699014527456

Blanchard, M.A. (1992). Free expression and wartime: Lessons from the past, hopes for the future. *Journalism Quarterly, 69,* 5-17. doi:10.1177/107769909206900102

Blasi, V. (1977). The checking value in First Amendment theory. *American Bar Foundation Research Journal, 1977,* 521-649.

Bobbitt, P. (1982). *Constitutional fate: Theory of the Constitution*. New York: Oxford University Press.

Bollinger, L.C. (1983). Free speech and intellectual values. *Yale Law Journal, 92*, 438-473.

Bollinger, L.C. (1988). *The tolerant society*. New York: Oxford University Press.

Borden, D.L. (1998). Reputational assault: A critical and historical analysis of gender and the law of defamation. *Journalism & Mass Communication Quarterly, 75*, 98-111. doi:10.1177/107769909807500111

Boyer, J.H. (1975). Barron and the courts. *Journalism Quarterly, 52*, 120-124. doi:10.1177/107769907505200121

Broussard, J. & Blackmon, C.R. (1978). Advisers, editors and principals judge First Amendment cases. *Journalism Quarterly, 55*, 797-799. doi:10.1177/107769907805500427

Brown, T. (1971). Free press fair game for South Africa's government. *Journalism Quarterly, 48,* 120. doi:10.1177/107769907104800113

Bryan, C.R. (1961). Security and the news in liberal countries. *Journalism Quarterly, 38,* 485-496. doi:10.1177/107769906103800406

Bunker, M.D. (1993). Lifting the veil: Ethics bodies, the citizen-critic, and the First Amendment. *Journalism Quarterly, 70*, 98-107. doi:10.1177/107769909307000111

Bunker, M.D. (1995). The corporate plaintiff as public figure. *Journalism & Mass Communication Quarterly, 72*, 597-609. doi:10.1177/107769909507200310

Bunker, M.D. (1996). Have it your way? Public records law and computerized government information. *Journalism & Mass Communication Quarterly, 73*, 90-101. doi:10.1177/107769909607300109

Bunker, M.D. (2000). Trespassing speakers and commodified speech: First Amendment freedoms meet private property claims. *Journalism & Mass Communication Quarterly, 77,* 713-726. doi:10.1177/107769900007700401

Bunker, M.D. (2001). Intellectuals' property: Universities, professors, and the problem of copyright in the Internet age. *Journalism & Mass Communication Quarterly, 78,* 675-687. doi:10.1177/107769900107800404

Bunker, M.D. (2010). The song remains the same: Transformative purpose analysis in fair use law. *Journalism & Mass Communication Quarterly, 87,* 170-183. doi:10.1177/107769901008700110

Bunker, M.D. & Bolger, B. (2003). Protecting a delicate balance: Facts, ideas, and expression in compilation copyright cases. *Journalism & Mass Communication Quarterly, 80,* 183-197. doi:10.1177/107769900308000112

Bunker, M.D. & Calvert, C. (2016). Video games and the right of publicity: The courts drop the ball. *Journalism & Mass Communication Quarterly, 93,* 627-643. doi:10.1177/1077699015610067

Bunker, M.D. & Davis, C.N. (1998). Privatized government functions and freedom of information: Public accountability in an age of private governance. *Journalism & Mass Communication Quarterly, 75,* 464-477. doi:10.1177/107769909807500303

Bunker, M.D., Gates, P.H. & Splichal, S.L. (1993). RICO and obscenity prosecutions: Racketeering laws threaten free expression. *Journalism & Mass Communication Quarterly, 70,* 692-699. doi:10.1177/107769909307000319

Bunker, M.D. & Splichal, S.L. (1993). Legally enforceable reporter-source agreements: Chilling news gathering at the source? *Journalism Quarterly, 70,* 939-946. doi:10.1177/107769909307000418

Bunker, M.D. & Tobin, C.D. (1998). Pervasive public figure status and local or topical fame in light of evolving media audiences. *Journalism & Mass Communication Quarterly, 75,* 112-126. doi:10.1177/107769909807500112

Burrowes, C.P. (1997). Press freedom in Liberia, 1830-1847: The impact of heterogeneity and modernity. *Journalism & Mass Communication Quarterly, 74,* 331-347. doi:10.1177/107769909707400207

Bush, E.M. (1994). Access to governors' records: State statutes and the use of executive privilege. *Journalism Quarterly, 71,* 135-144. doi:10.1177/107769909407100113

Buss, T.F. & Malaney, G.D. (1978). How broadcasters feel about the fairness doctrine. *Journalism Quarterly, 55,* 793-797. doi:10.1177 /107769907805500426

Camaj, L. (2016). Governments' uses and misuses of freedom of information laws in emerging European democracies: FOI laws' impact on news agenda-building in Albania, Kosovo, and Montenegro. *Journalism & Mass Communication Quarterly*, *93*, 923-945. doi:10.1177/1077699015610073

Carter, E.L. (2005). Defining government speech: Recent approaches and the germaneness principle. *Journalism & Mass Communication Quarterly*, *82*, 398-415. doi:10.1177/107769900508200210

Carter, E.L. (2008). Reclaiming copyright from privacy: Public interest in use of unpublished materials. *Journalism & Mass Communication Quarterly*, *85*, 417-434. doi:10.1177/107769900808500211

Carter, E.L. (2016). "Error but without malice" in defamation of public officials: The value of free expression in international human rights law. *Communication Law and Policy*, *21*, 301-322. doi:10.1080/10811680.2016.1184910

Carter, E.L. & Clark, B. (2006). "Arrogance cloaked as humility" and the majoritarian First Amendment: The free speech legacy of Chief Justice William H. Rehnquist. *Journalism & Mass Communication Quarterly*, *83*, 650-668. doi:10.1177/107769900608300311

Chaney, J.D. (1978). New copyright law gives authors little cause for rejoicing. *Journalism Quarterly*, *55*, 515-518. doi:10.1177/107769907805500313

Chang, H. (1994). The news media's right of access to pretrial discovery materials in civil lawsuits. *Journalism Quarterly*, *71*, 145-158. doi:10.1177/107769909407100114

Cobb-Reiley, L. (1992). Not an empty box with beautiful words on it: The First Amendment in Progressive Era scholarship. *Journalism Quarterly*, *69*, 37-47. doi:10.1177/107769909206900105

Cohen, J. & Gleason, T. (1990). *Social research in communication and law*. Newbury Park, Calif.: Sage.

Cohen, J. & Gleason, T. (2006). Charting the future of interdisciplinary scholarship in communication and law. In Reynolds, A. & Barnett, B. (Eds.), *Communication and law: Multidisciplinary approaches to research*. Mahwah, N.J.: Lawrence Erlbaum.

Collins, J. (1987). Copyright and new technology: Implications for audiovisual works. *Journalism Quarterly*, *64*, 94-98, 170. doi:10.1177/107769908706400112

Cooper, R. (1991). Colorization and moral rights: Should the United States adopt unified protection for artists? *Journalism Quarterly*, *68*, 465-473. doi:10.1177/107769909106800317

Copple, R.F. (1987). The dynamics of expression under the state constitutions. *Journalism Quarterly, 64,* 106-113. doi:10.1177/107769908706400114

Day, L.A. (1983). Broadcaster liability for access denial. *Journalism Quarterly, 60,* 246-252, 261. doi:10.1177/107769908306000206

Dennis, E. (1973). Purloined information as property: A new First Amendment challenge. *Journalism Quarterly, 50,* 456-462, 474. doi:10.1177/107769907305000306

Drechsel, R.E. (1987). Media tort liability for physical harm. *Journalism Quarterly, 64,* 99-177. doi:10.1177/107769908706400113

Drechsel, R.E. (1990). The survival of "end run" theories of tort liability after *Hustler v. Falwell*. *Journalism Quarterly, 67,* 1062-1070. doi:10.1177/107769909006700407

Dupagne, M. (1994). Regulation of sexually explicit videotext services in France. *Journalism Quarterly, 71,* 121-134. doi:10.1177/107769909407100112

Eisenberg, T. (2011). The origins, nature, and promise of empirical legal studies and a response to concerns. *University of Illinois Law Review, 2011,* 1713-1738.

Ekstrand, V.S. (2002). Online news: User agreements and implications for readers. *Journalism & Mass Communication Quarterly, 79,* 602-618. doi:10.1177/107769900207900305

Emerson, T. (1970). *The system of freedom of expression*. New York: Random House.

Foley, J. (1973). Broadcast regulation research: A primer for non-lawyers. *Journal of Broadcasting, 17,* 147-158. doi:10.1080/08838157309363680

Francois, W.E. (1980). Copyright law and videotaping of TV programs for classroom use. *Journalism Quarterly, 57,* 5-9. doi:10.1177/107769908005700101

Gajda, A. (2008). What if Samuel D. Warren hadn't married a senator's daughter?: Uncovering the press coverage that led to "The Right to Privacy." *Michigan State Law Review, 2008,* 35-60.

Gillmor, D.M. (1964). Free press versus fair trial: A new era? *Journalism Quarterly, 41,* 27-37. doi:10.1177/107769906404100104

Ginosaur, A. & Krispil, O. (2016). Broadcasting regulation and the public interest: Independent versus governmental agencies. *Journalism & Mass Communication Quarterly, 93,* 946-966. doi:10.1177/1077699015610066

Gleason, T.W. (1991). Killing 'gnats with a sledgehammer'? Case study: Fairness doctrine and a broadcast license denial. *Journalism Quarterly, 68,* 805-813. doi:10.1177/107769909106800421

Gleason, T.W. (1993). The libel climate of the late nineteenth century: A survey of libel litigation, 1884-1899. *Journalism Quarterly, 70,* 893-906. doi:10.1177/107769909307000414

Gray, W.R. (1994). Public and private speech: Toward a practice of pluralistic convergence in free-speech values. *Texas Wesleyan Law Review, 1,* 1-79.

Grimes, T. & Drechsel, T. (1996). Word-picture juxtaposition, schemata and defamation in television news. *Journalism & Mass Communication Quarterly, 73,* 169-180.

Gross, J. (1973). *Rosemont v. Random House* and the doctrine of fair use. *Journalism Quarterly, 50,* 227-236, 277. doi:10.1177/107769907305000203

Hale, F.D. (1975). How reporters and justices view coverage of a state appellate court. *Journalism Quarterly, 52,* 106-110. doi:10.1177/107769907505200117

Hale, F.D. (1992). Free expression: The first five years of the Rehnquist Court. *Journalism Quarterly, 69,* 89-104. doi:10.1177/107769909206900108

Halstuk, M.E. & Chamberlin, B.F. (2001). Open government in the digital age: The legislative history of how Congress established a right of public access to electronic information held by federal agencies. *Journalism & Mass Communication Quarterly, 78,* 45-64. doi:10.1177/107769900107800104

Hanks, W. & Schofield, L. (1986). Limitations on the state as editor in state-owned broadcast stations. *Journalism Quarterly, 63,* 797-801. doi:10.1177/107769908606300418

Hanks, W.E. & Coran, S.E. (1986). Federal preemption of obscenity law applied to cable television. *Journalism Quarterly, 63,* 43-47. doi:10.1177/107769908606300107

Hawkins, E.T. & Hawkins, K.A. (2003). Bridging Latin America's digital divide: Government policies and Internet access. *Journalism & Mass Communication Quarterly, 80,* 646-665. doi:10.1177/107769900308000310

Hightower, P. (1975). Canon 35 remains same despite courtroom tests. *Journalism Quarterly, 52,* 546-548. doi:10.1177/107769907505200322

Hindman, E.B. (1992). First Amendment theories and press responsibility: The work of Zechariah Chafee, Thomas Emerson, Vincent Blasi and Edwin Baker. *Journalism Quarterly, 69,* 48-64. doi:10.1177/107769909206900106

Hoffer, T.W. & Butterfield, G.A. (1976). The right to reply: A Florida First Amendment aberration. *Journalism Quarterly, 53,* 111-116. doi:10.1177/107769907605300117

Hopkins, W. W. (1991). Flag desecration as seditious libel. *Journalism & Mass Communication Quarterly, 68,* 814-822. doi:10.1177/107769909106800422

Hopkins, W. W. (1996). The Supreme Court defines the marketplace of ideas. *Journalism & Mass Communication Quarterly, 73*, 40-52. doi:10.1177/107769909607300105

Hovland, R. & Taylor, R.E. (1990). Advertising and commercial speech since the 1986 *Posadas* case. *Journalism Quarterly, 67*, 1083-1089. doi:10.1177/107769909006700410

Jennings II, J.M. (1982). Is *Chandler* a final rewrite of *Estes*? *Journalism Quarterly, 59*, 66-73. doi:10.1177/107769908205900110

Jones, S. (1994). Unlicensed broadcasting: Content and conformity. *Journalism Quarterly, 71*, 395-402. doi:10.1177/107769909407100212

Kerr, R.L. (2002). Impartial spectator in the marketplace of ideas: The principles of Adam Smith as an ethical basis for regulation of corporate speech. *Journalism & Mass Communication Quarterly, 79*, 394-415. doi:10.1177/107769900207900209

Knudson, J.W. (1996). Licensing journalists in Latin America: An appraisal. *Journalism & Mass Communication Quarterly, 73*, 878-889. doi:10.1177/107769909607300408

Koehler, E.M. (1999). The variable nature of defamation: Social mores and accusations of homosexuality. *Journalism & Mass Communication Quarterly, 76*, 217-228. doi:10.1177/107769909907600203

Kozlowski, D.V. (2011). Toothless *Tinker*: The continued erosion of student speech rights. *Journalism & Mass Communication Quarterly, 88*, 352-373. doi:10.1177/107769901108800208

Kozlowski, D.V., Bullard, M.E. & Deets, K. (2009). Uncertain rights: Student speech and conflicting interpretations of *Morse v. Frederick. Journalism & Mass Communication Quarterly, 86*, 138-156. doi:10.1177/107769900908600109

Lashner, M.A. (1976). Privacy and the public's right to know. *Journalism Quarterly, 53*, 679-688. doi:10.1177/107769907605300411

Lawson, L. (1994). When publishers invited federal regulation to curb circulation abuses. *Journalism Quarterly, 71*, 110-120. doi:10.1177/107769909407100111

Le Duc, D.R. (1973). Broadcast legal documentation: A four-dimensional guide. *Journal of Broadcasting, 17*, 131-146. doi:10.1080/08838157309363679

Leeper, R.V. (1993). Communication law and justice: Brennan's structural-functional theory. *Journalism Quarterly, 70*, 160-171. doi:10.1177/107769909307000118

Lipschultz, J.H. & Hilt, M.L. (1993). First Amendment vs. business orientations of broadcast general managers and news directors. *Journalism Quarterly, 70*, 518-527. doi:10.1177/107769909307000304

Mason, L. (1995). Newspaper as repeater: An experiment on defamation and third-person effect. *Journalism & Mass Communication Quarterly, 72*, 610-620. doi:10.1177/107769909507200311

McCarthy, W.O. (1979). How state courts have responded to *Gertz* in setting standards of fault. *Journalism Quarterly, 56*, 531-539, 693. doi:10.1177/107769907905600310

McCulloch v. Maryland, 17 U.S. 316 (1819).

McLean, D. (1979). Justice White and the First Amendment. *Journalism Quarterly, 56*, 305-310. doi:10.1177/107769907905600211

Mehra, A. (1984). ISKCON court decisions: Setback for proselyting rights. *Journalism Quarterly, 61*, 109-116. doi:10.1177/107769908406100115

Meiklejohn, A. (1961). The First Amendment is an absolute. *Supreme Court Review, 1961*, 245-266.

Middleton, K. (1979). Copyright and the journalist: New powers for the free-lancer. *Journalism Quarterly, 56*, 38-42. doi:10.1177/107769907905600106

Mill, J.S. (2002). "On Liberty," in *The Basic Writings of John Stuart Mill.* New York: Penguin Random House.

Mizuno, T. (2001). The creation of the "free" press in Japanese-American camps: The war relocation authority's planning and making of the camp newspaper policy. *Journalism & Mass Communication Quarterly, 78*, 503-518. doi:10.1177/107769900107800307

Mizuno, T. (2011). Censorship in a different name: Press "supervision" in wartime Japanese-American camps, 1942-1943. *Journalism & Mass Communication Quarterly, 88*, 121-141. doi:10.1177/107769901108800107

Mooradian, K. (1962). The American author and foreign copyright protection. *Journalism Quarterly, 39*, 464-470. doi:10.1177/107769906203900406

Morag-Levine, N. (2013). Facts, formalism and the Brandeis brief: The origins of a myth. *University of Illinois Law Review, 2013*, 59-101.

Najjar, O.A. (1998). The ebb and flow of the liberalization of the Jordanian press: 1985-1997. *Journalism & Mass Communication Quarterly, 75*, 127-142. doi:10.1177/107769909807500113

Nelson, J.L., Lewis, D.A. & Lei, R. (2017). Digital democracy in America: A look at civic engagement in an Internet age. *Journalism & Mass Communication Quarterly, 94*, 318-334. doi:10.1177/1077699016681969

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Nichols, J.E. (1979). The pre-*Tinker* history of freedom of student press and speech. *Journalism Quarterly, 56,* 727-733. doi:10.1177/107769907905600404

Nord, D.P. (1985). The authority of truth: Religion and the John Peter Zenger case. *Journalism Quarterly, 62,* 227-235.

O'Neill, P. (1994). Editorial rights of telephone carriers. *Journalism Quarterly, 71,* 99-109. doi:10.1177/107769909407100110

Office of the UN Special Adviser on the Prevention of Genocide. (2009). *Analysis framework.* Retrived from https://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf

Packer, C. & Gower, K.K. (1997). The persistent problem of media taxation: First Amendment protection in the 1990s. *Journalism & Mass Communication Quarterly, 74,* 579-590. doi: 10.1177/107769909707400311

Parramore, J.R. (1992). State constitutions and the press: Historical context and resurgence of a libertarian tradition. *Journalism Quarterly, 69,* 105-123. doi:10.1177/107769909206900109

Pasadeos, Y., Bunker, M.D. & Kim, K.S. (2006). Influences on the media law literature: A divergence of mass communication scholars and legal scholars? *Communication Law and Policy, 11,* 179-206. doi:10.1207/s15326926clp1102_1

Perkins, M. (2001). Violence against the press in Latin America: Protections and remedies in international law. *Journalism & Mass Communication Quarterly, 78,* 275-290. doi:10.1177/107769900107800205

Podboy, A.M. (2000). The shifting sands of legal research: Power to the people. *Texas Tech Law Review, 31,* 1167-1194.

Preston, I.L. & Johnson, R.H. (1972). Puffery—A problem the FTC didn't want (and may try to eliminate). *Journalism Quarterly, 49,* 558-568. doi:10.1177/107769907204900317

Pritchard, A.D. (2013). Come one, come all into the newsroom? Student publications after *Christian Legal Society v. Martinez*. *Journalism & Mass Communication Quarterly, 90,* 287-307. doi:10.1177/1077699013482905

Pritchard, D. (2009). Rethinking criminal libel: An empirical study. *Communication Law and Policy, 14,* 303-338.

Pritchard, D. & Sanders, C. (1991). Unlicensed broadcasting and the Federal Radio Commission: The 1930 George W. Fellowes Challenge. *Journalism Quarterly, 68,* 823-828. doi:10.1177/107769909106800423

Raaflaub, K.A. (2004). "Aristocracy and freedom of speech in the Greco-Roman world," in *Free Speech in Classical Antiquity*. Leiden: Brill.

Rakow, L.F. (2011). Commentary: Interviews and focus groups as critical and cultural methods. *Journalism & Mass Communication Quarterly, 88*, 416-428. doi:10.1177/107769901108800211

Reader, B. (2012). Free press vs. free speech? The rhetoric of "civility" in regard to anonymous online comments. *Journalism & Mass Communication Quarterly, 89*, 495-513. doi:10.1177/1077699012447923

Redish, M.H. (1982). The value of free speech. *University of Pennsylvania Law Review, 130*, 591-645.

Reinard, J.C. & Ortiz, S.M. (2005). Communication law and policy: The state of research and theory. *Journal of Communication, 55*, 594-631. doi:10.1111/j.1460-2466.2005.tb02687.x

Relly, J.E. (2012). Freedom of information laws and global diffusion: Testing Rogers's model. *Journalism & Mass Communication Quarterly, 89*, 431-457. doi:10.1177/1077699012447921

Reynolds, A. & Barnett, B. (2006). *Communication and law: Multidisciplinary approaches to research*. Mahwah, NJ: Lawrence Erlbaum.

Richards, D.A.J. (1974). Free speech and obscenity law: Toward a moral theory of the First Amendment. *University of Pennsylvania Law Review, 123*, 45-91.

Riley, S.G. & Shandle, J. (1974). Commercial use without consent: Privacy or property? *Journalism Quarterly, 51*, 718-722. doi:10.1177/107769907405100423

Rivera-Sanchez, M. & Ballard, M. (1998). A decade of indecency enforcement: A study of how the Federal Communications Commission assesses indecency fines (1987-1997). *Journalism & Mass Communication Quarterly, 75*, 143-153. doi:10.1177/107769909807500114

Robbins, J.C. (1972a). Deciding First Amendment cases: Part I. *Journalism Quarterly, 49*, 263-270. doi:10.1177/107769907204900206

Robbins, J.C. (1972b). Deciding First Amendment cases: Part II, Evidence. *Journalism Quarterly, 49*, 569-578. doi:10.1177/107769907204900318

Ross, S.D. (1998). "Their rising voices": A study of civil rights, social movements, and advertising in the *New York Times*. *Journalism & Mass Communication Quarterly, 75*, 518-534. doi:10.1177/107769909807500307

Ross, S.D. (2002). Silenced students: The uncertain but extensive power of school officials to control student expression. *Journalism & Mass Communication Quarterly, 79*, 172-187. doi:10.1177/107769900207900112

Rubin, E.L. (1988). The practice and discourse of legal scholarship. *Michigan Law Review*, *86*, 1835-1905.

Schofield, L.B. (1985). First Amendment implications of banning alcoholic beverage ads on radio and TV. *Journalism Quarterly*, *62*, 533-539. doi:10.1177/107769908506200311

Sen, A. (1999). *Development as freedom*. New York: Oxford University Press.

Sherard, R.G. (1987). Fair press or trial prejudice? Perceptions of criminal defendants. *Journalism Quarterly*, *64*, 337-340. doi:10.1177/107769908706400207

Siebert, F.S. (1971). Property rights in materials transmitted by satellites. *Journalism Quarterly*, *48*, 17-25.

Silver, D. (2011). The framers' First Amendment: Originalist citations in U.S. Supreme Court freedom of expression opinions. *Journalism & Mass Communication Quarterly*, *88*, 99-120. doi:10.1177/107769901108800106

Simon, T.F. (1992). The indeterminate future of the First Amendment. *Journalism Quarterly*, *69*, 28-36. doi:10.1177/107769909206900104

Sisk, G.C. (2008). The quantitative moment and the qualitative opportunity: Legal studies of judicial decision-making. *Cornell Law Review*, *93*, 873-900.

Sluiter, I. & Rosen, R. (2004). "General Introduction," in *Free Speech in Classical Antiquity*. Leiden: Brill.

Smith, J.A. (1984). A reappraisal of legislative privilege and American colonial journalism. *Journalism Quarterly*, *61*, 97-103, 141.

Sneed, D. & Stonecipher, H.W. (1986). More freedom for the prison press: An emerging First Amendment issue? *Journalism Quarterly*, *63*, 48-54, 68. doi:10.1177/107769908606300108

Splichal, S.L. & Chamberlin, B.F. (1994). The fight for access to government records round two: Enter the computer. *Journalism Quarterly*, *71*, 550-560. doi:10.1177/107769909407100307

Stempel, G.H. (1987). Update on scale analysis of Supreme Court cases. *Journalism Quarterly*, *64*, 860. doi:10.1177/107769908706400430

Stevens, G.E. (1989). Newsracks and the First Amendment. *Journalism Quarterly*, *66*, 930-933, 973. doi:10.1177/107769908906600425

Stewart, D.R. (2013). When retweets attack: Are Twitter users liable for republishing the defamatory tweets of others? *Journalism & Mass Communication Quarterly*, *90*, 233-247. doi:10.1177/1077699013482913

Stewart, D.R. & Littau, J. (2016). Up, Periscope: Mobile streaming video technologies, privacy in public, and the right to record. *Journalism & Mass Communication Quarterly, 93,* 312-331. doi:10.1177/1077699016637106

Stonecipher, H.W. (1981). Protection for the editorial function. Is First Amendment right being eroded? *Journalism Quarterly, 58,* 363-370. doi:10.1177/107769908105800302

Stoycheff, E. (2016). Under surveillance: Examining Facebook's spiral of silence effects in the wake of NSA Internet monitoring. *Journalism & Mass Communication Quarterly,93,* 296-311. doi:10.1177/1076990166302 55

Tankard, Jr., J.W., Middleton, K. & Rimmer, T. (1979). Compliance with American Bar Association fair trial-free press guidelines. *Journalism Quarterly, 56,* 464-468. doi: 10.1177/107769907905600302

Teeter Jr., D.L. (1992). The First Amendment at its bicentennial: Necessary but not sufficient? *Journalism Quarterly, 69,* 18-27. doi:10.1177/107769909206900103

Thompson, M.E. (1995). The impact of need for cognition on thinking about free speech issues. *Journalism & Mass Communication Quarterly, 72,* 934-947. doi:10.1177/107769909507200416

Thorson, E., Wicks, R. & Leshner, G. (2012). Experimental methodology in journalism and mass communication research. *Journalism & Mass Communication Quarterly, 89,* 112-124. doi:10.1177/1077699011430066

Trager, R. & Dickerson, D.L. (1980). Prior restraint in high school: Law, attitudes and practice. *Journalism Quarterly, 57,* 135-138. doi:10.1177/107769908005700120

Trager, R. & Stonecipher, H.W. (1978). Gag orders: An unresolved dilemma. *Journalism Quarterly, 55,* 231-240, 268. doi:10.1177/107769907805500202

Uhm, K. (2005). The Cold War communication crisis: The right to know movement. *Journalism & Mass Communication Quarterly, 82,* 131-147. doi:10.1177/107769900508200109

Uhm, K. (2008). The founders and the revolutionary underpinning of the concept of the right to know. *Journalism & Mass Communication Quarterly, 85,* 393-416. doi:10.1177/107769900808500210

Unger, R.M. (1983). The critical legal studies movement. *Harvard Law Review, 96,* 561-675.

United Nations Human Rights Committee. (2011). *General comment 34*. CCPR/C/GC/34.

Voakes, P.S. (1998). What were you thinking? A survey of journalists who were sued for invasion of privacy. *Journalism & Mass Communication Quarterly, 75,* 378-393. doi:10.1177/107769909807500212

Volokh. E. (1998). Writing a student article. *Journal of Legal Education*, *48*, 247-269.

Walden, R. (1992). A government action approach to First Amendment analysis. *Journalism Quarterly*, *69*, 65-88. doi:10.1177/107769909206900107

Wallace, R.W. (2004). "The power to speak and not to listen in ancient Athens," in *Free Speech in Classical Antiquity*. Leiden: Brill.

Warren, S.D. & Brandeis, L.D. (1890). The right to privacy. *Harvard Law Review*, *4*, 193-220.

Watkins, J.J. (1975). The status of confidential privilege for newsmen in civil libel actions. *Journalism Quarterly*, *52*, 505-514. doi:10.1177/107769907805500202

Woocher, L. (2006). *Developing a strategy: Methods and tools for genocide early warning. Report prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide*. Retrieved from http://www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf

Wyatt, R.O., Kim, J., & Katz, E. (2000). How feeling free to talk affects ordinary political conversation, purposeful argumentation, and civic participation. *Journalism & Mass Communication Quarterly*, *77*, 99-114. doi:10.1177/107769900007700108

Youm, K.H. (1993). The "wire service" libel defense. *Journalism & Mass Communication Quarterly*, *70*, 682-691. doi:10.1177/107769909307000318

Youm, K.H. & Park, A. (2016). The "right to be forgotten" in European Union law. *Journalism & Mass Communication Quarterly*, *93*, 273-295. doi:10.1177/1077699016628824

Youm, K.H. & Takeichi, H. (1990). Libel law and the press in Japan. *Journalism & Mass Communication Quarterly*, *67*, 1103-1112.

Zick, T. (2014). *The cosmopolitan First Amendment: Protecting transborder expressive and religious liberties*. New York: Cambridge University Press.