

Widener Law Review, Widener University Delaware Law School, presents:



The First Amendment,  
Defamation, and Privacy in  
**Social Media**

Friday, April 7, 2017

8:45 am–3:15 pm

Widener University   
Delaware Law School

*Widener Law Review*, Widener University Delaware Law School, presents  
**THE FIRST AMENDMENT, DEFAMATION, AND PRIVACY  
IN THE SOCIAL MEDIA AGE**

**Friday, April 7, 2017  
8:45 am – 3:15 pm**

**Delaware Law School  
Ruby R. Vale Moot Courtroom  
Main Law Building  
Wilmington, Delaware**

FIVE (5) CLE credits in DE & PA (including one ethics credit).  
NJ attorneys can self-report with Delaware Law's Certificate of Attendance.

**Symposium Agenda**

**8:15 a.m. Registration Check-In**

**8:45 a.m. – 9:00 a.m. Welcome & Introduction**

**Rodney A. Smolla**, Dean and Professor of Law, Widener University  
Delaware Law School

**Andrew P. Stafford**, Editor-in-Chief, *Widener Law Review*; J.D.  
Candidate, May 2017

**9:00 a.m. – 10:30 a.m.**

**First Panel: Defamation, Privacy, and the Current State of Discourse**

Are defamation and invasion of privacy modern “growth industries?” The internet and social media have made our public discourse more robust than ever. Everyone with a connection has a voice. No longer are mainstream media outlets the gatekeepers or the setters of discussion agendas. This is an epoch of democratization, few barriers to entry, virtually universal access, and (for those who choose it), anonymity. Yet this explosion of communication and discourse arguably has a dark side. The quality of public discourse may not increase with the quantity of public discourse. There may be less thoughtfulness, less reflection, less attention to factual accuracy. There may be a channeling tendency, through which like-minded people communicate with like-minded people, with less exposure or authentic dialogue across lines of affinity. Personal attacks, of the sort that tort law had traditionally addressed through actions for defamation or invasion of privacy, may also be on the rise. The first panel will explore these issues, in a wide-open, robust, yet civilized conversation.

**10:30 a.m. – 10:45 a.m. Break**

**10:45 a.m. – 12:15 p.m.**

**Second Panel: The Legal Doctrines that Matter and Whether They Should be Changed**

Defamation is an ancient tort. Invasion of privacy is of newer origins, but has also been part of our legal fabric for nearly a century. There are multiple privacy torts, not all recognized in all jurisdictions: false light, publication of private facts, intrusion, and appropriation / right of publicity. The First Amendment has been interpreted to alter the elements and defenses applicable to many of these causes of action. The stress points in defamation and privacy litigation are familiar. They include such doctrines as defamatory meaning, the distinction between fact and opinion, burdens of proving falsity, the distinction between public and private figures, fault standards, newsworthiness defenses, statutes of limitations, the single publication rule, liability for republication, the fair reports privilege, neutral reportage, and the immunities provided by § 230 of the Communications Decency Act, anti-SLAPP laws, and unmasking rules, as exemplars. What stresses do the internet and social media place on the complex matrix of substantive and procedural doctrines germane to defamation and privacy? In light of those stresses, what doctrines, if any, ought to be adjusted? Should they be adjusted to make recovery easier, or more difficult? This panel, the most “hard law” segment of the symposium, will explore these issues.

**12:15 p.m. – 12:50 p.m. Lunch – Barristers’ Club**

**1:00 p.m. – 2:00 p.m. Distinguished Speaker**

**Speech and Liability in the Global Arena—A Cautionary Tale**

Professor Xiaoxing Xi, Laura H. Carnell Professor of Physics at Temple University, will discuss his experience as a person accused of espionage by the Department of Justice.

**2:00 p.m. – 2:15 p.m. Break**

**2:15 p.m. – 3:15 p.m.**

**Concluding Forum: All the News that is Fit and All the News that Fits**

What insights, observations, or new perspectives and discoveries were revealed in the morning and luncheon sessions? This forum will reflect on the subjects discussed earlier in the day, and invite additional comments on issues that exert enormous influence on the quality of discourse and redress for injury. Among other matters, this panel will explore the role of major social media and search engine providers, such as Facebook, Twitter, or Google; the role of private arrangements to curtail expression, such as settlements that limit discourse or future suits; and any and all other observations on the subject of the symposium, from all the news that’s fit to print to all the news that fits.

**Moderator:**

- **Rodney A. Smolla**, Dean and Professor of Law, Widener University Delaware Law School

**Panel Speakers:**

- **Clay Calvert**, Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project, University of Florida College of Journalism and Communications
- **Erin Daly**, Professor of Law, Widener University Delaware Law School
- **Alan E. Garfield**, Professor of Law, Widener University Delaware Law School
- **Henry R. Kaufman**, Principal, Henry R. Kaufman P.C., New York, New York
- **Ashley Messenger**, In-house Counsel, NPR; Adjunct Professor, American University School of Communication
- **John J. Walsh**, Senior Counsel, Carter Ledyard & Milburn LLP, New York, New York
- **Stephen Wermiel**, Professor of Practice in Constitutional Law, American University Washington College of Law
- **Xiaoxing Xi**, Laura H. Carnell Professor of Physics, Temple University

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**WIDENER UNIVERSITY DELAWARE LAW SCHOOL  
RUBY R. VALE MOOT COURTROOM  
FRIDAY, April 7, 2017**

**Username: social  
Password: media17**

**Course materials are available for download as a pdf at  
[delawarelaw.widener.edu/firstamendmentcle](http://delawarelaw.widener.edu/firstamendmentcle)**

# **BIOGRAPHIES**

## Clay Calvert



Clay Calvert is Professor and Brechner Eminent Scholar in Mass Communication at the University of Florida in Gainesville, where he also directs the Marion B. Brechner First Amendment Project. He teaches both undergraduate and graduate-level courses on communications and media law issues, and he coordinates the joint JD/MA program for the College of Journalism and Communications. Professor Calvert has authored or co-authored more than 130 published law journal articles on freedom of expression-related topics. He is co-author, along with Don R. Pember, of the market-leading undergraduate media law textbook, *Mass Media Law, 19th Edition* (McGraw-Hill), and is author of *Voyeur Nation: Media, Privacy, and Peering in Modern Culture* (Westview Press). Professor Calvert received his J.D. Order of the Coif from the University of the Pacific's McGeorge School of Law and later earned a Ph.D. in Communication from Stanford University, where he also completed his undergraduate work in Communication, earning a B.A. with Distinction. He is a member of the

State Bar of California and the Bar of the Supreme Court of the United States.

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## Erin Daly



Erin Daly is Professor of Law at Delaware Law School. She served as Interim Dean and Vice Dean of the Law School in 2013-2015 and is the Co-Director of the Law School's Dignity Rights Project. Professor Daly has written extensively on comparative constitutional law and transitional justice issues throughout the world. In *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (U. Penn 2012), with a foreword by former President of the Israeli Supreme Court, Aharon Barak, she examines the constitutional law of dignity around the world, including in areas relating to privacy, defamation, freedom of information and expression, and other issues relating to first amendment rights. With Professor Jim May, she also published extensively on environmental constitutionalism (including co-

authored and co-edited volumes from Cambridge University Press and Edward Elgar). Her first book, *Reconciliation in Divided Societies: Finding Common Ground*, (U. Penn 2006, 2010), co-authored with South African scholar Jeremy Sarkin and with a foreword by Archbishop Desmond Tutu, examines post-conflict reconciliation and the extent to which nations can achieve justice, truth, and forgiveness after violent political upheaval. She has also written about defamation law and, in the *Delaware Law Review*, about employee speech protections.

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## **Alan E. Garfield**



Alan E. Garfield is a professor of law at Delaware Law School. He received his Bachelor of Arts, *magna cum laude*, from Brandeis University, and his Juris Doctorate from UCLA School of Law, where he was a member of the UCLA Law Review and the Order of the Coif (top 10%). Prior to joining the Delaware faculty, Professor Garfield worked for three years in the litigation department of Weil, Gotshal & Manges in New York City. He is licensed to practice in California and New York.

Professor Garfield has been honored for his scholarship and teaching. He received the Douglas E. Ray Excellence in Faculty Scholarship Award in both 2006 and 2015, and the Outstanding Faculty Award from the graduating class of 2004. He served as the H. Albert Young Fellow in Constitutional Law from 2005 to 2007 and was a

Distinguished Professor from 2011 to 2014. Professor Garfield has also been a visiting professor at American University's Washington College of Law and Bryn Mawr College, and an adjunct professor at Drexel University School of Law.

Professor Garfield writes and teaches in the areas of Constitutional Law, Copyright, and Contracts. His scholarship has appeared in numerous journals including the *Columbia Law Review Sidebar*, the *Cornell Law Review*, and the *Washington University Law Review*. He has also published op-eds in the *Philadelphia Inquirer* and *The News Journal*, including, since October 2009, a monthly column in *The News Journal* on the Supreme Court. The column, *Bench Press*, received the Delaware Press Association's first place award for a personal opinion column in 2012, 2013, 2014, and 2015, and the first-place award for a personal opinion column in a national competition sponsored by The National Federation of Press Women in 2012.

Professor Garfield is a past chair of the Association of American Law Schools Section on Mass Communication Law. He has also served on the Board of Directors of the Delaware ACLU since 2006 and is currently the Board's President.

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## **Henry R. Kaufman**



Henry Kaufman, the principal of Henry R. Kaufman, P.C., has been a nationally-recognized leader of the publishing and media law bar for more than three decades. Mr. Kaufman began his publishing law career as General Counsel of the Association of American Publishers where he represented the book publishing industry on both First Amendment and copyright law issues, including the latter stages of passage and initial implementation of the Copyright Reform Act of 1976.

While at AAP Mr. Kaufman helped to found, and thereafter served for fifteen years as General Counsel of, the Libel Defense Resource Center/LDRC (now known as the Media Law Resource Center/MLRC), a

national coalition of media companies, media and journalism organizations and law firms focused on advancing the legal rights and interests of the media in the United States, in particular as regards their First Amendment rights.

After leaving the LDRC, Mr. Kaufman joined SESAC, Inc., the music performing rights licensing company, where he served as Senior Vice President-General Counsel from 1996 to 1999. At SESAC he dealt with individual and industry-wide licensing transactions, copyright infringement litigation and copyright arbitrations, and legislative matters in connection with the Digital Millennium Copyright Act of 1999, the Copyright Term Extension Act and the Fairness in Music Licensing Act.

Mr. Kaufman's current practice focuses on litigation and transactional matters for book, newspaper and online publishers, authors, artists, film and music industry clients, higher education and other individual, corporate and law firm clients covering a range of both First Amendment and Intellectual Property law matters, including defamation, privacy, publicity, commercial speech, access, reporter's privilege, prior restraint, obscenity and indecency, and copyright, trademark, tradename, unfair competition, trade secrets, misappropriation and "hot news." He also maintains an active pre-publication and pre-broadcast review practice.

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## Ashley Messenger



Ashley Messenger is Senior Associate General Counsel at NPR and an adjunct professor at American University. At NPR, she oversees all legal issues related to content, including anything related to news, music, programming, podcasts, permissions, licensing, and social media. She previously served as editorial counsel to *U.S. News & World Report* and was the McCormick-Tribune Fellow at the Reporters Committee for Freedom of the Press. Early in her career, she was a commercial radio talk show host (KTEG-FM, Albuquerque) and worked at an alternative newsweekly.

She teaches graduate and undergraduate communications law classes at American University, and also taught First Amendment law at the University of Michigan Law School. She is the author of a textbook, *A Practical Guide to Media Law*, as well as numerous law review articles.

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## Rodney A. Smolla



Rod Smolla is Dean and Professor of Law at the Delaware Law School of Widener University, in Wilmington, Delaware. He was previously the 11<sup>th</sup> President of Furman University, in Greenville, South Carolina, the Dean of the Law School at Washington and Lee University Law School, the Dean of the University of Richmond Law School, the Director of the Institute of Bill of Rights Law at the College of William and Mary, and Senior Fellow and Project Director of the Washington Annenberg Program of Northwestern University. He has also been a faculty member at the DePaul, University of Illinois, and University of Arkansas law schools, and a visiting professor at the Duke, University of Georgia, University of Indiana, Denver University, and University of Melbourne law schools. As an educator, he has been an advocate for experiential learning, including greater emphasis on helping law students develop skills relating to counseling, problem-solving, negotiation, drafting,

advocacy, civic engagement, pro bono service, legal ethics, and professionalism. He has emphasized diversity and community outreach and important institutional missions in higher education and legal education.

Smolla is a nationally-known scholar on matters relating to constitutional law, civil rights, freedom of speech, and mass media, particularly matters relating to libel and privacy. He is the author of five multi-volume legal treatises, all published by Thomson Reuters, which are updated twice annually: *Law of Defamation*; *Smolla and Nimmer on Freedom of Speech*; *Rights and Liabilities in Media Content, Internet, Broadcast, and Print*; *Federal Civil Rights Acts*; and, *Law of Lawyer Advertising*. He is also author of *The First Amendment: Freedom of Expression, Regulation of Mass Media, Freedom of Religion* (Carolina Academic Press 1999) (a law school casebook); and co-author of *Constitutional Law: Structure and Rights in Our Federal System* (6th Edition, 2010, with Dean William Banks). He is the editor each year of the *First Amendment Law Handbook*, published annually by Thomson Reuters. He was also editor of *The Copyright Law Anthology* published by Thomson Reuters. He is also the author of many trade and university press books, including *Suing the Press: Libel, the Media, and Power* (Oxford University Press 1986) (won ABA Silver Gavel Award Certificate of Merit); *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press 1988); *Free Speech in an Open Society* (Alfred A. Knopf 1992) (winner of the William O. Douglas Award); *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book* (Crown Publishers 1999) (made into a television movie by FX, with Timothy Hutton playing the role of Rod Smolla); *The Constitution Goes to College* (New York University Press 2010). He was editor of *A Year in the Life of the Supreme Court* (Duke University Press 1995) (won ABA Civil Gavel Award). Smolla has published over 100 articles in law reviews and other publications.

Smolla has served as Chairman of the Association of American Law Schools Section on Defamation and Privacy Law, as Chairman of the Association of American Law Schools Section on Mass Communications Law, as a member of the American Bar Association Advisory Committee to the Forum on Mass Communications Law, and as a member of the First Amendment Advisory Board to the Media Institute, as the Director of the Annenberg Washington Program Libel Reform Project, and author of the Annenberg Libel Reform Report that emerged from the blue ribbon task force on that project. He served as a Director of the Media General Corporation, and as a Director of the American Arbitration Association. In 2011, he was appointed by Governor Nikki Haley to serve as a Commissioner on the South Carolina Commission of Higher Education, which included within its mission the oversight of all of South Carolina's public universities and colleges, and licensure and programmatic approval for all public and private educational programs within the state.

Smolla has been and remains an active litigator. He has participated as counsel or co-counsel in litigation matters in state and federal courts throughout the nation, and is a frequent advocate, having presented oral argument in numerous state and federal courts, including the Supreme Court of the United States.

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## **John J. Walsh**



John J. Walsh is a Senior Counsel at the New York City firm of Carter Ledyard and Milburn LLP. He has been practicing media law for over 35 years, almost always as a litigator for libel plaintiffs in trial and appellate courts, and as counselor to and advocate for individuals and businesses subjected to false and defamatory publications in newspapers, magazines, television broadcasts, books, and digital media of all types. He is one of the best known media law attorneys in the country as a result of the well-known cases in which he has appeared for prominent individuals and entities. Much of his practice involves representation of clients in pre and post-publication negotiations with major media companies to argue for fair and accurate reporting or to obtain corrections, clarifications, and retractions when false information has been published.

Mr. Walsh received his B.B.A. magna cum laude from Fairfield University, his J.D. from Boston College Law School, and is a member of the Order of the Coif. He has been a frequent guest on television talk shows, and as a speaker and panelist on media law conferences such as the Forum on Communications Law of the American Bar Association. He is a member of the Bars of New York, Connecticut, several federal District and Circuit Courts, and of the Supreme Court of the United States.

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## **Stephen Wermiel**



Steve Wermiel is a professor of practice at American University Washington College of Law where he teaches constitutional law, First Amendment law, and a seminar on the Supreme Court. Before becoming a professor, he was a newspaper reporter for 20 years, including 12 years as Supreme Court correspondent for the Wall Street Journal. He also worked for the Boston Globe for 8 years. He graduated from Tufts in 1972 with a BA in political science, and from Washington College of Law in 1982 with a JD.

He is the co-author of two books, *Justice Brennan: Liberal Champion*, published in 2010, and *The Progeny: Justice William J. Brennan's Fight to*

*Preserve the Legacy of New York Times v. Sullivan*, published in 2014. He has authored many law review articles and writes a regular online column for SCOTUSblog explaining the Supreme Court for law students. He is an active member of the American Bar Association where he has worked for sixteen years in the Section of Civil Rights and Social Justice, of which he is a past chair. He is president-elect of the Tufts University Alumni Association.

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## **Xiaoxing Xi**



Xiaoxing Xi is Laura H. Carnell Professor of Physics at Temple University, and was the interim chair of the Physics Department from 2014 - 2016. Prior to joining Temple in 2009, he was a Professor of Physics and Materials Science and Engineering at the Pennsylvania State University. He is a renowned expert on thin film materials and is an author of over 300 journal articles and 3 U.S. patents in the area of thin films of high-temperature superconductors and magnesium diboride. He is a Fellow of the American Physical Society.

Born in Beijing, China, Professor Xi received his Bachelor of Science and PhD in Physics from Peking University. He moved to the United States in 1989, and is a naturalized American citizen. In 2015, the U.S. government charged and arrested Professor Xi for sharing U.S. company technology with China. The charges were later dropped when they were proven wrong. Since then, he has spoken out to encourage the active participation of Asian Americans and scientists in the democratic process.

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