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Fighting Back Against Information Shutdown, At Home and Abroad

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It's going to be a secret war on terrorism. The president has said so. Much of what the government will do, in the Middle East, in Central Asia, and even here at home, in the name of the American people, will be kept from us.

Up to a point, even the most ardent Freedom of Information advocate can accept that some secrecy is essential. A covert operation can't be conducted in public. No journalist would want to be told that a news story revealing operational details led to the death of American troops. And if experience is any guide, the public will tolerate, even embrace, the military's insistence on secrecy, at least in the short term.

What's more, it won't be easy to persuade the public that the government is being secretive at all. After all, not a day goes by without news conferences, photo ops, and statements from various officials. But just because the government is saying it doesn't mean we should be reporting it without questioning it. Journalists must always be on alert to the possibility that they are being used as a public relations tool, or even as a conduit for disinformation. Never is that more important in times of crisis, or war.

What about coverage of military operations overseas? Assuming the press is "allowed" to join troops abroad, it may find itself hobbled by one of the unfortunate legacies of the Persian Gulf War: the Statement of Principles brokered by media representatives and the Pentagon in 1992. (Of course, this also assumes that the Pentagon intends to follow these principles.)

The Statement of Principles was intended to rectify some of the more egregious restrictions imposed on the media during the Gulf conflict. It proclaims that "open and independent reporting" will be the "principal means" of combat coverage. The controversial press pools supposedly will be deployed only when they are the sole feasible means of access.

All very well, as far as it goes. But who will those "open and independent reporters" be? They will first have to receive credentials from the military. They also will be required to abide by an as-yet-undefined

set of security ground rules, or face expulsion from the battlefield. In light of new technology that permits instantaneous transmission of news reports, will the military be prepared to take the risk that previously untried reporters, unaffiliated with traditional news organizations, will respect operational security? And even for those who obtain credentials, the Principles already anticipate that there will be times when "electromagnetic operational security" will justify restrictions on communications systems used by the media to dispatch their stories.

These types of constraints have the practical effect of accomplishing what the Pentagon failed to secure when the Principles were drafted: a concession from the media representatives to submit to prior "security review" of their news material. If the military control who is allowed to cover the war, and retain the authority to shut down the means of filing the stories those reporters write, then they also control the story.

But I don't think we are powerless here. It is true that the courts have not been sympathetic to the various legal challenges brought against restrictions imposed during the Grenada invasion and the Persian Gulf War. But unlike those conflicts, President Bush has warned the American public that the "campaign against terrorism" will not be a quick fix. Accordingly, the military need the media as much as the media need the military. They need us to transmit information because the public will not support a sustained conflict for long if it isn't allowed to know what is going on from an independent source. We should be able to bargain, and bargain hard, for the coverage the public deserves and will eventually demand.

Failing that, we must at least be certain that our readers and viewers know that the "news" they are receiving was not gathered under *our* usual ground rules. Although this may seem self-evident to us in the industry, it is by no means obvious to the public. Many consumers of news had no idea how shackled the media were during the Gulf War. This time, we must make clear, repeatedly, exactly what obstacles are impeding us from providing our readers and viewers with the

News Council Rules On Complaints Brought by Government Bodies

During the summer of 2001, the Minnesota News Council (MNC) heard two complaints brought by government bodies against local newspapers. The Ely City Council submitted a complaint against the *Ely Echo* regarding an April 30 story on a closed meeting held by the council. The Winona County Board of Commissioners filed a complaint against the *Winona Post*, claiming that one of its editorials unfairly accused the board of conducting an illegal meeting and that the newspaper's response to the board's complaint was inadequate. In the *Ely Post* case, MNC members unanimously voted in favor of the paper; in the *Winona Post* case, the MNC narrowly sided with the Winona County Board of Commissioners.

On January 9, 2001 the Winona Committee of the Board convened after a regular Winona County Board meeting. According to the complaint, the *Winona Post* was sent a notice that these meetings would be held. During the committee meeting, exploration of the purchase of a former school building for extra office space was authorized. The story ran in another newspaper, *The Winona Daily News*, in an article that did not make entirely clear whether the decision to buy the school was finally authorized or not at the Committee's meeting. The *Winona Post's* editor John Edstrom interpreted it to mean that the acquisition had been approved. When the board chair explained that this was not the case, that the acquisition was not finalized, the editor concluded that if any such decision (to buy the school) had been made, it would have been at an illegal, closed meeting.

In his editorial which ran on January 14, Edstrom wrote: "The Chairman of the County Board, Dave Stoltman, denies that any such decision was made [to buy the school]. And well he should, since it would probably have been illegal to do so at a meeting that almost certainly took place in violation of Minnesota's open meeting laws." After the editorial, the board wrote the *Winona Post* seeking a public correction to clear the board's members of the accusation that they had held an illegal meeting. In his editorial of January 21, Edstrom wrote that he never made a direct assertion that an illegal meeting had taken place.

On June 21, 2001, the MNC voted 10-9 that the *Winona Post's* editorials unfairly accused the County Board of conducting an illegal meeting. Council member Don Shelby argued that the tense of the word "took" instead of "would have taken" in the editorial suggested that such a meeting actually did take place, and was not, as Edstrom argued, "a hypothetical situation." In its press release, the MNC stated it subscribes to the standard of the National Council of Editorial Writers, which says that if an editorial includes facts, those facts must be accurate. The MNC also decided 12-7 that the newspaper's response to initial requests for retractions had been inadequate.

The *Winona Post* did not take part in the hearing, because it said that the situation had nothing to do with ethics or facts, but was personal and political in nature. In a letter dated May 31 and sent to MNC Executive Director Gary Gilson, Edstrom stated that he had never directly accused the board members of holding a closed or illegal meeting: "The decision [to buy the school] was never made in the first place...but if it were, it would have had to have been made at a meeting unknown to the Chairman [since he denied such a decision being made], the public, and me, almost certainly illegal, had it taken place, which I never asserted." Edstrom also argued, "Having no status in law, the News Council can derive authority to sit in judgement only from the consent and voluntary participation of the parties involved, which it certainly does not have from me or my paper." In the same letter he also stated that the News Council is too willing to take claims and expressed concern that "government types hoping to avoid scrutiny in the press are catching on to that."

There is indeed a concern that government agencies and politicians, who bear a very heavy burden of proof when taking a press outlet to court, would exploit the MNC to harass the media. Of course, media outlets can always decline to participate, but the hearings will go on without them. When asked for a reaction, Gilson dismissed those concerns. "Our records show that in the past four years, covering about 25 cases, only four or five came from government bodies." He also referred to a later case, *Ely City Council v. Ely Echo*, to make the point that the MNC cannot be exploited by government agencies to harass the media.

In that case, the Ely City Council complained that the *Ely Echo* had acted unethically by publishing a truthful account of a closed door meeting of the Ely City Council with its attorney involving a strategy for reducing a possible fine from the Environmental Protection Agency. The council complained that the language used in the article implied that the meeting was illegal and inaccurately suggested that the city was not threatened with a lawsuit, which was the justification for holding the meeting behind closed doors because of attorney/client privilege. The MNC, in a hearing on August 16, unanimously sided with the newspaper on the first count, and also ruled in favor of the newspaper on the other two counts (13-1 and 11-3 respectively), in what Gilson calls "a ringing endorsement of the independence of the press."

Rather than considering a MNC complaint from a government agency as some kind of "press harassment," Gilson asks, why not consider such an experience "as a great opportunity for the press to educate the public — and the complainant — about the role of a free press in a democracy?" Gilson hopes that newspapers would continue to take this opportunity to inform the public about their decision-making processes and to "explain their value to the community by participating in News Council proceedings."

—BASTIAAN VANACKER
RESEARCH ASSISTANT

There is a concern that government agencies and politicians would exploit the Minnesota News Council to harass the media.

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J. Edward Gerald Remembered

University of Minnesota's School of Journalism and Mass Communication Professor Emeritus J. Edward Gerald passed away on July 18, 2001. The following appreciation by Professor Emeritus and former Silha Professor and Silha Center Director Donald M. Gillmor originally appeared in the Spring 2000 issue of Media Ethics. It is reprinted with permission.

There are no scholarships in his name. Nor does a lecture series honor him. His name is unconnected to any never-to-be-forgotten conference. No anthology of his writings has appeared. For all intents and purposes he is forgotten.

How soon we forget. J. Edward Gerald is alive at 94, devoted to an ailing spouse, living what he personified, and as intellectually lucid as ever. A seminal thinker, Gerald was the first journalism educator to securely connect general media law and its torts to the broader constitutional protections of speech and press. His dissertation for a Ph.D. in political science at the University of Minnesota was published (by the University of Minnesota Press, like most of his works) in 1948 as *The Press and the Constitution 1931-1947*, a search for an ethical/legal system seeking freedom, justice and fairness in the period between the Minnesota Gag Law and revision of the Wagner Act.

Social justice, both personal and public, has always been a fulcrum of Gerald's concerns. He wrote from a thoughtful and deeply considered liberal position, observing acutely that government may intervene in private affairs "on the theory that freedom is not a passive force but must be socially directed to carry out the principles of the First and Fourteenth amendments."

No apologist for those who owned and controlled the media, Gerald often wondered whether newspaper publishers broadly understood "the real nature of their rights." He demonstrated how, in spite of publisher objections, the courts required newspapers to be subject to nondiscriminatory laws of general application in such areas as labor relations, taxation and antitrust.

Perhaps Gerald's most memorable example of stretching the free press clause to protect unpopular speech in that early book was his final chapter on the struggles of Jehovah's Witnesses against the devious ways of censorship. That struggle culminated in the 1938 U.S. Supreme Court ruling in *Lovell v. Griffin* that distribution of words on paper was complementary to free press and a basic right of citizenship. Later cases would fine tune this right.

Carrying forward his examination of the limits and consequences of government intervention in matters of the press was *The British Press*

Under Government Economic Controls (1956), written with the help of a Guggenheim grant in London in 1953-1954.

Although viscerally opposed to the extension of newsprint control on the British press in wartime, and then long beyond the cessation of hostilities, coupled with the government's reluctance to explain to the populace why such economic controls were necessary, Gerald nevertheless faults publishers for going along with the system for reasons of profit rather than principle. Controls on newsprint meant less competition for those already on top. When controls were lifted the situation worsened; weaker publications disappeared in droves. Gerald wrote prophetically: "Since it is increasingly clear that economic competition can no longer be relied upon as the principle means of enforcing diversity of ideas and information which enter the 'marketplace of thought,' it is perhaps a time for American newspapers to consider economic consultation on a national and regional level." (emphasis added)

Revolutionary for its time? Perhaps. Gerald was intimating a paradox of press freedom. While the First Amendment said "hands off" in its baldest interpretation, publishers couldn't play the game alone; public intervention could be therapeutic if not curative. Gerald had in mind the British Press Council, first recommended by an unfriendly British Labour government through a Royal Commission. Here was a means, perhaps, for developing a pantheon of ethical precepts and standards of social responsibility. "A press without values," he wrote, "even though it has political and economic freedom, might not deserve a preferential place in society."

His *The Social Responsibility of the Press* (1963) was a logical next step. "Restraint of trade in political ideas," he observed, "no matter how high-minded and patriotic the monopolist, means - in the parlance of the market - bankruptcy for democracy." - an anticipation of Robert Entman's *Democracy Without Citizens: Media and the Decay of American Politics* (1989) and Robert McChesney's *Rich Media, Poor Democracy* (1999). Gerald in 1963 essentially called for

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Gerald was the first journalism educator to securely connect general media law and its torts to the broader constitutional protections of speech and press.

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Journalists' Records Subpoenaed In Separate Cases

Two recent cases have raised concern in the journalistic community about the Justice Department's policy on issuing subpoenas against journalists. Since July 20, Vanessa Leggett has been in the Federal Detention Center in Houston, Texas, for failure to turn over subpoenaed interview notes and tapes that could identify some of her confidential sources to a federal grand jury investigating a four-year-old Houston murder. No other American journalist has been jailed as long for refusing to identify a confidential source. And in May, the Justice Department subpoenaed the telephone records of an investigative journalist, John Solomon, seeking to learn the source of leaked material from a political corruption investigation.

Vanessa Leggett, a 33-year-old aspiring writer, assistant professor and former private investigator in Houston, Texas, claims to have been working on a book about the 1997 murder of Doris Angleton. Robert Angleton, Doris' husband, was accused and acquitted on state charges of hiring his brother to shoot his wife. Leggett had conducted extensive research on the case; she had over 200 hours of taped interviews with Roger Angleton, Robert's brother and the alleged murderer, who committed suicide while awaiting trial. She had also interviewed a number of other witnesses regarding the case. When a Houston grand jury tried to make its case against the brothers, Leggett shared her materials with prosecutors, including the taped conversations. She was subpoenaed but never called to testify for the grand jury.

After the state court acquittal, federal investigators started working on the case and demanded that Leggett turn over all her notes and tapes from the past four years, including originals, and to testify before a grand jury about her sources. Leggett, unwilling to violate the confidentiality agreements she had made with her sources as well as face the potential of losing four years of research, refused. On July 6, Leggett failed to quash the subpoena against her and on July 20, she was jailed on contempt charges.

The Reporters Committee for Freedom of the Press, the Society of Professional Journalists, the American Society of Newspaper Editors and the Radio-Television News Directors Association filed an *amicus* brief supporting the reversal of the contempt order. A motion by 20 other media organizations to join the brief after it was filed was denied by the court. On August 17, 2001, the U.S. Court of Appeals in Houston (5th Cir.) upheld the contempt citation. In its unpublished opinion, the court argued that reporters have no privilege against grand jury subpoenas. This ruling mooted the prosecutors' claim that the reporter's privilege did not apply to Leggett, who did not yet have a publisher for her book.

Although Leggett's status as a journalist might not have been relevant to the Court of Appeals, the Justice Department has guidelines stating that the approval of the Attorney General is required in order to subpoena a reporter. According to the Reporters Committee for Freedom of the Press, a spokesperson for the Attorney General disclosed that Leggett is not considered a journalist by the Justice Department, implying that no special approval from John Ashcroft is needed to subpoena her.

However, in the United States, unlike in many other countries, there is no government licensing of journalists. A journalist is anyone who is engaged in journalistic activities, irrespective of the fact that he or she is a member of a large media organization or is a published author. There appears to be no question that Leggett's research was "newsgathering." Despite the fact that she had previously worked as a private investigator, together with her limited track record as a published writer, she claims to have been engaged in investigative reporting: she was gathering news and had the intention to disseminate the news to the public in the form of a book. These are the requirements that constitute the test the Fifth Circuit said it would follow to determine if a person is a journalist entitled to invoke a privilege.

Some commentators have been skeptical of the media's support for someone who simply asserts that she is a journalist. Others have argued that independent journalists like Leggett need support since they are not backed by powerful media organizations, and are thereby more vulnerable to this type of subpoena. The Freedom Forum argued that it is no coincidence that the federal officials subpoenaed Leggett instead of CBS's *48 Hours*, which was also investigating the case. It is doubtful that CBS would have been served with a "catch all" subpoena demanding all its materials.

At the time the *Bulletin* went to press, Leggett was still in jail for refusing to turn over materials that would reveal her confidential sources. According to the *Los Angeles Times* and the *New York Times*, Leggett potentially faces as much as 18 months of jail time. Leggett's attorney has asked for a rehearing before the entire Fifth Circuit.

On the heels of the Leggett case, it was revealed that the Justice Department had subpoenaed the telephone records of AP investigative reporter John Solomon the previous May.

Solomon was researching a story on alleged corruption involving Sen. Robert Torricelli (D-NJ), and had reported details about a wiretap operation leaked to him by investigators. On May 14, the Justice Department, eager to find the leak, had subpoenaed all records of Solomon's incoming and outgoing calls between May 2 and May 7 from his telephone company. Not until August was Solomon informed of the subpoena.

Department of Justice guidelines state that subpoenas seeking journalists' phone records should only be issued when the information sought is essential to the investigation and after the journalist has been given a chance to contest the subpoena, except in rare cases. Those guidelines do not seem to have been followed here. The subpoena has also raised some eyebrows in Washington. On September 4, Senator Grassley (R-Iowa) wrote a letter to the Attorney General, demanding an explanation for the Solomon subpoena, calling it "a matter of great concern." In his letter, Grassley requested a detailed account of the decision-making process that had led to the issuing of the subpoena.

Despite the fact that the Department has stated that it has not changed its guidelines, this case and the Leggett case are alarming for media organizations and raise questions about the First Amendment commitment of the new administration at the Department of Justice.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

These cases raise questions about the First Amendment commitment of the new administration.

War Against Terrorism Means New Challenges For News Media

Responding to the events of September 11, 2001, the White House and other governmental agencies have made requests and, in some instances, placed restrictions on the media and American citizens regarding speech and information. Examples of those restrictions and requests include:

- The White House asked news outlets to stop airing tapes produced by Osama bin Laden and his supporters, speculating that the Al-Qaeda terrorist network might be using the footage to send coded messages to other terrorists. ABC, CBS, CNN, NBC and Fox networks agreed that they would not broadcast Al-Qaeda's transmissions without first screening and possibly editing them. However, many American cable companies carry overseas networks, such as the BBC and Deutsche Welle, which are not bound by such restrictions. In addition, satellite television is available nationwide, and provides access to foreign programming.
- Some government organizations and non-government organizations have pulled "sensitive" information from their Web sites. Entities which modified or deleted material from their sites include the Nuclear Regulatory Commission (which contained coordinates of the nation's 103 commercial nuclear reactors); the Environmental Protection Agency (which pulled reports on chemical plants); the Centers for Disease Control and Prevention (which removed a report about security at chemical plants); the Federation of American Scientists (which had posted diagrams and photos of U.S. intelligence facilities); the U.S. Office of Pipeline Safety (which provided mapping software and pipeline data; it is now restricted to use by industry and government officials); Irish Republican Activist Radio (which suspended operations out of fear that its assets would be seized if it was accused of supporting terrorism). Twenty-one journalism organizations, including the Society of Professional Journalists, the Radio-Television News Directors Association and the Poynter Institute have criticized the action to pull information from Web sites, many of which were unannounced.
- Knight Ridder agreed to delay publication of a story reporting that special operations units had secretly entered Afghanistan, at the request of the Pentagon.
- President Bush warned Congress that if its members leak sensitive war information to the press, only a handful would be allowed access to such information. Subsequently, he closed briefings to all but eight members of Congress. The president later revised his position when Rep. Tom Lantos (D-Calif.) reminded him that the State Department is required by law to keep House and Senate committees on foreign relations "fully and currently informed."
- The Pentagon has requested that defense contractors not release information about the weapons they make.

- The State Department attempted to block the Voice of America from broadcasting an interview with a Taliban official, saying that VOA should not be "broadcasting the voice of the Taliban." The interview was finally aired, with minor revisions. The *Washington Post* wrote in an editorial on September 25 that the broadcast had occurred, "following an outcry from VOA journalists and others, who pointed out that the credibility, not propaganda, is the real strength of [its] broadcast service...."
- Bill Maher, host of television's "Politically Incorrect" talk show, was publicly scolded by White House spokesman Ari Fleisher for his controversial comments during a broadcast. Maher had said: "We have been the cowards, lobbing Cruise missiles from 2,000 miles away. That's cowardly. Staying in the airplane when it hits the building, say what you want about it, it's not cowardly." Fleisher's comment following Maher's broadcast was: "There are reminders to all Americans that they need to watch what they say, watch what they do. This is not a time for remarks like that. There never is." Maher later apologized for his remarks.
- FBI agents turned to the main Internet providers – Hotmail, AOL, Earthlink, etc. – asking for information on possible e-mail exchanges between the terrorists. The Freedom Forum's Web site reported that the Paris-based Reporters sans Frontieres stated that the Internet providers "fully collaborated with the American secret services."
- Helicopters and other news aircraft were grounded nationwide. The ban limited news organizations' ability to gather information about their local communities at a time when the public was particularly concerned about safety. Additionally, the ban was specific to news operations, allowing other aircraft to fly without restriction, and did not distinguish between sensitive and non-sensitive geographic areas. Thus far in American law, restrictions of general applicability are not seen to be in violation of the First Amendment. These restrictions, however, do single out the press, and for that reason are problematic.
- The Bush administration has declined to release examples of evidence proving that Osama bin Laden was behind the September 11 attacks on the World Trade Center and the Pentagon. A White House spokesman said that the evidence must be kept confidential as it will be going to a grand jury, which operates in secret. In addition, the information was derived from classified intelligence material.
- Attorney General John Ashcroft asked congressional leaders to enact laws that would give U.S. law enforcement agencies permission to conduct "roving wiretaps," tap phones on the basis of the person who is using them. Existing laws grant surveillance to a particular phone but require permission to be sought anew for each line that tapped.

The Department of Defense has posted on its Web site (see http://www.defenselink.mil/news/Sep2001/t09302001_t0928asd.html) the transcript of a meeting held by the Assistant Secretary of Defense Public Affairs with presenter Victoria Clarke and Media Pool Bureau Chiefs. The

The White House and other governmental agencies have made requests and placed restrictions on the media and American citizens.

Ohio Man Jailed For Diary Contents

In early July, an Ohio man, 22-year-old Brian Dalton, was sentenced to serve ten years in prison for writing about his sexual fantasies in his diary.

Already convicted in 1998 on charges of possessing photographs of child pornography, Dalton had served several months of jail time before being released on probation. His probation included homework assignments he was required to complete as part of his sex-offender treatment program. When the assignments were not completed as directed, he was arrested again for failing to comply. His parents, who had gone to clean his apartment in his absence, discovered the diary. They turned the diary over to authorities, hoping that their son's parole would be revoked for a year or two, enabling him to receive extensive sex-offender treatment in prison. The *Columbus Dispatch* reported that Michael and Sarah Dalton have said that their decision might not have been the wisest choice, but they felt that it was morally the best thing to do.

The contents of the diary describe Dalton's fantasies involving three children – two of them his cousins – ages 10 and 11. Dalton's diary described placing them in a cage in his basement, and detailed how the children were abducted, subsequently raped and tortured. When Christian Somis, an assistant county prosecutor in Franklin County, read portions of the diary aloud to a grand jury, he was asked to stop after only two pages due to the disturbing content of the diary. Reportedly, one of the female jurors was in tears.

No proof has been discovered, however, that anything Dalton wrote in his diary was related to actual events. His parents have questioned their nieces, Dalton's cousins, who were portrayed in the book, and neither of them reported that Dalton has ever molested them. Police investigations have turned up no additional evidence to support the claims that anything in Dalton's diary is factual.

Dalton initially pled guilty in order to obtain a dismissal on a second pandering charge and in hopes of receiving a lighter sentence. Reportedly, Dalton was also concerned that if the diary were entered into evidence at trial, its contents would become public and further embarrass him and his family.

But alarmed that the charges against Dalton violated First Amendment rights, the American Civil Liberties Union (ACLU) offered to challenge them on Dalton's behalf. However, a motion filed by Dalton's attorney, Isabella Dixon, to withdraw Dalton's guilty plea was denied by Franklin County Judge Nodine Miller. According to the Associated Press, the judge said that Dalton had not demonstrated that "manifest injustice" had taken place. Further, Dalton had failed at the time he pled guilty to question the constitutionality of the law, and competent attorneys had represented him. In a memorandum, prosecutors argued, "The record contains no indication that the defendant

was confused about the nature of the plea, the rights being waived or the possible sentences.... If the defendant was primarily concerned about receiving treatment, then he failed to demonstrate that while on probation, because he repeatedly failed to properly seek, obtain, and participate in their sexual-offender treatment plan." The memorandum further stated that a defendant cannot withdraw a plea "merely because he changed his mind."

Because Dalton has not been allowed to change his plea, the case seems to be concluded. However, those concerned with freedom of speech rights have raised their voices against the charges facing Dalton. There are calls to declare the Ohio law under which Dalton has been convicted unconstitutional. Passed in 1989, the law bans possession of obscene material that involves children. However, the law was challenged before the Supreme Court in 1990, and the high court upheld it.

But in a story appearing in the July 25, 2001 *Washington Post*, Raymond Vasvari, legal director of the ACLU in Ohio, says that the Ohio law is a throwback to the "bad tendency" theory, which the Supreme Court abandoned 30 years ago. The "bad tendency" theory holds that the mere possession of pornography incites its possessor to commit illegal sexual acts. But that standard was supplanted in 1969 in the *Stanley v. Georgia* case. That case led to a legal test requiring that the obscene material present a clear and imminent danger to children. The *Washington Post* story quoted Vasvari as saying, "For 30 years the bad-tendency theory has been dead, and this [the Dalton case] is an attempt to resuscitate it. They want to punish people for what might happen and not what happened. They are criminalizing a man's thoughts just because he got caught putting those thoughts into his private diary."

According to civil libertarians, two key constitutional issues regarding obscenity law could come into question if Dalton is allowed to reverse his plea. First, there is the question of whether child pornography is limited to images. According to Ohio's pandering laws, child pornography includes "any obscene material that has a minor as one of its participants or portrayed observers." Generally, laws against child pornography are enacted primarily to protect children. Gary Daniels, spokesman for the National Coalition Against Censorship, also quoted in the July 25 *Washington Post* article, said that images of children engaged in sexual acts are seen as proof of actual abuse.

The second question asks whether child pornography is illegal if it is simply possessed and not disseminated. In earlier cases, the Supreme Court has consistently ruled that protecting children from pedophiles is more important than First Amendment rights. Bruce Taylor, president of the National Law Center for Children and Families, has handled more than 600 obscenity cases. Quoted in the July 25 *Washington Post* article, he said that some privately held written material incites pedophiles to molest and seduce children. "Child pornography doesn't stay in your sock drawer. It gets a life of its own and is acted out eventually. Kids get hurt by its mere existence."

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No proof has been discovered that anything Dalton wrote in his diary was related to actual events.

Secret Police Files Center of Privacy Debate In Former East Germany

Two important rights – the right to privacy and the public’s right to know – are struggling to find a balance in the former German Democratic Republic. The current balancing efforts involve files the East German State Security kept on its country’s citizens.

In July 2001, a Berlin court ruled that secret police files on former German chancellor Helmut Kohl will remain closed. Investigators had hoped the files would augment their investigation of a financial scandal involving Kohl’s Christian Democrat (CDU) party and allegations of bribery. Kohl has admitted to accepting \$900,000 in illegal donations, but when he agreed to pay a fine, the charges against him were dropped. He has not named the others who had been involved in the scandal. Investigators had hoped that the file, which supposedly contains transcripts of Kohl’s telephone conversations, would reveal others involved in the scandal.

Marianne Birthler is the head administrator of the East German State Security (Staatsicherheit) files, otherwise known as the Stasi files. The BBC reported that Birthler said that the Stasi Records Act states that files may be released so long as the person is not a victim of the secret police’s activities. But Kohl’s attorney, Stephan Holthoff-Pfoerner argued that Kohl did fit into this category. “Files about any victim, including historically significant figures, with personal information gathered by crude, illegal means cannot be read without their permission.”

Deutsche Welle reported that the Stasi closely monitored the entire population of East Germany during the Cold War. The information collected included the speech or actions of anyone who did not follow the Communist party line. At the time of German reunification, the Gauck agency was established to expose former Stasi agents and informers, and to allow victims to see the files the Stasi had gathered about them. The agency’s aim was also to give historians and journalists an opportunity to gain insights into the workings of the failed Communist system in East Germany.

The Stasi records act (available online at <http://www.bstu.de/englisch/01.htm>), enacted in 1991, regulates the custody, preparation, administration and use of the records. The act provides individuals the opportunity to access personal data so that they may clarify “what influence the state security service has had on his personal destiny...[and] protect...the individual from impairment of his right to privacy being caused by use of the personal data stored by the State Security Service...to ensure and promote the historical, political, and juridical reappraisal of the activities of the State Security Service.” The Act further “provide[s] public and private bodies with access to the information required to achieve the purposes stated in this Act.” The Act is applicable to “the records of the State Security Service which can be found in possession of public bodies of the Federation...of private individuals, or of other private bodies.”

The Act further provides for the “depersonalization and erasure of personal data” except in cases when that information may be used as evidence, if the information is “necessary for research related to the political and historical reappraisal.” If depersonalization is not possible and if the information is not necessary for the provided research, the records shall be destroyed or, in the case of electronic data, erased.

Deutsche Welle has reported that German Interior Minister Otto Schily has demanded that Birthler stop releasing files on all public figures. Birthler, however, does not wish to block access to documents despite the Kohl decision, and has said she will fight the Kohl ruling in appeals courts. Only a small portion of the Stasi files have been examined to date, and gaps remain in twentieth-century German history. Much research still needs to be done, and restrictions on access to the files would hamper that research. The right of privacy of well-known figures is at odds with the public’s – both Germany’s and the world’s – right to know.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

Diary, continued from page 6

But in *Stanley v. Georgia* (394 U.S. 557; 89 S.Ct.1243;22 L.Ed. 2d 542; 1969 U.S. Lexis 1972 [1969]), Justice Thurgood Marshall wrote, “If the First Amendment means anything, it means the state has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”

Although it may appear that the Dalton case is over, concern for the implications on freedom of speech and First Amendment rights continues. An Internet search on the case revealed only one article in support of the Ohio court’s decision. All others, including George Will, various arms of the ACLU, writers of commentaries in newspapers ranging from the *New York Times* to the *Los Angeles Times*, from the *Village Voice* to the *Washington Post*, have expressed their fears that this case will become a watershed event leading to restrictions on speech and thought, and to severe restrictions on personal privacy.

Leonard Pitts, Jr., in his article, “Should a Man be Put in Jail for What He’s Thinking?” on the Jewish World Review Web site, pointed out a disturbing paradox of the Dalton case: “The guy got probation after being convicted of possessing pornographic photos of real children. He’s looking at almost nine years for writing private thoughts about fictitious ones.” (Found at www.jewishworldreview.com/0801/pitts1.asp on 10/5/01)

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

“Files about any victim...with personal information gathered by crude, illegal means cannot be read without their permission.”
--Stephan Holthoff-Pfoerner

Silha Center Co-Sponsors Forum on Terrorist Attacks on America

News reporting as it should be done, with a greater focus on hard news, issues, and international concerns, has resurfaced in the wake of the attacks on New York and Washington on September 11. This was the overall consensus of the audience and panel gathered for a public forum where media experts discussed how their industry has been covering news since September 11. The event, held in Cowles Auditorium of the Hubert H. Humphrey Institute on the evening of October 22, attracted a diverse audience that raised issues ranging from government censorship of news to increased coverage of the impact of the war at home. The forum was co-sponsored by the Silha Center.

Members of the panel included: Eric Black, a reporter on the nation/world desk of the Minneapolis *Star Tribune*; Vicki Gowler, the managing editor of the St. Paul *Pioneer Press*; Scott Libin, news director for KSTP television; Tim McGuire, editor and senior vice president of the *Star Tribune*, and Jane Kirtley, Silha Professor and Director of the Silha Center. The event was moderated by Duchesne Drew, the president of the Minnesota Pro Chapter of the Society of Professional Journalists who is assistant Metro Team Leader at the *Star Tribune*.

Much of the discussion centered on the need of the public to be given context and background on the issues that led to the attacks. What had recently been an international story has now become local. Gowler commented that more news outlets will now be sending their own correspondents overseas, relying less on the major international news providers, such as wire services and the *New York Times*. This development would mean a greater depth and breadth of international coverage than Americans now receive.

There was a growing concern among the forum's panelists with regard to government censorship, however. McGuire said that things have gotten "trickier;" that there is no tolerance for dissent and open discussion. He cited Attorney General Ashcroft, who issued a directive saying that the government's response to Freedom of Information Act requests would be limited in the light of the current war. "Sunshine makes the truth grow... some people from the government are forgetting that," McGuire said. Kirtley agreed, citing the government's concern that the rhetoric in Bin Laden's interviews would serve as propaganda to the American public, while during World War II, Movie-Tone newsreels of Hitler's speeches were shown to American filmgoers in theaters nationwide with no ill effects. Kirtley also reminded the audience that the only branch of the government that has not yet taken a position on censorship is the judicial branch, which has traditionally been a strong supporter of the news media's First Amendment rights.

In addition to the Silha Center, other co-sponsors of the event included: The Society of Professional Journalists Minnesota Pro Chapter, the Minnesota News Council, and the Minnesota Journalism Center at the University of Minnesota School of Journalism and Mass Communication.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

What had recently been an international story has now become local.

Correction

A story about access to Dale Earnhardt's autopsy photos, "New Florida Law Closes Door on Autopsy Photos" appeared in the Summer 2001 issue of the Bulletin.

We wish to correct and clarify the following points:

The initial injunction was sought by Laurence H. Bartlett and Joseph E. Foster and was issued *ex parte* on February 22, 2001.

The *Orlando Sentinel* filed a request for the autopsy photographs after NASCAR announced on February 23 that seat belt failure had caused Earnhardt's death. It was also after NASCAR's announcement that the *Sentinel* retained a medical expert.

Under the settlement, the *Sentinel's* expert was to review three general subjects related to Earnhardt's death: the cause of death; whether seat belt failure contributed to Earnhardt's death; and whether basilar skull fracture was caused by head whip.

Finally, the settlement binds only the parties to it.

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Judicial Conference Casts Vote On Accessibility of Electronic Files

On September 19, 2001, the Judicial Conference of the United States adopted a report with recommendations regarding policies that govern the electronic availability of federal court case file information. Earlier this summer, the Silha Center had filed Comments on the Privacy and Public Access to Electronic Case Files before the Judicial Conference and advocated continued access to court documents converted to electronic form. The comments may be viewed at <http://www.silha.umn.edu/privacy.pdf>.

The report was unanimously endorsed by the Committee. The Committee's recommendations as adopted include:

- Documents in civil cases should be made available electronically to the same extent that they are available at the courthouse, but with one change in policy – that “personal data identifiers” should be modified or partially redacted by the litigants. “Personal data identifiers” include: Social Security numbers, dates of birth, financial account numbers and names of minor children.
- Public remote electronic access to documents in criminal cases should not be available at this time. This policy will be re-examined within two years of adoption by the Judicial Conference.
- Documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases. The Bankruptcy Code should be amended to establish privacy and security concerns as a basis for sealing a document, and the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect only the last four digits of a debtor's Social Security number.
- Access to appellate case files should be treated at the appellate level the same way they are treated at the lower level, which could vary depending on whether they were appealed from a U.S. district court or a federal agency.

Electronic access to court docket sheets through PACERNet and to court opinions through their respective web sites would not be affected by the proposed policy, and neither would the availability of court files at the courthouse.

The Judicial Conference adopted the above policies in a mail ballot of its 27 members.

The Chief Justice of the United States originally convened the 141st session of the Judicial Conference at 9:30 am on September 11, 2001. Preliminary business was being conducted when, at 10:15, Chief Justice Rehnquist announced that the Supreme Court building would be evacuated immediately. The Conference was expected to continue the following day and conclude its business at that time. However, as the day went on, it became obvious that this would not be the case. Later, the Chief Justice sent a memo to Conference members suggesting that time-sensitive issues be resolved by mail ballot, and the Conference would reconvene in March 2002.

It was the first time in its history that a Judicial Conference had been cancelled.

The Judicial Conference of the United States is the principal policy-making body for the federal court system. It consists of the Chief Justice, who serves as the presiding officer of the Conference, and the chief judges of the 13 courts of appeals, a district judge from each of the 12 geographic circuits, and the chief judge of the Court of International Trade. The Conference meets twice a year to consider administrative and policy issues affecting the court system and to make recommendations to Congress concerning legislation involving the Judicial Branch.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

The Silha Center advocated continued access to court documents converted to electronic form.

New Media Challenges, *continued from page 5*

transcript reflects both the media concerns for reporting the truth to the public and the vital importance of keeping American and allied troops and their families out of harm's way, as well as maintaining the secrecy of military operations in order to ensure their success. Topics included:

- The possibility of “embedding media” – assigning a small number of reporters to different military divisions in order to follow operations. Concerns over this include the enemy's ability to build a “mosaic” in which reports from the media confirm troop presence in one place, then another, until the enemy has a complete picture of U.S. forces' locations within the territory.
- The reality that other countries broadcast information that is classified under U.S. government guidelines, and that these broadcasts are readily available by satellite dish and the Internet.
- Whether the government would lie in order to keep some military operations secret.
- Government performing “security reviews” on stories before they may be disseminated, affecting not only content, but also the timeliness with which they are released.
- The track record of the military, which has been to err on the side of extreme secrecy.
- The new concern that in interviewing an individual soldier and including that person's last name and home town, that terrorist attacks might be perpetrated on that person's family members. (This was rescinded on October 17 after Susanne Schafer, who covers the Pentagon for the Associated Press, questioned the decision, saying “When [the media are] out there with the military in the field, they want you there. You are a boost to their morale.”)
- The use of media pools as a means to centralize the transmission of text, photos and videos exerts a tremendous amount of control on the information that is released.
- The need for journalists to keep confidential – even to the point of not telling family members – about their own movements while on assignment.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

J. Edward Gerald, *continued from page 3*

the professionalization of entire media organizations, making no distinction between news and business values.

Professionalization would mean the application of ethical judgments to one's work, whatever its kind, in order to achieve rationality, civility, compassion, intellectual depth and breadth of understanding. Overseeing this ideal would be a national news council. Gerald appeared to be far ahead of the curve in taking up recommendations of the 1947 Hutchins Commission report.

"Professional spirit," he wrote, "is a powerful defense against the acceptance of imbalanced government, against technological captivity, against coercion and disruption of political communication, because it tracks and trains persons able to cope with tasks of such magnitude. Pride in political liberty internalized in the consciences of journalists and pre-eminent among the common values of the community, can release journalism from the thralldom of non-involvement and fear to work for the repair and maintenance of the self-governing community."

In 1983, long after he had become professor emeritus, Gerald returned to the interface of law and journalism with his *News of Crime: Courts and Press in Conflict*. In it he spoke to reporters directly: "The worst fate for a journalist is to be a pawn in the game of power: to be given a half truth as fact and to be denied the other half, to watch corrupt officials pose as servants of the state and, in the vacuum of the fact, to be rewarded for their treachery; to see the system of justice work for the rich and crooked and against the common citizen, as if it had been designed that way. In moments of frustration, the process of fair trial seems to the journalist to shield crooks and shame the state. At such times the reporter may take a secret grand jury report – journalistic contraband in the eyes of the court – and turn it into news, into facts he thinks people ought to know. This action puts the heat not only on fair trial, but on hypocrites."

Throughout his academic life and beyond, Gerald pled for accountability, public responsibility and professional standards that would keep the media "worthy of a place in the Constitution." The failure of journalists to have coherent organization for these purposes, he believed, was knowing and deliberate: "They do not wish to take on the burden of professional self-government, even though it is clear that society grants absolute freedom to no individual and no institution. The way to maximize freedom, as journalists well know, is to organize for its development and protection... Without accepting this obligation, no profession can have the tool of testing in its own hands."

Gerald taught in the University of Minnesota's School of Journalism for 28 years, before that at the University of Missouri. His first doctoral student was

Gerald pled for accountability, public responsibility and professional standards that would keep the media "worthy of a place in the Constitution."

Harold Nelson, a legal historian who headed the University of Wisconsin's journalism program for more than 20 years. Upon completion of his master's degrees at the University of Missouri in 1928, Gerald served as a United Press correspondent in Denver, editor of the Canyon, Texas *News*, and as a copyeditor for the St. Louis *Star Times*. Before coming to Minnesota he was manager of the Missouri Press Association. In 1952 Gerald was president of the Association for Education in Journalism, now the Association for Education in Journalism and Mass Communication. He was present at the founding of the extant Minnesota News Council and served as its secretary from 1970 to 1974.

Such a pioneer in ethical thinking about the media should not be forgotten. Areas of media studies such as constitutionalism, economics, and social responsibility build on the foundations laid by such thinkers as J. Edward Gerald, colonists of the mind.

—DONALD M. GILLMOR
FORMER SILHA PROFESSOR AND
FORMER DIRECTOR OF THE SILHA CENTER

Fighting Back. continued from page 1

independent coverage they expect, and usually take for granted.

Back home, keep an eye on the legislation that is working its way through Congress. It is easy to be distracted from monitoring the deluge of complex bills that have emerged from September 11. But despite repeated statements from the president, Attorney General Ashcroft, and their allies that constitutional rights will be respected, many of these proposals would bestow unprecedented powers of surveillance long sought by the law enforcement and intelligence communities. Meanwhile, the public's right of access to national security information will be sharply curtailed. Initiatives such as these have been rejected in the past, but will be eagerly embraced by some as a quick fix to allay fears of terrorist threats. The news media must challenge those seeking such measures to justify not only their necessity, but their efficacy in preventing future harm to national security.

—JANE E. KIRTLEY
SILHA PROFESSOR AND
DIRECTOR OF THE SILHA CENTER

Guidelines Issued For Coverage of Suicides

A panel of experts in behavioral sciences, suicide and media studies issued a set of guidelines for news outlets' coverage of suicides on August 9, 2001. The guidelines, crafted by the Pennsylvania-based Annenberg Public Policy Center, in association with representatives from the Centers for Disease Control and Prevention, the National Institute of Mental Health, the Office of the Surgeon General, the Substance Abuse and Mental Health Services Administration, the American Association of Suicidology and the American Foundation for Suicide Prevention are aimed at reducing the "copy-cat" effect that some studies have observed and linked to suicide coverage in the media. According to these studies, sensational coverage of suicides might stimulate other suicides. The guidelines are designed to help news organizations better inform the public about suicide, and to find a balance between telling the truth and reducing future harm.

The experts urge news organizations not to romanticize suicide as a heroic act and to avoid detailed accounts of suicide methods, as this might encourage identification with the victim and facilitate imitation. Particularly in the case of celebrity suicides, news organizations should apply special care not to glamorize the event, but instead focus on underlying problems such as mental health problems or substance abuse as important factors in many suicides. According to the recommendations, both media and public should be aware that suicide is usually not caused by a specific event or personal tragedy, but is the result of long-lasting underlying mental problems.

The guidelines also contain some recommendations about "appropriate" terms and language to be used in suicide coverage (for example using "died by suicide" instead of "committed suicide," "non-fatal suicide attempt" instead of "unsuccessful attempt.") The panel of specialists also warns that giving excessive exposure to grieving family members and friends or giving young adults a forum to talk about unsuccessful, "non-fatal" attempts only makes suicide more appealing for some. A partnership of public and private organizations will distribute the guidelines to editors, reporters and producers throughout the country.

The guidelines can be downloaded from the Annenberg Public Policy Center Web site at <http://www.appcpenn.org>.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

The guidelines are aimed at reducing the "copy-cat" effect linked to suicide coverage in the media.

Silha Lecture, continued from page 12

and made clear that it was unwilling to limit the right of the press to publish information, even if that information was collected from a source that broke the law when acquiring it.

The Solicitor General's other claim, that the wiretap act serves a government interest of the highest order and hence cannot be overridden by the First Amendment, was based on two contentions: first, that the government has an interest in drying up the market for illegally intercepted conversations, and second, that the government has an interest in protecting the privacy of people using cell phones. Levine explained that the high court found that the government interest served by the wiretap act was not of the highest order to justify overriding the First Amendment right to publish or broadcast truthful information about a matter of public concern. However, the Court was not insensitive to the right of privacy involved in this case, and some Justices expressed great concern about the state of privacy in today's society.

The fact that the Supreme Court decided that the *Daily Mail* principle continues to provide the appropriate model for constitutional analysis in press cases like these is, Levine said, an important victory for everyone cherishing the First Amendment. But Levine pointed out some other, possibly troublesome, implications for the press reflected in the other opinions, especially in the concurring opinion written by Justice Breyer (joined by Justice O'Connor).

Above all, this opinion reconfirmed the Supreme Court's strong commitment to privacy. Justice Breyer argued that in cases like these, there are speech interests on both sides of the equation. Justice Breyer stressed that privacy interests are implicated, and that the First Amendment does not automatically trump them. In this case, Justice Breyer agreed that the First Amendment concerns outweighed the privacy interest of the plaintiffs. Levine acknowledged that Justice Breyer suggested that the government should have a greater role striking the balance, especially in the context of new technology, and to regulate accordingly.

Levine mentioned that although this case (re)established that the media have great First Amendment protection when publishing or broadcasting truthful information of public concern, and even untruthful information in the case of public figures, this protection might not be available when the press breaks the law in the process of gathering the news. As a consequence, he foresees that future claims against the press will focus on the gathering rather than on the publication of information. He expects these claims to be increasingly technology-driven.

Levine showed how early depositions of the plaintiffs leave little doubt that their true motive for suing Vopper was to seek damages for defamation, yet they sued under the wiretap statute, betting that a privacy claim would be more likely to prevail. These types of claims, Levine concluded, were the ones most likely to face media organizations in the coming years.

In addition to the lecture, Levine gave a presentation to the School of Journalism and Mass Communication's faculty and graduate students, and was interviewed by Don Shelby on WCCO Radio the afternoon of October 2.

Levine is a founding partner of the Washington, D.C. law firm Levine Sullivan & Koch, LLP and adjunct professor of law at the Georgetown University Law Center.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

Bartnicki v. Vopper Topic of Sixteenth Annual Silha Lecture

First Amendment attorney Lee Levine says that the biggest victory for the press in *Bartnicki v. Vopper* is that the Supreme Court re-affirmed the principle established in *New York Times v. Sullivan*, that the media cannot be punished for publishing truthful information about a matter of public concern.

Levine, who successfully represented the media defendants in front of the Supreme Court, delivered the 16th Annual Silha Lecture on October 2, 2001, in the Cowles Auditorium of the Humphrey Center on the West Bank of the University of Minnesota Twin Cities campus. Despite his victory, Levine warned that the media should not expect the same level of First Amendment protection if they engage in illegal conduct while gathering this information. Levine expects that future claims against the media will focus on newsgathering rather than on publication of information, especially if in the process of gathering information, the press violated someone's personal privacy.

The *Bartnicki* case was the first major media case to reach the Supreme Court since *Cohen v. Cowles Media* ten

years ago, and has been closely monitored by media groups across the country. Silha Center Director, Jane Kirtley, in her introduction of the lecturer, called the case "seminal" and put it in the line of classic First Amendment cases: *Near v. Minnesota*, *New York Times v. Sullivan*, *United States v. New York Times* (Pentagon papers) – cases that define the First Amendment framework within which all journalists operate.

The *Bartnicki* case began in 1993 in Pennsylvania when a cellular telephone call between two teachers' union activists involved in a labor dispute was intercepted, passed on and subsequently broadcast numerous times on Fred Vopper's radio talk show. In the call, one of the union activists stated that if the school board did not agree with the proposed pay raise they were "gonna have to go to their, their homes...to blow off their front porches." Although no allegation was made that the radio show host had anything to do with the interception, he was sued based on language in state and federal wiretapping laws (see 18 Pa. Con. Stat. Ann. § 5701 et seq., and 18 U.S.C. §§ 2510, 2520) making it illegal to disseminate, as well as to tape, cell phone conversations without the consent of the parties. When the case reached the Supreme Court, Levine and his law firm became involved in the case.

On May 21, 2001 the Court ruled 6-3 in favor of the defendant.

Levine explained to the audience how he built his defense before the high court around the *Daily Mail* principle, named after *Smith v. Daily Mail Publishing Co* (443 U.S. 97 (1979)) in which it was first formulated. The principle holds that the First Amendment protects the publication of truthful information about matters of public concern, at least in the absence of a demonstrated need to vindicate a competing government interest of the very highest order. The Solicitor General, who had intervened because the defendants challenged the constitutionality of the federal wiretap statute, argued that the *Daily Mail* principle did not apply to the wiretap act because the act is "content neutral;" it serves to regulate conduct and not content. Even if the *Daily Mail* principle did apply, the wiretap act serves government interests of the highest order, the government contended.

The Court rejected the claims of the solicitor general, stating that the wiretap act is not content neutral since it not only regulates the interception of conversations, but also the act of disseminating this information further, even if one has not taken part in the interception. According to the statute, a person having heard the tape played on Vopper's show could be in violation of the wiretap act if he told somebody else about the content of the tape. Therefore, Levine had argued that the statute was too broad. The Court agreed

Silha Lecture. *continued on page 11*

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