

Department of Justice Drops Attempt to Force Apple to Unlock iPhone, but Questions Remain

The high profile legal battle between the Department of Justice (DOJ) and Apple, Inc. (Apple) came to a close on March 28, 2016 when the DOJ asked the U.S. District Court for the Central District of California to vacate its Feb. 16, 2016 order compelling Apple to assist law enforcement officials in unlocking the iPhone of one of the shooters in the December 2015 San Bernardino, Calif. terrorist attack.

The DOJ's motion to vacate came after the Federal Bureau of Investigation (FBI) announced on March 28 that it had accessed the phone's data with help from an unidentified third-party company and no longer needed Apple's assistance. Although the case ended without Apple's direct involvement in decrypting its product, many tech industry observers and data privacy advocates have said that questions still remain over the possible precedents that the case may have set. The case also exemplified the continuing battle between tech companies and law enforcement officials over the best way to balance data privacy and security with investigators' need for evidence. (For more information about the earlier disputes between law enforcement and data encryption, see "Law Enforcement, Tech Companies Clash on Built-in Privacy Features" in the Fall 2014 issue of the *Silha Bulletin*, "Update: Tech Companies, Law Enforcement Continue to Battle of Strong Encryption for Mobile Devices" in the Summer 2015 issue, and "Obama Administration Backs Down on Cellphone Encryption Dispute, but Battles over Government Access to Technology Continue" in the Fall 2015 issue.)

On Dec. 2, 2015, Syed Rizwan Farook and his wife, Tashfeen Malik, killed 14 people and injured 22 others during a mass shooting at a local government holiday party in San Bernardino, Calif. Both Farook and Malik were killed that same day in a shootout with police. During the investigation in the aftermath of the attack, FBI officials believed that data stored in Farook's iPhone 5C held important information about the attack. However, the data on the phone was encrypted and could only be decrypted with Farook's passcode. The phone also had Apple iOS security features that would delete all data contained in the phone after 10 incorrect passcode attempts.

Federal prosecutors obtained a search warrant allowing them to examine the contents of the phone on Dec. 2, 2015, but government officials claimed that they could not access the encrypted phone data without Apple's help. After Apple refused to provide assistance voluntarily, the DOJ asked a federal court

to order Apple to develop software that would weaken its security settings. "Apple has exclusive technical means which would assist the government in completing its search, but has declined to provide that assistance voluntarily," the DOJ argued in a Feb. 16, 2016 motion.

In support of its motion, federal prosecutors cited a 1789 statute called the All Writs Act, 28 U.S.C. § 1651. The law broadly states that federal courts can issue "all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law." The purpose of the law is to give courts procedural powers to handle unusual issues not covered by pre-existing laws provided that the orders are "appropriate" and "reasonable." The law has often been used by government officials to compel tech companies to assist with investigations, according to a February 18 story by *Gizmodo*.

On Feb. 16, 2016, U.S. Magistrate Judge Sheri Pym for the U.S. District Court for the Central District of California relied upon the All Writs Act to grant the DOJ's request that Apple be compelled to develop new software that would disable security mechanisms on Farook's phone, thereby allowing the FBI to crack the password using a "brute force" unlocking technique, which uses computer software to attempt millions of passcode combinations, without the risk of deleting the phone's data. Magistrate Judge Pym's ruling quickly sparked a heated debate between technology experts and law enforcement advocates over the value of data privacy and necessary exceptions for terrorism investigations.

Within hours of the ruling, Apple CEO Tim Cook published a letter on the company's website stating that Apple strongly opposed the order, arguing that breaching security protections on iPhones would set a troubling precedent. "Up to this point, we have done everything that is both within our power and within the law to help them. But now the U.S. government has asked us for something we simply do not have, and something we consider too dangerous to create. They have asked us to build a backdoor to the iPhone," Cook wrote. "Specifically, the FBI wants us to make a new version of the iPhone operating system, circumventing several important security features, and install it on an iPhone recovered during the investigation. In the wrong hands, this software — which does not exist today — would have the potential to unlock any iPhone in someone's physical possession."

Apple, continued on page 3



- 1 **Department of Justice Drops Attempt to Force Apple to Unlock iPhone, but Questions Remain**

[Cover Story](#)

- 5 **Gawker Faces \$140 Million Judgment after Losing Privacy Case to Hulk Hogan**

[Privacy](#)

- 9 **Justice Antonin Scalia Leaves Mixed Legacy on First and Fourth Amendment Jurisprudence**

[Supreme Court News](#)

- 12 **Television Program's Refusal to Disclose Footage Raises Questions over Minnesota Shield Law**

[Reporter's Privilege](#)

- 14 **Grand Jury Indicts Creators of Undercover Planned Parenthood Videos; Possible Implications for Undercover Newsgathering**

[Newsgathering](#)

- 16 **Canadian and U.S. News Organizations Raise Complaints over Law Enforcement Officers Impersonating Journalists**

[Law Enforcement Conflicts](#)

- 19 **Federal Trade Commission Cracks Down on Native Advertisements**

[Advertising Regulation](#)

- 20 **Rolling Stone Faces New Reporting Controversy, Continues to Face Questions over Retracted Story**

[Media Ethics](#)

- 23 **Ninth Circuit Rulings Set Important Precedents for First Amendment Cases**

[Ninth Circuit Decisions](#)

- 25 **Twitter's Change in Terms of Service to Limit "Harmful Speech" Garners Criticism**

[Social Media](#)

- 28 **Iran Frees American Reporter; Protections for Expression Face Significant Challenges Elsewhere**

[Endangered Journalists](#)

- 32 **Media Law Issues Remain at Forefront in Several States**

[State Law Updates](#)

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Apple, continued from page 1

On February 25, Apple filed a motion to vacate the February 16 order. Apple argued that compelling it to create new software was an extraordinary expansion of the All Writs Act. The tech giant contended that the order was both unprecedented and unreasonably burdensome, pointing to a standard set by the U.S. Supreme Court's decision in *U.S. v. New York Telephone*, which required courts to consider, among other factors, the burden that compliance with an order issued under the All Writs Act would place on a company. 434 U.S. 159 (1977). Apple also argued that compelling the company to create a "backdoor," which would allow the company to bypass encryption features to the iPhone, would infringe on individuals' privacy rights. Apple also suggested that if it developed backdoor software, potentially hackers could find ways to obtain and use it to gain access to data on others'

COVER STORY

phones. "The only way to guarantee that such a powerful tool isn't abused and doesn't fall into the wrong hands is to never create it," Apple wrote in its brief.

In its March 10 reply brief, the DOJ argued that Apple's claims over any type of burden it would face when developing the backdoor software were self-imposed and could not be used to avoid compliance with the order. The DOJ also dismissed Apple's privacy concerns, calling the tech company's arguments a "diversion" tactic. "Far from being a master key, the software simply disarms a booby trap affixed to one door," the DOJ wrote.

However, the FBI announced on March 28 that investigators no longer needed Apple's assistance to unlock Farook's phone because an unidentified third-party company had helped the agency successfully retrieve data. Shortly thereafter, the DOJ filed a motion asking the U.S. district court to vacate the original order compelling Apple to unlock the phone. "Our decision to conclude the litigation was based solely on the fact that, with the recent assistance of a third party, we are now able to unlock that iPhone without compromising any information on the phone," U.S. Attorney Eileen M. Decker said in a March 28 statement, according to National Public Radio (NPR).

Although Apple ultimately did not assist with the investigation, government officials and data privacy advocates contended that it still leaves open several legal questions over encryption. In a March 29 e-mail to *Ars Technica*, DOJ spokesperson Melanie Newman stated that the agency would consider taking similar actions in the future. "It remains a priority for the government to ensure that law enforcement can obtain crucial digital information to protect national security and public safety, either with cooperation from relevant parties, or through the court system when cooperation fails," Newman wrote in the e-mail. "We will continue to pursue all available options for this mission, including seeking the cooperation of manufacturers and relying upon the creativity of both the public and private sectors."

In a March 28 interview with *The New York Times*, American Civil Liberties Union (ACLU) staff lawyer Alex Abdo suggested that the DOJ's decision to drop its case against Apple would not resolve the ongoing debate over encryption on mobile devices. "Unfortunately, this news appears to be just a delay of an inevitable fight over whether the FBI can force Apple to undermine the security of its own products," Abdo said.

After the case ended, the FBI offered few details about the hacking tool that it used to access Farook's phone. In an April 28 story, *The Guardian* reported that American law enforcement agencies regularly purchase information about data security flaws in consumer software from hackers, defense contractors, and researchers. Investigators typically keep these flaws a secret but use them to hack into criminal suspects' or intelligence targets' computing devices. Privacy advocates have criticized the practice because the flaws remain uncorrected, which leaves users' devices susceptible to hackers who also discover the flaws. In 2014, the Obama administration announced that it would establish a security review board that would examine whether such security flaws should be disclosed to the public, according to *The Guardian*. The board was assigned the task of balancing the government's

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— Tim Cook,
Apple CEO

interest in exploiting the flaws against the public's interest in correcting the flaws in order to secure data.

Despite calls by Apple and computer security experts to publicize the flaw that had been discovered, FBI Executive Assistant Director for Science and Technology Amy Hess released a statement on April 27 that the agency did not plan to submit the third-party exploit used to unlock Farook's phone to the review board, according to the *Los Angeles Times*. "[The FBI has not acquired] the rights to technical details about how the method functions," Hess said in the statement. "As a result, currently we do not have enough technical information about any vulnerability that would permit any meaningful review."

During the case, others also raised questions over the DOJ's reliance on the All Writs Act. Cato Institute surveillance law expert Julian Sanchez told *The Guardian* on February 19 that the DOJ's use of the All Writs Act raised issues for similar cases in the future. "The law operates on precedent, so the fundamental question here isn't whether the FBI gets access to this particular phone," Sanchez said. "It's whether a catch-all law from 1789 can be used to effectively conscript technology companies into producing hacking tools and spyware for the government."

Judges have also differed on how to apply government requests to use the All Writs Act to force tech companies to make data accessible. In a similar case, Magistrate Judge James Orenstein for the U.S. District Court for the Eastern District of New York refused to issue an order on Feb. 29, 2016 that would compel Apple to extract data from an iPhone used by a drug dealer in New York City, according to a *New York Times* story from the same day. In denying the order, Magistrate Judge Orenstein said the government was inflating

Apple, continued on page 4

Apple, continued from page 3

its authority by using the All Writs Act to force Apple to unlock an iPhone. That case also ended when the U.S. Drug Enforcement Administration was able to access the phone's data through other means.

Because courts have been inconsistent in their rulings, both the FBI and Apple have called on Congress to step in to help settle the question of whether and when law enforcement can compel tech companies to provide assistance in accessing private data. “[The] tension should not be resolved by corporations that sell stuff for a living,” James Comey, the director of the FBI, wrote in a February 21 post on the national-security blog *Lawfare*. “It also should not be resolved by the FBI, which investigates for a living. It should be resolved by the American people deciding how we want to govern ourselves in a world we have never seen before.” In a March 17 interview with *Time*, Apple's Cook said that “somebody should pass a law that makes it clear what the boundaries are. This thing shouldn't be done court by court by court by court.”

Responding to the calls for legislation, U.S. Senators Richard M. Burr (R-N.C.) and Dianne Feinstein (D-Calif.) published an official discussion draft of a mandatory decryption bill, titled the Compliance with Court Orders Act of 2016, on April 13 after a draft of the bill was leaked to the press the week prior. The bill would require tech companies to comply with court orders that compel them to help law enforcement officials who wish to access encrypted data, according to an April 14 story by NPR. In an April 13 press release, Sen. Feinstein said the legislation was needed to ensure that law enforcement had the necessary tools to combat terrorism. “No entity or individual is above the law. The bill we have drafted would simply provide that, if a court of law issues an order to render technical assistance or provide decrypted data, the company or individual would be required to do so,”

Sen. Feinstein said in the statement. “Today, terrorists and criminals are increasingly using encryption to foil law enforcement efforts, even in the face of a court order. We need strong encryption to protect personal data, but we also need to know when terrorists are plotting to kill Americans.”

Although law enforcement officials backed the newly-introduced bill, trade industry groups representing tech companies argued that the bill would weaken consumer security and infringe on privacy rights. After reviewing the leaked bill, the Electronic Frontier Foundation (EFF) published a letter to President Barack Obama on April 11

“It remains a priority for the government to ensure that law enforcement can obtain crucial digital information to protect national security and public safety, either with cooperation from relevant parties, or through the court system when cooperation fails.”

— **Melanie Newman,**
Department of Justice Spokesperson

criticizing its scope. The EFF's letter was joined by several other civil liberties organizations and privacy advocates, including the Committee to Protect Journalists, the Center for Democracy and Technology, and the American Library Association, among others. “It is beyond dispute that this bill would threaten the safety of billions of internet users, including journalists, activists, and ordinary people exercising their right to free expression, as well as critical infrastructure systems and government databases,” the group wrote in the letter. “However, it would likely do very little to assist in investigations of crime or terrorism, since those who engage in illegal activities will have access to other means to protect their own devices and communications.” The complete

letter is available at <https://www.eff.org/files/2016/04/11/encryption-letter.pdf>.

The New York Times reported on May 8 that the Consumer Technology Association, a trade group that has 4,000 members, including Apple, Google, Facebook, and Amazon, among others, strongly opposed the bill. The association's president, Gary Shapiro, told several government officials during an April 13 lunch hosted by the Media Institute, a nonprofit organization in Washington, D.C. focusing on media research, that the bill would create significant problems for data protection. “[The bill is] dangerously overreaching and technically unsophisticated,”

Shapiro said, according to the *Times*. “This bill would essentially make effective cybersecurity illegal in the United States, pushing companies that take cybersecurity seriously offshore.”

The *Times* also reported that Sen. Ron Wyden (D-Ore.), who is known for his focus on technology-related issues, said that he would filibuster the bill. “I have not filibustered many issues, but I think the stakes are enormous,” Sen. Wyden told the *Times*. “The bill as written is a lose-lose, because it will create less security, American families will be less safe, and your liberty and privacy will be damaged.”

As the *Bulletin* went to press, Sen. Burr and Sen. Feinstein had not yet formally introduced the Compliance with Court Orders Act of 2016 in the U.S. Senate.

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Gawker Faces \$140 Million Judgment after Losing Privacy Case to Hulk Hogan

On March 18, 2016, a Florida jury awarded professional wrestler Hulk Hogan, whose real name is Terry Bollea, \$115 million in damages in an invasion of privacy lawsuit against Gawker Media, an online media company that had published an

PRIVACY

excerpt of a sex tape of Hogan in 2012 on its flagship site, *Gawker*. On March 22, the jury awarded Hogan an additional \$25 million in punitive damages, which resulted in a total judgment of \$140 million against *Gawker*. The jury's decision has divided many First Amendment and press advocates. Several commentators have suggested that the First Amendment's protections do not extend to a news organization's disclosure of a private sex tape, while others argued that the Florida jury's decision intrudes upon editorial decision-making and could create a troublesome precedent for future privacy cases involving public figures.

The dispute between Hogan and *Gawker*, a site known for its irreverent tone when reporting on celebrity and media industry gossip, began in October 2012 after the website published a story titled "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work but Watch it Anyway," written by then-editor-in-chief A.J. Daulerio. The story contained an approximately one-and-a-half minute excerpt from a 30-minute video recorded in 2007 of Hogan engaging in various sexual acts with Heather Cole, then-wife of radio host and Hogan friend "Bubba the Love Sponge" Clem, in the bedroom in Clem's home. The editor also provided a written description of the remaining footage that *Gawker* did not publish.

Daulerio justified the publication of the video in his post, writing that although the Internet has "made it easier for all of us to be shameless voyeurs and deviants," celebrity sex tape videos allow people to "come away satisfied that when famous people have sex it's closer to the sex we as civilians have from time to time." In addition to the description and footage, Daulerio wrote that *Gawker* had obtained the footage from an anonymous source, and that several

other online gossip sites had reported the existence of the tape months earlier but declined to publish any video. During trial proceedings, attorneys for Hogan stated that the story accumulated approximately five million page views as well 2.5 million views on other sites that re-posted the video, according to a March 16, 2016 story by *The New York Times*.

On Oct. 15, 2012, Hogan brought an invasion of privacy lawsuit against both Clem and Cole in a Florida state circuit court, arguing that they were responsible for providing the tape to the

"For me, the message is America is tired of this type of behavior and it's unacceptable, and it's illegal. I hope [Gawker] learned what the trial was about: that we were actually protecting the First Amendment and carving out that little piece of privacy."

— Professional wrestler Hulk Hogan

public. Several days later, Hogan settled his lawsuit with Clem for \$5,000. Clem later released a statement about the settlement acknowledging that he had recording devices in his bedroom that captured the video of his former wife and Hogan, but that Hogan was probably not aware that he was being taped. Clem also maintained that he had nothing to do with the disclosure of the video, but that the DVD with the recording was stolen from his desk. Hogan also later settled with Cole under undisclosed terms.

Hogan also brought a federal lawsuit against *Gawker* in October 2012 claiming invasion of privacy, publication of private facts, infliction of emotional distress, unauthorized use of his name and likeness, and copyright infringement. A federal judge dismissed the copyright infringement claims, holding that *Gawker's* use of the tape fell within its news reporting functions and could be defended under the doctrine of fair use. After procedural maneuvering, Hogan dropped his federal case against *Gawker* and re-filed it in a Florida state trial court in December 2012, bringing complaints under Florida state law citing

individual privacy rights and infliction of emotional distress. Hogan sought approximately \$100 million in damages. Once the case entered state court, Hogan and his attorneys sought a temporary injunction requiring *Gawker* to remove the story from its website. Hogan argued that his privacy interests outweighed *Gawker's* right to keep the video publicly available. In April 2013, Florida Circuit Judge Pamela Campbell granted Hogan's motion for a temporary injunction. *Gawker* refused to remove the post and appealed the trial court order. In May 2013, the Florida Second District

Court of Appeal stayed Judge Campbell's order. The appellate court then reversed the trial court's decision in January 2014, ruling that the order was an unconstitutional prior restraint under the First Amendment.

Gawker Media, LLC v. Bollea, 129 So.3d 1196 (Fla. 2d DCA 2014).

As pre-trial proceedings continued, Judge Campbell ruled on July 1, 2015 that she was barring *Gawker's* edit of the sex tape from being shown publicly during the trial, according to a *Tampa Bay Times* story published the same day. The circuit judge determined that jurors would be shown the video on monitors that angled away from the area of the courtroom where the public and media were permitted to be. The *Tampa Bay Times* reported that Judge Campbell's decisions were made over the objections of *Gawker* as well as lawyers representing several other media organizations covering the trial. During a hearing, *Gawker* attorney Rachel Fugate argued that refusing to allow the video to be viewed during the public trial would bias the jury. "If these video excerpts cannot be played in open court ... that sends a very clear and unmistakable message to the jury that they are not fit for public disclosure," Fugate said, according to the *Tampa Bay Times*. Hogan's attorneys maintained that

Gawker, continued from page 5

airing the video publicly raised privacy concerns. Judge Campbell agreed, ruling, “It’s important for the jury to decide this issue, not necessarily the public.”

After the years-long procedural delays and pre-trial proceedings, the trial between Hogan and *Gawker* began on March 7, 2016. During the course of the approximately two-week trial, attorneys for *Gawker* maintained that the company should be protected from Hogan’s privacy claims under First Amendment grounds. Specifically, *Gawker* argued that publishing the tape was newsworthy because Hogan had previously publicized his private sex life in various books and media appearances. *Gawker*’s attorneys also maintained that posting the video was newsworthy because Hogan had publicly denied that he had ever had a sexual relationship with Cole and that other gossip websites had also been discussing the existence of the tape. *Gawker* also defended Daulerio’s story as newsworthy because it was commentary on the public’s fascination with celebrity sex tapes.

Meanwhile, Hogan’s attorneys described *Gawker* as regularly publishing salacious material. During the trial’s opening statements, Hogan attorney Shane Vogt pointed to *Gawker* founder Nick Denton’s previous comments about his editorial philosophy, such as the company’s goal to “level[] the playing field” against celebrities and that anything “true and interesting” was the standard for publication. Hogan’s attorneys also argued that *Gawker*’s motivation for publishing the tape was not based on a newsworthy standard or interest in informing the public. Rather, the editorial staff of the website believed that the Hogan sex tape would garner attention for *Gawker* leading to a financial boost for the company, and had no regard for Hogan’s privacy.

The trial also produced several unusual moments during the course of its proceedings. According to a March 8, 2015 post on *The Hollywood Reporter*’s website, Hogan maintained during his testimony that Hulk Hogan and Terry Bollea had separate expectations of privacy. The former professional wrestler contended that his previous media appearances in which he discussed his sex life were done in the guise of Hulk Hogan, a character meant to entertain. He argued that the man seen in the tape posted by *Gawker* was Terry Bollea, who had significant privacy interests. During

the second day of testimony, *Gawker* defense attorney Michael Sullivan questioned Hogan about an appearance on “The Howard Stern Show” in which Hogan and Stern discussed the tape. When Sullivan asked why Hogan did not object to the conversation as an invasion of privacy, Hogan responded, “I didn’t want to bring Terry Bollea the man into the conversation,” according to *The Hollywood Reporter*.

On March 9, 2016, *The New York Times* reported that *Gawker* faced moments of embarrassment during the trial when Hogan’s attorneys played a videotaped deposition of Daulerio. In the deposition, an attorney asked Daulerio whether there was ever a situation in which sex tapes of celebrities would not be newsworthy. “If they were a child,” Daulerio replied. When asked about under what age, Daulerio said, “Four,” according to *The New York Times*. The footage prompted *Gawker* to release a statement later in the day explaining that the former editor-in-chief was being flippant. When taking the stand the following week, Daulerio also contended that his responses to the questions in the deposition were sarcastic and that he regretted his answer. During the trial, Hogan’s attorneys declined to show the sex tape footage that Daulerio had posted with his story, but the video was available to the jury during deliberations.

Additionally, the *Tampa Bay Times* reported on March 10 that Hogan’s attorneys called upon former executive editor of *St. Petersburg Times* and University of Florida journalism professor Mike Foley to serve as an expert witness. Foley testified that he believed that *Gawker* had violated the Society of Professional Journalists (SPJ) Code of Ethics as well as Hogan’s privacy. Foley suggested that although the existence of the sex tape might be newsworthy, the actual tape itself was not. In a March 10 interview with *Politico Media*, SPJ President Paul Fletcher took issue with Foley citing the organization’s ethics code. “In 2009, we added an explicit disclaimer saying that it was not legally enforceable. It doesn’t establish a standard of care for journalists,” Fletcher said. “The ethics code is not intended as a legal standard. It’s a set of best practices to guide journalists in making ethical decisions.”

During closing arguments, *Gawker*’s attorneys argued that a decision in favor of Hogan would be likely to have troubling implications for the First

Amendment. “We don’t need the First Amendment to protect what’s popular,” Sullivan said, according to a March 18 story by *The Hollywood Reporter*. “We need a First Amendment to protect what’s controversial.” Hogan attorney Ken Turkel countered that the case had little to do with constitutional protections. “This is not about political speech. This case is unique,” Turkel said. “You’re not going to condemn someone’s right to engage in speech. You’re balancing the right to make speech versus privacy rights.” *The Washington Post* reported on March 18 that the six-person jury deliberated for six hours before awarding Hogan \$55 million for economic injuries and \$60 million for emotional distress. On March 21, the jury added an additional \$25 million in punitive damages against *Gawker*.

Adding further complexity to the case, the *Tampa Bay Times* reported on March 16 that the Florida Court of Appeal for the Second District had ordered that some of the records related to the lawsuit must be unsealed. The appellate court issued the order after several news organizations challenged Judge Campbell’s decision to seal trial court records related to an investigation that the Federal Bureau of Investigation (FBI) had conducted of an alleged extortion attempt against Hogan. The *Tampa Bay Times* reported that the records were unsealed on March 18 while jurors were deliberating. The newspaper noted that some of the documents contained statements that Hogan, Clem, and Cole gave to the FBI under oath that directly contradicted their testimony during sworn depositions with *Gawker*’s attorneys in 2015. For example, Clem told FBI investigators that Hogan knew about the video recording cameras in the bedroom, which were not hidden. Later, Clem testified during his deposition for the lawsuit that Hogan was unaware of the cameras. Hogan also claimed during his deposition for the lawsuit that he was unaware that any other recordings existed relating to his sexual encounter with Cole. However, the unsealed documents showed that Hogan and his attorney David Houston watched three separate DVD recordings that Clem had made, including one that showed Hogan making several racist comments about the African-American boyfriend of his daughter. None of the unsealed documents were presented to the jurors.

After the verdict was announced, Hogan's attorneys praised the jury's decision in a statement. "We're exceptionally happy with the verdict," the legal team said in a press release, according to a March 18 story by *The Hollywood Reporter*. "We think it represents a statement as to the public's disgust with the invasion of privacy disguised as journalism. The verdict says no more." *The Hollywood Reporter* wrote that Denton also delivered a statement after the announcement of the verdict, indicating that *Gawker* intended to appeal the ruling. "Given key evidence and the most important witnesses were both improperly withheld from this jury, we all knew the appeals court will need to resolve the case," Denton said, referencing the documents that the appellate court ordered to be unsealed. "I want to thank our lawyers for their outstanding work and am confident that we would have prevailed at trial if we had been allowed to present the full case to the jury. That's why we feel very positive about the appeal that we have already begun preparing, as we expect to win this case ultimately." *Politico Media* reported on March 18 that under Florida law, *Gawker* could be required to post a bond of \$50 million before it can proceed with its appeal. Information disclosed during the trial indicated that *Gawker* generated \$48.7 million in revenue during 2015, which suggests that the bond may be financially challenging for the media company.

In a March 22 interview with the *Reno Gazette-Journal*, Hogan's personal attorney David Houston said he did not think the case raised any First Amendment issues. "I don't think this is a First Amendment case at all. I think that was a ruse and I think a lot of the pundits and talking heads are banging the drum in calamity for the First Amendment. There's no such thing here. Quite honestly this was always an invasion of privacy case. The First Amendment does not, has not, never was entitled or meant to cover any and all conduct that someone may choose to pump out on the Internet," Houston told the *Gazette-Journal*. "And to those who argue this is a First Amendment issue regardless, this doesn't jeopardize the First Amendment. It carves out a very clear rule, and the rule is you do not publish a sex video that was taken without the knowledge and or consent of the participants and disseminate it without their approval.

How does a bright-line rule like that impact or affect the First Amendment?"

In a March 22 interview with the *New York Post*, Hogan said that jury's decision was a relief. "I would run into kids who would say, 'I downloaded the Hulk Hogan WrestleMania video, and [the] Hulk Hogan sex tape came up.' I dealt with so many horrible things, people in public asking me about the tape. I felt like I had, all of a sudden I had a heat lamp on me at all times," Hogan told the *Post*. "For me, the message is America is tired of this type of behavior and it's unacceptable, and it's illegal. I hope [*Gawker*] learned what the trial was

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— Nick Denton,
Gawker Media founder

about: that we were actually protecting the First Amendment and carving out that little piece of privacy."

In a March 22 post on *Gawker*, Denton elaborated on his thoughts about the jury's decision and the defense that Hogan presented during the trial. "The enormous size of the verdict is chilling to *Gawker* Media and other publishers with a tabloid streak, but it is also a flag to higher courts that this case went wildly off the rails," Denton wrote. "Celebrities, especially ones as public about their personal and sex life as Hulk Hogan, have a narrower zone of privacy than ordinary people. Regardless of questions about *Gawker's* editorial standards and methods, self-promoters should not be allowed to seek attention around a specific topic and then claim privacy when the narrative takes an unwelcome turn. The benefits of publicity come at a price; and for someone like Hogan, whose whole life is a performance, it's a full-time and long-term commitment."

In a March 24 interview with WNYC's "On the Media," *Gawker* Media president and general counsel Heather Dietrick argued that Hogan's lawsuit was never about privacy or emotional distress, which would be the focus of the company's appeal. "Documents unsealed by the appellate court reveal that if

[Hogan] was worried about anything, it was about the existence of another tape where he was saying racist and homophobic comments," Dietrick told host Bob Garfield. "We weren't able to show that in front of the jury, but our argument is that [the other tapes are] wholly relevant to damages. The thing that he was really concerned about was the release of that tape. That's not too surprising when you put that together with the deep detail in which he's spoken about his sex life and all sorts of lurid, graphic details in his career."

In a March 24 interview that aired on ABC's "Good Morning America,"

several of the jurors explained why they decided in favor of Hogan. "As human beings, we collectively said, you know ... if we were all in the same circumstances, how would we feel about it, and, emotionally, we would have all been

really devastated," said juror Paula Eastman. Juror Shelby Adkins noted that she did not believe that Hogan deserved less privacy because of his celebrity status. "No, he's still a human being just like everyone else, no matter how many people know his name and his face," Adkins said. Another juror, Shane O'Neil, also suggested that *Gawker's* editorial approach to publishing also worked against the company. "*Gawker* made it clear to everyone ... that they were all about crossing the line," O'Neil said. "It just wasn't about punishment of these individuals and *Gawker*. You had to do it enough where it makes an example in society and other media organizations ... and we had to take that into consideration."

The jury's decision also divided First Amendment scholars and media law experts over whether the case raised significant concerns for press freedoms. In a March 18 post for *The New York Times'* "Room for Debate," George Washington University Law School professor Daniel J. Solove argued that *Gawker's* decision to post the video fell outside the protections of the First Amendment. "*Gawker's* posting of the Hulk Hogan sex video is not speech that the First Amendment right to free speech does or should protect. Sex videos, nude

Gawker, continued from page 7
photos and revenge porn — even of famous people — are not newsworthy. They are not of legitimate public concern,” Solove wrote. “In a series of cases, the U.S. Supreme Court has held that the First Amendment provides the greatest protection to speech of legitimate public concern. A sex video doesn’t contribute to public debate or to the development of ideas. The First Amendment doesn’t protect speech out of a desire to satisfy morbid curiosity or prurient interest.”

In a March 19 interview with *The New York Times*, Media Law Resource Center Executive Director George Freeman said that the case focused on a narrow set of circumstances. “I think the damages are crazy, but I don’t see this as a terrible blow to the First Amendment,” said Freeman. “This was an unusual and extremely private matter. [If the jury’s decision is upheld on appeal,] that could be bad for the future of sex tapes, but I’m not sure it would be a threat to anything else.” In the same *New York Times* story, Erwin Chemerinsky, First Amendment scholar and dean of the law school at the University of California, Irvine, agreed with Freeman’s assessment. “I think this case establishes a very limited proposition: It is an invasion of privacy to make publicly available a tape of a person having sex without that person’s consent,” said Chemerinsky. “I don’t think it goes any further than that and I do not see a First Amendment basis for claiming that there is a right to do this.”

In a March 21 interview with *The Washington Post*, David Hudson Jr., First Amendment Ombudsman for the Newseum Institute’s First Amendment Center, suggested that the jury’s decision signaled the public’s shifting views on privacy, but that the damages awarded to Hogan were excessive. “[The decision against *Gawker*] could have some implications for newsgathering. I think it sort of ratchets up the notion that the public is very [protective] of privacy. It shows the pre-eminence of public concern about privacy,” said Hudson. “It’s one of those verdicts that shocks the conscience. I won’t go as far as to say it will be overturned, but the damage award is too high. It does not reflect the damage done.”

Others expressed much greater concern over the negative effect the jury’s decision could have for the First

Amendment. In a separate March 18 post for the *Times*’ “Room for Debate,” Jane Kirtley, Director of the Silha Center and Professor of Media Ethics and Law at the University of Minnesota, wrote that the jury’s assessments of what might be newsworthy in privacy cases can create problems from a First Amendment standpoint. “Assessing newsworthiness is subjective. Jurors often react viscerally to what they see as gratuitous invasions of privacy by the press, no matter how notorious the plaintiff may be. Some ponder their own vulnerability in a digital world. They look

“[T]he underlying principle here is who is going to control information about public figures. There’s no dispute that Hulk Hogan is a public figure and that he made his sex life a matter of public debate and discussion.”

— Jane Kirtley,
Director of the Silha Center and
Silha Professor of Media Ethics and Law

at the Hulk Hogan tape, and think, ‘That could be my daughter, or my grandson. Or me.’ And they conclude that the First Amendment was not intended to protect speech like that,” Kirtley wrote. “In fact, the Supreme Court has held that it does. Even private individuals may not recover from emotional distress or intrusion on their privacy if it involves speech that could be ‘fairly considered as relating to any matter of political, social, or other concern to the community’ or when it ‘is a subject of general interest and of value and concern to the public’ — even if a jury might find the speech to be an ‘outrageous’ invasion of privacy.”

In a March 26 interview on WGN Radio’s “John Williams Show,” Kirtley argued that the jury’s decision against *Gawker* was a threat to editorial independence. “Hulk Hogan voluntarily went on TMZ and he went on Howard Stern’s show to talk about this tape. It’s really hard for me to see this as anything other than as ‘I want to control this information about me and I don’t want somebody else to make money off of it,’” Kirtley said. “And I say that not because I think *Gawker* makes these wonderful editorial choices, but the underlying principle here is who is going to control

information about public figures. There’s no dispute that Hulk Hogan is a public figure and that he made his sex life a matter of public debate and discussion.”

In an April 1 op-ed in the *Reno Gazette-Journal* responding to Hogan’s attorney’s March 22 interview, Reynolds School of Journalism at the University of Nevada, Reno assistant professor Patrick File, who is also a former Silha Center fellow and *Silha Bulletin* editor, rejected the lawyer’s claim that the Hogan case did not involve potential First Amendment implications. “In my First Amendment class we reason by analogy.

We can do so here. A ‘bright-line’ rule against the publication of any sex video without the consent of those depicted, regardless of the participants’ public status or the public’s interest in the video makes common sense,” File wrote. “But that rule would also apply to videos

that might carry greater consequence as news audiences increasingly call for video evidence to substantiate contested public claims. Consider a video involving a politician who denies allegations of morally repugnant or illegal sexual activity. We can reject *Gawker*’s justifications for posting this particular video from an ethical standpoint (I do) without accepting a legal rule that renders all similarly situated publishers liable and reluctant to provide proof.”

On April 5, *The Wall Street Journal* reported that *Gawker* had begun the process of appealing the \$140 million verdict. The company filed two motions in the state trial court asking that the judge overturn the verdict or, alternatively, greatly reduce the damages that the jury awarded to Hogan. The motions argued that the hefty damages would financially ruin *Gawker*, according to *The Wall Street Journal*. As the *Bulletin* went to press, the trial court had not yet held hearings about *Gawker*’s motions.

CASEY CARMODY
SILHA BULLETIN EDITOR

Justice Antonin Scalia Leaves Mixed Legacy on First and Fourth Amendment Jurisprudence

On Feb. 13, 2016, United States Supreme Court Justice Antonin Scalia died in his sleep while on a hunting trip at a Texas resort. The 79-year-old justice served for 29 years after being nominated to the high court by Ronald Reagan in 1986.

SUPREME COURT NEWS

While on the Court, Justice Scalia joined the majority, and authored several important opinions concurring or dissenting, in significant First and Fourth Amendment cases. He was also a devoted advocate of “textual originalism,” meaning that he believed judges should interpret the U.S. Constitution through the founders’ understanding of the text when it was adopted rather than viewing it as a “living” document that evolves over time. Many Supreme Court observers and legal scholars have suggested that Justice Scalia’s pointed views and strict form of constitutional interpretation left a complex legacy for his First and Fourth Amendment jurisprudence.

During his tenure on the Court, Justice Scalia authored majority opinions in several cases outlining the First Amendment protections for hate speech as well as new media formats. In 1992, Justice Scalia delivered an opinion for a unanimous Court striking down a St. Paul, Minn. city ordinance that criminalized the knowing display of symbols that “arouse[d] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In holding that the ordinance violated the First Amendment, Justice Scalia wrote that the government could not create viewpoint-based restrictions on certain subcategories of unprotected speech, such as “fighting words” expressing racism, even though the entire category of speech, such as “fighting words” as a whole, may constitutionally be regulated. “[Under the ordinance,] one could hold up a sign saying, for example, that all ‘anti-Catholic bigots’ are misbegotten; but not that all ‘papists’ are, for that would insult and provoke violence ‘on the basis of religion,’” Justice Scalia wrote. “St. Paul has no such authority to license one side of a debate to fight

freestyle, while requiring the other to follow Marquis of Queensberry rules.”

Justice Scalia also authored the majority opinion in a 2011 case that established that video game content qualifies for First Amendment protections. *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011). In the 7-2 decision, the Court struck down a California statute that prohibited the sale of violent video games to minors, ruling that it was unwilling to declare that violent depictions found in video games accessible to children fell outside of the protections of the First Amendment. Justice Scalia wrote that content directed toward minors has often been both violent and interactive, citing “choose-your-own-adventure” stories and children’s fantasy literature. “Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers ‘till [*sic*] she fell dead on the floor, a sad example of envy and jealousy,” Justice Scalia wrote. “Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.” The Court also ruled that the law failed to pass the First Amendment’s “strict scrutiny” test, which means content regulations must be “justified by a compelling government interest” and “narrowly drawn to serve that interest” in order to be held constitutional. The Court did not find California’s argument that research connecting video game violence and aggression established a compelling government interest. (For more on *Brown v. Entertainment Merchants Association*, see coverage of the 25th Annual Silha Lecture given by attorney Paul M. Smith, who argued on behalf of the Entertainment Merchants Association, in “U.S. Supreme Court Weighs California’s Ban on Violent Video Game Sales” in the Fall 2010 issue of the *Silha Bulletin*, and “U.S. Supreme Court Strikes Down Ban on Violent Video Game Sales to Minors” in the Summer 2011 issue.)

In addition to writing majority opinions, Justice Scalia authored an important concurring opinion in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989),

which involved a newspaper that had inadvertently published the name of a rape victim that it had obtained from an official police report. The victim won a civil judgment against the newspaper by relying upon a Florida criminal statute that barred mass media from publishing the names of victims of sexual offenses. The Court overturned the judgment finding that reliance on the statute to impose civil liability on the newspaper violated the First Amendment because it improperly punished the publication of lawfully obtained information. In his concurring opinion, Justice Scalia criticized the Florida law for singling out the press for particular regulations, but failing to regulate neighborhood gossip in a similar fashion. “In the present case, I would anticipate that the rape victim’s discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name. Yet the law in question does not prohibit the former in either oral or written form,” Justice Scalia wrote. “Nor is it at all clear, as I think it must be to validate this statute, that Florida’s general privacy law would prohibit such gossip. . . . This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest ‘of the highest order.’”

Despite such endorsements of broad First Amendment protections, Justice Scalia joined narrow majority opinions in some cases that placed greater restrictions on expression, particularly for students. In 1988, he was in the 5-3 majority when the Court determined that public high school administrators did not violate the First Amendment when censoring a school-sponsored student newspaper discussing parents’ divorce and teenage pregnancy because their actions were “reasonably related to legitimate pedagogical concerns.” *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Nearly two decades later, Justice Scalia joined the majority in a 5-4 case that found that a public high school principal did not violate a student’s First Amendment rights when she punished the student for

Scalia, continued from page 9 displaying a banner stating “BONG HiTS 4 JESUS” during an off-campus, school-sponsored event. *Morse v. Frederick*, 551 U.S. 393 (2007). (For more on *Morse*, see “In *Morse v. Frederick*, Court Places Limits on Student Expression” in the Summer 2007 issue of the *Silha Bulletin*.)

Justice Scalia also authored a dissenting opinion in *McIntyre v. Ohio*, 514 U.S. 334 (1995), in which the Supreme Court held in a 7-2 decision that the distribution of anonymous campaign literature was protected under the First Amendment. In the dissent, Justice Scalia wrote that Ohio’s state law prohibiting anonymous campaign speech could be found constitutional because the protection of the electoral process’ integrity permitted greater restrictions on speech. Additionally, he noted that a “right to anonymity” had not previously been “such a prominent value in our constitutional system” that it should overcome the Court’s obligation to protect the electoral process. Furthermore, Justice Scalia wrote that prohibitions on anonymous speech were effective means in achieving the goal of “protecting and enhancing democratic elections,” as shown by the fact that all 50 states had enacted similar regulations.

In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), Justice Scalia joined Chief Justice William Rehnquist’s dissenting opinion that disagreed with a six-justice majority which held that the First Amendment protects the disclosure of illegally intercepted conversations involving matters of public concern so long as the person disclosing the information did not participate in the illegal interception. Chief Justice Rehnquist criticized the majority’s opinion for not giving enough deference to legislative attempts to deter the illegal interception and subsequent disclosure of conversations through a “dry-up-market” theory which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime.” Furthermore, the Chief Justice wrote that the Court’s ruling would have a chilling effect on private conversations because people could fear that their conversations may be disclosed to the public. (For more on *Bartnicki v. Vopper*, see “U.S. Supreme Court Rules in Historic *Bartnicki* Case” in the Summer 2001 issue of the *Silha Bulletin*, and “*Bartnicki v. Vopper* Topic

of Sixteenth Annual Silha Lecture” in the Fall 2001 issue. Attorney Lee Levine, who served as counsel for Vopper, also delivered the 16th Annual Silha Lecture, titled “Newsgathering on Trial: The Supreme Court and the Press in the 21st Century.”)

Justice Scalia was also a member of the U.S. Supreme Court’s unanimous decision in *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) which established an expansive interpretation of the government’s ability

“History likely will remember Scalia not only for certain Court opinions and dissents, but also for being the embodiment of what the Court has defended since the First Amendment was adopted: The vigorous, robust and full discussion of matters of public concern.”

— Gene Policinski,
Newseum Institute Chief Operating Officer

to refuse to disclose documents under Exemption 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Exemption 7(C) allows the government to deny requests for law enforcement records when dissemination “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” In the case, the Court held that the privacy rights of the family of a high-ranking White House official who committed suicide outweighed the public interest in disclosing photos taken during the government’s investigation of the death. The Court further held that the public interest could overcome the privacy interest only in situations when requestors could provide evidence that the government was acting improperly. (For more on *Nat’l Archives and Records Admin. v. Favish*, see “Citing Family Members’ Privacy, Supreme Court Allows Government to Withhold Foster Photos,” in the Spring 2004 issue of the *Silha Bulletin*, “The Silha Center Files *Amicus* Brief With the United States Supreme Court, Comments with the Council of Europe, and Department of Homeland Security” in the Summer 2003 issue, and Brief for Respondent Allan J. Favish as *Amicus Curiae* Supporting Respondent, *Nat’l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004) (No. 02-954) available

at <http://silha.umn.edu/assets/pdf/iocvfavishamicusbrieffinal.pdf>.)

Justice Scalia also produced influential opinions interpreting the Fourth Amendment’s prohibitions against unlawful searches in relation to technological advancements. In 2001, Justice Scalia, writing for a 5-4 majority, found that law enforcement authorities violated the Fourth Amendment when they used a thermal-imaging device to determine the amount of heat that was emanating from a suspected marijuana

grower’s house. *Kyllo v. United States*, 533 U.S. 27 (2001). “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance

is a ‘search’ and is presumptively unreasonable without a warrant,” he wrote.

In a 2012 case, Justice Scalia authored the majority opinion when the Court overturned a drug conviction of a nightclub owner who law enforcement officials tracked for 28 days with a GPS monitor placed on his car, which went beyond the bounds of a warrant they had initially obtained. *United States v. Jones*, 132 S.Ct. 945 (2012). He wrote that the law enforcement authorities’ use of the tracking device intruded upon the suspect’s property, making it an unlawful search under the Fourth Amendment. “Whatever new methods of investigation may be devised, our task, at minimum, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment,” Justice Scalia wrote in a footnote, defending his originalist approach. “Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.” (For more on *United States v. Jones*, see “Warrantless GPS Tracking Violates Fourth Amendment; White House Defends Warrantless Surveillance,” in the Spring 2012 issue of the *Silha Bulletin*.)

However, Justice Scalia joined a 5-4 majority in 2013 when the Supreme Court determined that several plaintiffs lacked standing to challenge the government's electronic surveillance of foreign persons under the Foreign Intelligence Surveillance Act (FISA). *Clapper v. Amnesty International USA et al.*, 133 S. Ct. 1138 (2013). Several journalists, attorneys, and labor, media, legal, and human rights organizations argued that FISA would allow the U.S. government to engage in the warrantless collection of Americans' communications with foreign individuals, violating the First and Fourth Amendment. The Supreme Court rejected the challenge, holding that the plaintiffs had not demonstrated that they had suffered any actual injury or harm. (For more on *Clapper v. Amnesty International USA*, see "U.S. Supreme Court Rejects Challenge to Federal Surveillance Law" in the Winter/Spring 2013 issue of the *Silha Bulletin*.)

Beyond the Supreme Court chambers, Justice Scalia often stirred controversy with his outspoken opinions. In a 2012 interview on "Charlie Rose," Justice Scalia questioned the Supreme Court's decision in *New York Times v. Sullivan*, which held that the First Amendment required public officials to prove that statements were made with "actual malice," meaning knowledge of falsity or reckless disregard for the truth, before recovering damages for libel. 376 U.S. 254 (1964). He argued that his "originalism" approach would not have adopted such an interpretation of the constitution. "One of the evolutionary provisions that I abhor is *New York Times v. Sullivan*. It may indeed be a very good system that you can libel public figures at will so long as somebody told you something, some reliable person told you the lie," Justice Scalia told host Charlie Rose. "But for the Supreme Court to say that the Constitution requires that, that is not what the [founders] understood when they ratified the First Amendment. Nobody thought that libel, even libel of public figures, was permitted, was sanctioned by the First Amendment."

Justice Scalia also consistently opposed allowing news cameras to record oral arguments before the

Supreme Court. During a 2012 interview on C-SPAN's "Q&A," he suggested that such recordings would not be used in a way to help inform the public about how the Supreme Court worked. "If the American people saw all of [the oral argument proceedings], they would be educated. But they wouldn't see all of that. [C-SPAN] would carry it all, to be sure, but what most of the American people would see would be 30 second, 15 second take outs from our argument, and those take outs would not be characteristic of what we do," Justice Scalia said. "People read [out-of-context quotes in newspapers] and say, 'well, it's an article in a newspaper and the guy may be lying or he may be misinformed.' But somehow when you see it live, an excerpt pulled out of an [argument] ... it has a much greater impact. No, I'm sure it will mis-educate the American people, not educate." (For more on cameras in the U.S. Supreme Court, see "Battles to Gain Camera/Audio Access to State and Federal Courtrooms Continue" in the Fall 2011 issue of the *Silha Bulletin*.)

Several legal scholars and Supreme Court observers reflected on Justice Scalia's First and Fourth Amendment legacy, suggesting that it defied a straightforward explanation. In a Feb. 16, 2016 post on the Student Press Law Center's (SPLC) blog, SPLC Executive Director Frank LoMonte wrote that Scalia's views on the First Amendment were not easy to categorize. "Consistency was not ... always the hallmark of Scalia's First Amendment jurisprudence. He was a reliable vote in favor of individualized liberty in cases such as *R.A.V. v. City of St. Paul*," LoMonte wrote. "But when it came to young people, Scalia subordinated free-speech concerns to the interest of government regulators. His vote tipped the balance in *Hazelwood School District v. Kuhlmeier*, ... [and] Scalia again fully joined a majority opinion [in *Morse v. Frederick*]. ... In neither of these cases were the majority rulings moored to any established constitutional doctrine; they were pragmatic workarounds of constitutional principle by judges bent on reaching a desired outcome, exactly the kind of results-driven jurisprudence that (in other settings) Scalia scornfully derided."

In a Feb. 15, 2016 post on *Motherboard*, Daniel J. Solove, the John Harlan Marshall Research Professor of Law at the George Washington University Law School, wrote that Justice Scalia's decisions in Fourth Amendment cases provided only limited protections from government surveillance. Particularly, Solove noted that Justice Scalia's *Kyllo* and *Jones* opinions relied on very narrow reasoning, whereas other justices would have adopted broader approaches to Fourth Amendment protections. Additionally, Solove argued that a new justice who might be more skeptical of the government surveillance under FISA could help to overturn the five-vote majority decision that Justice Scalia joined in *Clapper*. "The U.S. Supreme Court appears to be very close to making some dramatic changes in 4th Amendment law. With Justice Scalia's passing, a sometimes-champion of the 4th Amendment has been lost," Solove wrote. "Will the next justice also have a narrow version of originalism or will he or she have a more progressive approach? If the latter, we might see some dramatic shifts in 4th Amendment protection of government surveillance."

The Newseum Institute Chief Operating Officer Gene Policinski wrote a February 16 post on the organization's blog suggesting that historians' views of Justice Scalia's legacy may be connected to the ideals of the First Amendment. "History likely will remember Scalia not only for certain Court opinions and dissents, but also for being the embodiment of what the Court has defended since the First Amendment was adopted: The vigorous, robust and full discussion of matters of public concern," wrote Policinski. "At various times charming, humorous, biting, sarcastic, critical and loyal, Scalia believed in not just holding to one's views but also in publicly expressing them."

CASEY CARMODY
SILHA BULLETIN EDITOR

Television Program's Refusal to Disclose Footage Raises Questions over Minnesota Shield Law

During the summer of 2015, filmmakers for the television show "The First 48," a reality television show on the cable channel A&E, followed Minneapolis police officers as they investigated several serious crimes that had occurred throughout the city. Several months later, as trials related to these crimes began, lawyers on each side requested the filmmakers' footage as evidence. However, Kirkstall Road Enterprises, the production company of "The First 48," refused to release the footage, citing the Minnesota Free Flow of Information Act, the state shield law which protects journalists from disclosing their sources and collected information in court. Minn. Stat. 595.021 *et seq.* Although some legal observers were confident that the shield law will apply, others were not so sure, raising questions of not only who is covered by the law, but larger questions over how to define who is a journalist.

"The First 48" features law enforcement agencies during the initial days of criminal investigations. In the spring of 2015, Minneapolis Police Chief Janeé Harteau signed an access agreement allowing the production company the right to retain all the footage that was captured over the course of the various investigations. The agreement also permitted the Minneapolis police department to review a "near final" episode before it aired, according to a March 18, 2016 Minneapolis *Star Tribune* story.

On March 30, 2016, *City Pages* reported that the filmmaker's footage became a source of controversy as several cases involving the recorded investigations began heading to trial. Both prosecuting and defense attorneys sought to compel Kirkstall Road Enterprises to turn over all of its footage related to the Minneapolis Police Department's investigations of the alleged crimes, but the production company refused to comply. Throughout the legal battle, defense lawyers requested access to both published

and unpublished footage to determine whether police had properly conducted their investigations. The attorneys argued that videos could contain vital information for their clients' defense and should be considered as evidence. *City Pages* reported that defense attorneys have previously used footage from "The First 48" to convince judges to exclude evidence after a detective

the statutory language, the Minnesota shield law was designed to grant journalists "a substantial privilege not to reveal sources of information or to disclose unpublished information." Minn. Stat. 595.021 *et seq.* The *Star Tribune* reported that attorney John Borger, who represented Kirkstall Road Enterprises locally, sent a letter to the Hennepin County prosecutor's office in

October 2015 stating that the production company was not obligated to turn over the footage under the First Amendment and that the state shield law protected journalists from disclosing their sources or collected information to a court.

"It is frustrating. 'The First 48' is an entertainment device; it's not a device seeking truth or justice. It gets in the way of us doing our job, the defense doing their job. We wish the police would never have signed up for this."

— Mike Freeman,
Hennepin County Prosecutor

claimed that he felt compelled to "play act" as part of the television show.

Hennepin County Prosecutor Mike Freeman agreed that the defense attorneys should have access to the footage, according to *City Pages*. Freeman, who believed at least 12 cases could require footage from "The First 48," said he feels obligated to supply the information because, by law, he must provide defense lawyers with "all potentially exculpable evidence" that could aid in their clients' defense. Freeman also said that he wanted to avoid a retrial, a scenario that has previously occurred with investigations recorded by Kirkstall Road Enterprises. If a defendant is convicted prior to the airing of an episode depicting the investigation, Freeman said there would be a strong possibility of retrial because "The First 48" could air new information that may invalidate the completed case. "To do something, and then have it overturned on appeal, doesn't make much sense," Freeman said. "It wastes our time and energy."

Both the *Star Tribune* and *City Pages* reported that despite the arguments of both defense and prosecuting attorneys, Kirkstall Road Enterprises refused to release the footage, citing Minnesota's shield law. According to

Borger also argued in the October letter that the attorneys' requests for footage were both overly broad and did not meet the justifications to overturn shield protections. Under the Minnesota shield law, a court can overturn the shield protections to compel journalists to disclose information if a party in a case can meet a three-part test. The first part of the test requires that the information sought is clearly relevant to a gross misdemeanor or felony, or alternatively, the information is clearly relevant to a misdemeanor but would not clearly identify the source of information or the means through which it was obtained. The second part requires a showing that the information cannot be obtained through alternative means less destructive to the First Amendment. The final part requires a showing that there is a compelling interest in the disclosure of the information that is necessary to prevent injustice.

However, Freeman told the *Star Tribune* that he disagreed with Borger's assertion that the Minnesota shield law applies to "The First 48," arguing that the television program is entertainment rather than journalism. "It is frustrating. 'The First 48' is an entertainment device; it's not a device seeking truth or justice. It gets in the way of us doing our job, the defense doing their job.

REPORTER'S PRIVILEGE

We wish the police would never have signed up for this,” Freeman said. “If ‘The First 48’ tries to pull the mantle of the First Amendment around this and be sanctimonious — you know something, defendants have rights. And people want the truth.”

Hennepin County chief public defender Mary Moriarty agreed with several of Freeman’s assessments, referencing a case that had been delayed due to Kirkstall Road Enterprises’ refusal to disclose unaired footage. During the week of March 14, 2016, Hennepin County Judge Tanya Bransford granted one motion to compel the filmmakers to give up footage involving the investigation of a gang member who fatally shot two members of a rival gang. Both the public defender and the prosecutors say the footage could clear up eyewitness accounts that present conflicting stories and are critical to the case. However, the production company’s failure to comply has stalled the trial from moving forward. If the film crew eventually does turn over its footage, Judge Bransford will watch the footage and determine whether it should be admitted as evidence.

Moriarty told the *Star Tribune* that she did not expect the producers of “The First 48” to comply with the order, meaning the case may head to a New York court, where the filmmakers are based. The New York court would then determine whether Kirkstall Road Enterprises would be required to comply with the Minnesota order, which Moriarty argued would lead to further delays. (For more information about New York courts’ handling of other states’ requests related to reporter’s privilege cases, see “Update: U.S. Supreme Court Declines to Hear Reporter’s Privilege Cases” in the Summer 2014 issue of the *Silha Bulletin*, and “Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources” in the Fall 2013 issue.)

“The stakes are so high here,” Moriarty said. “You’re talking about a man going on trial for two murders, and you would rather have a videotape of what happened — what the witness said, how they appeared — rather than to rely on what people said happened or what they think happened.” Moriarty added that the attorneys are not asking filmmakers to reveal a confidential source. However, under the state shield

statute and previous Minnesota appellate court decisions, the information that attorneys seek does not necessarily have to reveal confidential sources in order to fall under the statute’s protection.

Press observers and media law experts have suggested that the legal conflicts over the footage raise important questions about the provisions of Minnesota’s shield law as well as the blurring lines between entertainment and journalism. In an interview

“I believe journalists’ shield laws should be interpreted broadly to include anyone who is doing ‘journalism,’ that is, gathering information for dissemination to the public. But here in the U.S., at least, that has meant doing so independently.”

— Jane Kirtley,
Director of the Silha Center and
Silha Professor of Media Ethics and Law

for the March 30 *City Pages* story, First Amendment lawyer and former reporter Steve Aggergaard said that arguments on both sides of the battle fall into “gray area” because reality shows about police are overtaking nightly news programs as a key source of information for viewers. “The three major [television] networks are functionally dead,” said Aggergaard. “Increasingly, shows like ‘First 48’ are how people are getting information on what police are up to.”

In a March 23 interview with *MinnPost*, University of Minnesota School of Journalism and Mass Communication instructor Chris Ison said he was more convinced that “The First 48” would fall under the shield law. “Given that it’s a so-called ‘true crime’ show, [‘The First 48’] would seem to be a form of journalism. The case is real, the footage is presumably all legitimate, as far as I know,” Ison told *MinnPost*. “I don’t follow the show, and obviously, these kinds of shows can sometimes get a bit fast and loose by adding drama, music, questionable narration and the like. But it seems to me that there’s enough journalism in a show like that, with information that’s of interest to the

public, that privileges like shield laws legitimately apply.”

Other observers also raised questions over whether Kirkstall Road Enterprises could be considered journalists under the Minnesota shield law. The language of the statute says that it protects any “person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public.” Jane Kirtley,

Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota, told *MinnPost* in its March 23 story that this definition could turn on whether Kirkstall Road Enterprises was acting as an independent newsgatherer.

“I am always unhappy when media organizations cut deals with the authorities in exchange for access. Inevitably it is a Faustian bargain because independence (that is, who controls editorial decisions) can be compromised. I believe journalists’ shield laws should be interpreted broadly to include anyone who is doing ‘journalism,’ that is, gathering information for dissemination to the public,” Kirtley wrote in an e-mail to *MinnPost*. “But here in the U.S., at least, that has meant doing so independently. I don’t know the details in this instance, but I note that there have been cases where journalists have been seen to be so intertwined with the cops that they have been deemed to be ‘state actors.’”

As the *Bulletin* went to press, Kirkstall Road Enterprises had not provided attorneys or courts with any footage related to Minneapolis police department investigations.

SCOTT MEMMEL
SILHA RESEARCH ASSISTANT

Grand Jury Indicts Creators of Undercover Planned Parenthood Videos; Possible Implications for Undercover Newsgathering

On Jan. 25, 2016, a Houston, Texas grand jury that was initially investigating accusations of criminal misconduct committed by Planned Parenthood issued indictments against employees of the Center for Medical Progress (CMP), an anti-abortion group that recorded covert videos of Planned Parenthood officials. The grand jury indicted David Daleiden, director of CMP, and CMP employee Sandra Merritt, for tampering with governmental records and on charges related to the purchasing of human organs. The indictments surprised many observers and raised several questions regarding investigative journalism as Daleiden and Merritt have argued that their recordings and videos were works of undercover journalism and should be considered protected speech.

NEWSGATHERING

Beginning in July 2015, the Center for Medical Progress released videos that showed Planned Parenthood employees discussing the transfer of tissue from aborted fetuses to research laboratories. The footage, which collectively stretched more than 10 hours, garnered millions of views online, and reignited a long-standing debate over the use of fetal tissue collected through abortions and re-energized longstanding public arguments over whether Planned Parenthood should receive any government funding.

On Jan. 25, 2016, *The New York Times* reported that Daleiden was accused of creating a fake company named Biomax Procurement Services, which claimed to be a legitimate business that provided fetal tissue to researchers. Daleiden and Merritt then assumed aliases and created fake California driver's licenses in order to set up meetings with Planned Parenthood employees. Daleiden and Merritt then used hidden body cameras to surreptitiously record the meetings. In the videos, Planned Parenthood officials spoke about abortions and the sale of fetal tissue in ways many regarded as nonchalant. The recordings were later

published online and spread rapidly across social media platforms. Planned Parenthood apologized for the candid language used by the employees but insisted that the organization did not break any laws. The organization also claimed that Daleiden and Merritt made small edits to the video footage to place Planned Parenthood representatives in a negative light, according to an Aug. 28, 2015 story by *Vox*.

On Aug. 5, 2015, NBC-affiliate KXAN reported that Texas Lt. Gov. Dan Patrick had ordered a criminal investigation of Planned Parenthood after a series of videos shot inside a Planned Parenthood clinic in Houston were published. However, on January 25, the Houston grand jury cleared Planned Parenthood Gulf Coast in Houston, Texas of any wrongdoing, while unexpectedly indicting Daleiden and Merritt for tampering with governmental records by creating fake identification cards and attempting to purchase human tissue unlawfully.

Nevertheless, Daleiden and Merritt argued that they were journalists entitled to First Amendment protection and that their videos show criminal wrongdoing by Planned Parenthood. Following the indictment, CMP published a statement on its website on January 25 arguing that it had not broken the law. "The Center for Medical Progress uses the same undercover techniques that investigative journalists have used for decades in exercising our First Amendment rights to freedom of speech and of the press, and follows all applicable laws," the organization wrote on its website.

On Jan. 29, 2016, WNYC's "On the Media" also aired a brief clip of Daleiden denying any wrongdoing during a press conference after the January 25 indictment. "CMP follows all applicable laws in the course of our investigative journalism work, and really it's just kind of a cheap political tactic for Planned Parenthood to try to describe any and all undercover journalism as unethical. I think that most people agreed that those kind of tactics are an important part of both journalism and law enforcement," Daleiden said.

In a January 29 CNN op-ed, Cornell University law professors Sherry F. Colb

and Michael C. Dorf expressed concerns over the implications that the indictment could have for investigative journalism techniques. "Whatever the precise facts of this case prove to be, the prosecution has broader implications, and not just for abortion and anti-abortion speech. Undercover exposés play a vital role in informing the American public of important facts that would otherwise remain hidden," they wrote. Colb and Dorf went on to explain that other activists, such as animal rights advocates, who gain access to farms, slaughterhouses, and laboratories by disguising their true intent, could also face criminal charges. "The criminal prosecution of Daleiden and Merritt, even if they did break the law, could chill undercover journalists and activists everywhere," Colb and Dorf wrote.

Tom Brejcha, president of the Thomas More Society and the attorney who is representing Daleiden, has also argued in an unrelated civil suit involving CMP that "equally as any other investigative journalist working for ABC, NBC, CBS, Fox News, or your local print or electronic media outlet may regularly resort to undercover journalism tactics to ferret out hidden crime, so too David Daleiden should have the right to penetrate the criminal underworld of America's abortion providers and report all the evidence he has uncovered of criminal wrongdoing to law enforcement and to members of the public."

However, many media law scholars took issue with the CMP and its supporters' argument that the First Amendment protects journalists from criminal charges. In an interview on the January 29 episode of "On the Media," Jane Kirtley, Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota, explained that the Supreme Court has not clearly established that the First Amendment allows journalists to engage in illicit activities in the process of their newsgathering. Rather, the Court has only affirmed the right of newspapers and other media outlets to publish documents that were given to them by a third party who obtained them illegally.

For example, in *New York Times v. United States*, also known as "The

Pentagon Papers Case,” the U.S. Supreme Court held that the government could not issue a prior restraint against newspapers that sought to publish classified documents after they received the information from someone who illegally photocopied the documents. 403 U.S. 713 (1971). The Court also held in *Bartnicki v. Vopper*, 532 U.S. 514 (2001) that journalists have the right to publish information that was obtained illegally about matters of public concern so long as the reporters themselves did nothing illegal to obtain it. (For more on *Bartnicki v. Vopper*, see “U.S. Supreme Court Rules in Historic Bartnicki Case” in the Summer 2001 issue of the *Silha Bulletin*, and “*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture” in the Fall 2001 issue. Attorney Lee Levine, who served as counsel for Vopper, also delivered the 16th Annual Silha Lecture, titled “Newsgathering on Trial: The Supreme Court and the Press in the 21st Century.”)

However, when the journalists themselves engage in illicit activities in the process of their reporting, Kirtley explained that American courts have almost always found that general criminal laws apply to the press. “The courts have said that laws that apply to everybody apply to the press just the same, except in very limited circumstances where you’re able to show that the story you’re doing is so important and could not be gotten any other way that it might justify allowing the journalist to get away with it. You can count those cases on the fingers of one hand,” Kirtley told “On the Media” host Brooke Gladstone.

On Jan. 27, 2016, Reuters’ columnist Alison Frankel also highlighted several cases in which individuals have unsuccessfully argued that their newsgathering techniques should be covered by the First Amendment. In *Food Lion v. Capital Cities/ABC Inc.*, 194 F.3d 505 (4th Cir. 1999), ABC had received a tip that there were problems with food safety at Food Lion grocery stores. The news organization had producers use false resumes to obtain undercover jobs at the grocery store in order to observe meat wrapping and other food handling practices. After ABC aired the story, Food Lion sued for a range of torts including trespassing, fraud, and breach of duty of loyalty as well as for violating a state unfair and deceptive trade practices act. The U.S. Court of Appeals for the 4th Circuit ruled

that ABC’s producers had committed a trespass and breached a duty of loyalty, but upheld a damage award of only two dollars.

In *U.S. v. Matthews*, 209 F.3d 338 (4th Cir. 2000), the U.S. Court of Appeals for the Fourth Circuit held that the First Amendment “provides no defense” for breaking the law in order to conduct journalistic research. In that case, a broadcast journalist who claimed he was producing a radio exposé on Internet child sex trafficking was convicted of violating federal anti-child pornography laws after he created an online chatroom called “SugarDad4yFem.” Many of his conversations online turned out to be with undercover federal agents, who accused him of sending or receiving more than 160 pornographic images of children. Matthews argued that the First Amendment required that the government show a “morally blameworthy mental state” before it could obtain a conviction under the anti-child pornography law. He maintained he was an investigative journalist and that he traded the pornographic images of children only so that he could “infiltrate a world he otherwise would have no access to.” However, the appellate court upheld his conviction, holding that the protection of children outweighed any First Amendment claims.

Others have also argued that although Daleiden is attempting to protect himself by citing some journalistic privilege, he should not be considered a journalist in the first place. *Salon*’s Amanda Marcotte wrote in a Jan. 28 article that Daleiden “has no right to call himself a journalist ... because of his relationship to the truth.” Marcotte argued that rather than backing off of the Planned Parenthood story when hours of footage turned up very little evidence, he instead allegedly falsified evidence and edited the videos out of context.

State reporter Dahlia Lithwick concurred with this sentiment in a February 2 story. “The difference between journalism and what CMP did is that journalists seek truth, while Daleiden seeks to show that somewhere in between the edited seams and faked voiceovers of his films there lies a truth he cannot quite prove but wants us to believe anyhow,” Lithwick wrote. “That can be called many things, but ‘journalism’ probably isn’t one of them.”

In the “On the Media” interview, Kirtley also noted that it might be difficult for Daleiden to claim that his

journalistic actions were necessary to expose illegal activity, given that the grand jury’s own investigation and 11 other independent state investigations, have found no wrongdoing by Planned Parenthood. “There was a belief, and I would argue there still is a belief in the media community, that the role of a journalist is to gather the news, not to create the news. And certainly not to entrap people to commit illegal acts,” Kirtley said.

Planned Parenthood officials have accused Daleiden of leading a crusade similar to those by other groups in years past that have attempted to embarrass Planned Parenthood through sting operations. On Jan. 14, 2016, Planned Parenthood also filed a federal lawsuit in the United States District Court for the Northern District of California, San Francisco Division, alleging that the Center for Medical Progress broke multiple federal laws and violated several torts as part of a smear campaign, including claims under the federal Racketeering and Corrupt Organization Act, mail fraud, invasion of privacy, illegal secret recording and trespassing claims. “These anti-abortion extremists spent three years creating a fake company, creating fake identities, lying, and breaking the law,” said Planned Parenthood Federation of America Vice President Eric Ferrero in a press release, according to a January 25 story by *The Washington Post*. “When they couldn’t find any improper or illegal activity, they made it up.” As the *Bulletin* went to press, the lawsuit remained in pre-trial proceedings.

On April 14, 2016, *The Hill* reported that Daleiden’s attorneys filed a motion in the 338th District Court of Harris County, Texas to dismiss the charges levied against him in Texas, arguing that Planned Parenthood officials had an undue influence over the grand jury, thus violating Daleiden’s Constitutional due process rights. The motion also alleged that prosecutors “have systematically leaked Grand Jury proceedings to unauthorized persons” in violation of Texas law requiring that such proceedings be kept secret. As the *Bulletin* went to press, the Texas district court had not yet ruled on the motion.

SARAH WILEY
SILHA RESEARCH ASSISTANT

Canadian and U.S. News Organizations Raise Complaints over Law Enforcement Officers Impersonating Journalists

In late 2015 and early 2016, news organizations in both Canada and the United States sought clarification from law enforcement authorities over the use of investigative techniques that involved posing as journalists. In Canada, a court dismissed the legal complaint of several news organizations that sought

LAW ENFORCEMENT CONFLICTS

a declaration that police officers' use of tactics involving the

impersonation of the press had violated the Canadian Charter of Rights and Freedoms. However, the organizations were able to broker an agreement with law enforcement officials that the use of such tactics would be limited in the future. In the United States, a press advocacy organization used the Freedom of Information Act (FOIA) to obtain records from the Federal Bureau of Investigation (FBI) revealing that the agency might have violated internal processes when agents posed as reporters to track a criminal suspect.

Canadian News Organizations Settle Complaints over Police Impersonations of Journalists

In December 2015, several Canadian media organizations settled and withdrew an application asking an Ontario court to declare that the Ontario Provincial Police (OPP) officers' impersonation of journalists during the course of several investigations violated the Canadian Charter of Rights and Freedoms. *Canadian Broadcasting Corporation v. Attorney General of Ontario*, 2015 ONSC 3131 (Can.). In July 2015, the court dismissed the media organizations' application, but attorneys suggested that they would appeal the decision. However, the OPP and news organizations later settled the case in December 2015 after both parties agreed to several guidelines governing how law enforcement officers would limit instances of posing as the press in the future. Attorneys representing the news organizations said that the agreed-upon principles could serve as a roadmap to ensure

that other criminal justice agencies did not falsely pose as journalists.

The Canadian Broadcasting Corporation, Canadian Journalists for Free Expression (CJFE), and Radio Television Digital News Association (RTDNA) Canada filed the application under section 24(1) of the Constitution Act, 1982, seeking a declaration that the practice of the officers (OPP) impersonating journalists for the purposes of criminal enforcement and investigation violated section 2(b) of the Canadian Charter of Rights and Freedoms. Section 2(b) of the Canadian Charter protects freedom of the press and other media communication. The Attorney General of Ontario, Minister of Community Safety and Correctional Services, and Commissioner of the Ontario Provincial Police represented the officers as the respondents.

The application cited three specific instances of police impersonating journalists. The first took place on Sept. 5, 1995 when two constables were assigned to conduct plainclothes surveillance of protesters at Ipperwash Provincial Park, the site of an indigenous land dispute. In response to a question from a group of journalists asking his affiliation, one of the officers responded he was a member of United Press Associates. The second event involved a plainclothes officer at the Aboriginal Day of Action on June 28, 2007. While conducting surveillance and taking video footage, the officer entered an area open to members of media organizations in order to get a better vantage point. However, the officer did not explicitly identify himself as a media member. The third instance occurred in 2009 when an undercover officer posed as an independent author, not affiliated with any organization or publisher, in an attempt to interview an inmate held in federal prison. The information gathered in the interview was later used to bring a first-degree murder charge against the inmate in a cold case, according to an Aug. 11, 2015 story by the *Toronto Star*.

Citing these instances, the applicants brought several challenges

against the OPP's specific actions and policies regulating reporter impersonation. The first OPP action that the organizations challenged was referred to as "Media-Presence Surveillance" in which law enforcement officers conducted surveillance at public protests in areas that were specifically designated for media members to conduct newsgathering. In these scenarios, OPP officers wore plainclothes to avoid being identified as law enforcement personnel. The second action, known as "Independent Author Operation," occurred when an OPP officer posed as an author, not affiliated with any organization, to obtain information. Finally, the applicants challenged the Ontario Provincial Police Order 2.8.6, which prohibited an OPP officer from posing as a person in authority, such as a member of the media, unless they received prior approval from supervisors. Specifically, the news organizations expressed concerns over any possible situation in which police officers would be able to impersonate journalists, regardless of prior approval. The applicants further argued that the impersonation restricted the free flow of information to journalists and could increase the likelihood of physical danger for journalists, intruding upon their ability to gather news and leading to a potential chilling effect.

In response, the OPP argued that the media organizations could not seek a declaration that the law enforcement actions and policy violated section 2(b) of the Canadian Charter because Media-Presence Surveillance did not constitute a practice of impersonating journalists. The governmental organizations also argued that the news organizations did not provide any evidence of a chilling effect on freedom of expression.

In July 2015, Canadian Superior Court of Justice Judge Benjamin T. Glustein dismissed the media organizations' application after examining several issues. The first issue was identifying whether the Media-Presence Surveillance, the Independent Author Operation, and Police Order 2.8.6 constituted a "practice" that was in vio-

lation of the Canadian Charter. Judge Glustein concluded that “there [was] no evidence of a practice of undercover operations which OPP officers pose as journalists” related to the Independent Author Operation and Police Order 2.8.6. Judge Glustein determined that there was insufficient evidence to show that Police Order 2.8.6 ever led to the impersonation of journalists, and therefore it should not be reviewed by the courts. Judge Glustein also ruled that the constitutionality of impersonating an independent author could not be considered because there was insufficient evidence to show any “practice” arising from this type of operation and that an independent author is not a journalist. Judge Glustein said, “While everyone enjoys freedom of expression, it does not mean that an author who chooses to write a book on a subject is a journalist.”

However, Judge Glustein held that the Media-Presence Surveillance did constitute a practice, and therefore the scope of the application must be limited to the Media-Presence Surveillance as the only practice that could possibly violate section 2(b) of the Charter. In the case at hand, he concluded that there was probably no constitutional violation because there was no evidence that plainclothes officers actually identified themselves as journalists. Judge Glustein also ruled that the evidentiary record did not establish a direct link or causal connection creating a chilling effect or restricting freedom of expression resulting from the practice. Furthermore, he concluded there was no chilling effect on freedom of expression as a matter of “common sense” because it was not clear that the Media-Presence Surveillance practice would make it harder for journalists to gather news or create a greater chance of harm for journalists that would be likely to cause them to avoid risks. Particularly, Judge Glustein doubted that journalists would have trouble covering protests in the future because protesters often do not expect to remain anonymous nor do they stop protesting when there are a number of unidentified cameras present.

In an Aug. 10, 2015 interview with the *Law Times*, Philip Tunley, an attorney with the Stockwoods law firm in Toronto and who served as counsel for the applicants along with Justin Safayeni, said that he had several concerns

after Judge Glustein’s decision, mostly pertaining to a “technical approach” and “highly technical distinctions” related to the applicants arguments and evidence. “The ruling is disappointing in that the court’s approach makes it extremely difficult, if not impossible, to challenge police practices that are publicly reported and widely known to exist but are also inherently covert and can rarely be traced to specific cases,” Tunley told the *Law Times*. “[Judge Glustein] just didn’t come to grips with

“The ruling is disappointing in that the court’s approach makes it extremely difficult, if not impossible, to challenge police practices that are publicly reported and widely known to exist but are also inherently covert and can rarely be traced to specific cases.”

— Attorney Philip Tunley

what we say is a single practice with various manifestations and he instead made us break it down and prove the individual elements one by one to a high standard.” Ministry of the Attorney General spokesman Brendan Crawley told the *Law Times* in the same story that the province’s position “was that the Ontario Provincial Police used investigative techniques that were in accordance with the law and do not infringe freedom of expression under the Charter,” but he declined to comment further.

On Dec. 23, 2015, the news organizations announced that they would not pursue an appeal of Judge Glustein’s dismissal after the groups negotiated an agreement regarding the OPP’s future practices. Under the signed statement, the OPP agreed to five principles that were at issue in the news organizations’ original application. First, both parties agreed that OPP orders “shall continue to provide that employees in an undercover role or a plainclothes role shall not pose as a member of the media unless he/she has approval in the same manner, based on the same criteria, and from the same commanding officer or officers as is required for posing as a person in authority.” Second, officers would not identify or represent themselves as media in places designated for only members of the press. The next two principles related

to using the agreed-upon statement as part of required training for every officer as well as for officers asked to do plainclothes surveillance. Finally, the OPP agreed to keep a written record of every decision to authorize the undercover or plainclothes operation that involved posing as a member of the media. The statement was signed by the Organized Crime Enforcement Bureau Chief Superintendent and Commander R.W. (Rick) Barnum. The full statement of principles is available

at http://www.adidem.org/Canadian_Broadcasting_Corporation_v_Attorney_General_of_Ontario_2015_ONSC_3131.

In an e-mail with *Silha Bulletin* staff, Tunley said that this latest update in the case “may be useful in future cases that

raise these issues ... despite the very disappointing result of the Court’s adjudication.” Nevertheless, Tunley said the signing of the Statement of Principles was an important step after a disappointing decision by the Court. He said further follow-up actions could include approaching other law enforcement departments, such as Sûreté Du Québec, to ask that they implement similar or better policies as established under the Statement of Principles. The Canadian Journalists for Free Expression are still considering this approach, according to Tunley.

Records Reveal that FBI Broke Internal Rules when Impersonating the Associated Press

On Oct. 28, 2014, the *Seattle Times* reported that the Federal Bureau of Investigation (FBI) acknowledged that in 2007 it had created a fake Associated Press (AP) news article in order to lure a bomb threat suspect into downloading secret software onto his computer. An FBI agent then posed as an AP reporter, conversed with the suspect, and convinced the suspect to click on a link to the fake AP story. The software contained in the link then permitted the FBI to track the suspect’s location and led to an arrest. The

Impersonating, continued on page 18

Impersonating, *continued from page 17*

FBI's tactics lead to widespread criticism from the journalism community, prompting FBI Director James Comey to defend the agency's actions in a Nov. 6, 2014, *New York Times* letter to the editor. "That technique was proper and appropriate under Justice Department and F.B.I. guidelines at the time," Comey wrote. "Today, the use of such an unusual technique would probably require higher-level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate." (For more information on the investigation, see "Federal Investigators' Deceptive Use of Media Raises Concerns" in the Fall 2014 *Silha Bulletin*.)

In response to the revelations, the Reporters Committee for Freedom of the Press (RCFP) and AP each filed Freedom of Information Act (FOIA) requests with the U.S. Department of Justice and FBI in October 2014 seeking information about the policies, practices, and circumstances surrounding the agency's tactics involving impersonation of the media. In August 2015, the RCFP and AP filed a lawsuit in the United States District Court for the District of Columbia requesting that the court compel the Department of Justice and FBI to comply with FOIA because the agencies had not yet produced any requested records. The organizations' full complaint is available at <https://rcfp.org/sites/default/files/docs/RCFP-APvFBI-DOJ.pdf>.

In an April 28, 2016 post on the organization's website, the RCFP reported that the FBI released some records in February 2016 that were related to the October 2014 requests. Several of the heavily-redacted re-

ports outlined the internal procedures related to "sensitive circumstances," such as when an agent impersonates a member of the media. Particularly, the FBI released portions of the Attorney General's Guidelines on FBI Undercover Operations (AGG-UCO), a document outlining the process for approving undercover operations involving 15 categories of "sensitive circumstances." The RCFP reported that the guidelines explained that "sensitive circumstances" could include situations that might lead an undercover agent to pose as a news media member.

When "sensitive circumstances" exist, agents must seek approval from FBI headquarters prior to taking action. The approval process requires a letter from a federal prosecutor judging the legality of the proposed tactic, a review by the FBI's Undercover Review Committee, and approval from a high-ranking FBI official. When the Undercover Review Committee considers investigations involving "sensitive circumstance," it must "weigh the risks and benefits of the operation," including the risks of reputational damage, interference with confidential relationships, and "the suitability of government participation in the type of activity that is expected to occur," according to the RCFP's review of the disclosed record.

The RCFP reported that the FBI also produced one heavily redacted record indicating that the FBI's Seattle field office did not follow the agency's internal rules when the agent posed as an AP reporter. The record, called a "Situation Action Background" report, was drafted by the Seattle office's Cyber Division in October 2014 and reviewed the FBI's 2007 investigation

using the false AP story. The report found that "although an argument can be made the reported impersonation of a fictitious member of the media constituted a 'sensitive circumstance' under the required processes, the Seattle office's decisions had not been unreasonable when it failed to follow internal protocols. The RCFP argued that the agency's determinations that the review processes could be easily disregarded showed that the FBI's internal protocols for review were not nearly as robust as indicated in the other disclosed records.

The RCFP also contended that the Cyber Division's conclusions raised additional issues because the "hacking" tool used in the fake AP story case has been widely used by other agents who were trying to locate anonymous criminal suspects. The FBI has increasingly used "hacking tools" and "network investigative techniques" in criminal investigations, but has reportedly maintained no "central and complete listing" of the instances in which they have been deployed. The RCFP reported that the Department of Justice was also seeking changes to the Federal Rules of Criminal Procedures to make it easier to obtain "hacking warrants," which would allow a federal judge to issue a search warrant permitting access to a computer located in any jurisdiction. Reuters reported on April 28 that the U.S. Supreme Court had approved the rule change and Congress had until Dec. 1, 2016 to accept or modify the changes. If Congress fails to act, the new rule will be adopted.

SCOTT MEMMEL
SILHA RESEARCH ASSISTANT

Federal Trade Commission Cracks Down on Native Advertisements

On March 15, 2016, the Federal Trade Commission (FTC) settled its first native advertising case against national retailer Lord & Taylor. Native advertisements resemble the editorial content of the platform upon which they appear,

ADVERTISING REGULATION

often blurring the line between paid advertising and independently-produced news stories. This has raised ethical concerns, especially when native ads appear on the websites of traditional news organizations. (For more on the ethical issues surrounding native ads, see “Native Advertising Creates Ethical Challenges for News Organizations in Digital Environment” in the Winter/Spring 2014 issue of the *Silha Bulletin*.) The FTC alleged that Lord & Taylor deceived consumers by paying for native advertisements — including an article published online by the fashion magazine *Nylon*, a *Nylon* Instagram post, and endorsements by popular social media users known as “fashion influencers” — without disclosing that the content was actually paid promotions.

In December 2015, the FTC expressly took the position that long-standing consumer protection principles apply to native advertising. This means that disclosures of the receipt of goods or compensation in exchange for content is mandatory, and omitting them triggers the possibility of enforcement proceedings under Section 5 of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45. According to the FTC complaint, Lord & Taylor launched a social media marketing campaign in late March 2015 to promote its new private-label Design Lab collection for women. The marketing plan included Lord & Taylor branded blog posts, photos, video uploads, editorials in online fashion magazines, and online endorsements by selected “fashion influencers,” all focused on a dress from the new collection — the Design Lab Paisley Asymmetrical Dress.

With respect to the native advertising editorials, the FTC alleged that Lord & Taylor had edited, reviewed,

and paid for an article, which appeared in *Nylon*, as well as reviewed and approved a caption to be posted alongside a photo of the dress on *Nylon*’s Instagram account. Neither the article nor the Instagram post gave any indication to consumers that they were paid advertising directed by Lord & Taylor.

Regarding the “fashion influencers,” the FTC noted that Lord & Taylor gave each of them a free paisley dress and paid them between \$1,000 and \$4,000 each to post a photo of themselves wearing it on Instagram or other social media sites. Lord & Taylor pre-approved each proposed post, and the influencers were obligated by contract to tag “@lordandtaylor” as part of the posts and to use the hashtag “#DesignLab” in the caption of the photos. However, Lord & Taylor failed to require the influencers to disclose that they received the dresses for free or were paid by Lord & Taylor for their posts. More than 11.4 million individual Instagram users saw the influencers’ posts.

The FTC settlement prohibited Lord & Taylor from making misrepresentations in the future that paid advertising emanates from an independent or objective source, and also established a “clear and conspicuous” standard for disclosures with which fashion companies must comply. The settlement also established a strict monitoring and review program for the company’s future endorsement campaigns during the next 20 years. The FTC’s full consent decree with Lord & Taylor is available at <https://www.ftc.gov/system/files/documents/cases/160315lordandtaylororder.pdf>.

“Lord & Taylor is deeply committed to our customers and we never sought to deceive them in any way, nor would we ever,” the retailer, which is a subsidiary of Hudson’s Bay Company, said in a March 15, 2016 statement provided to *Law360*. “We encourage the FTC to continue to update and communicate their guidelines clearly and swiftly as the digital and social media landscape rapidly evolves.”

In a March 15 statement, the FTC Bureau of Consumer Protection Director Jessica Rich said the settlement was a positive development for consumers. “Lord & Taylor needs to be straight with consumers in its online

marketing campaigns,” said Rich in the statement. “Consumers have the right to know when they’re looking at paid advertising.”

As the first of its kind, the settlement provided advertisers with crucial information about what steps companies must take to avoid similar FTC sanctions. The settlement comes after the FTC issued an Enforcement Policy Statement on Deceptive Formatted Advertisements, supplemented by a Native Advertising Guide for Businesses (Native Advertising Guidelines), in December 2015. The guidelines advise that clear, proximate and prominent disclosures must be included with native ads, such as the word “advertisement” rather than more ambiguous terms such as “promoted story,” in situations when consumers may be misled about the nature or source of an advertising message or when such misleading impression may affect the consumers’ conduct regarding the advertised product or services. The FTC’s enforcement policy statement for native advertisements is available at https://www.ftc.gov/system/files/documents/public_statements/896923/151222deceptiveenforcement.pdf. The FTC’s native advertising guidelines for businesses are available at <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

In a March 15 interview with *AdAge*, Ron Urbach, chairman at the law firm Davis & Gilbert said that advertisers could expect to see similar complaints and settlements in the future. He noted that it is up to the advertisers and not the publishers to comply with the FTC’s rules. “There are going to be more issues in the future, not less,” said Urbach. “The FTC has made it known that there are more cases to come. So advertisers and agencies, be on notice — you could be next.”

SARAH WILEY
SILHA RESEARCH ASSISTANT

Rolling Stone Faces New Reporting Controversy, Continues to Face Questions over Retracted Story

In early 2016, *Rolling Stone* found itself at the center of controversy once again after the magazine published an actor's account of meeting a notorious drug lord who had recently escaped from a Mexican prison. Many journalists and press observers criticized *Rolling Stone* for

MEDIA ETHICS

failing to adhere to fundamental reporting and journalistic ethical standards prior to publishing the story. The criticisms of *Rolling Stone* came less than a year after the magazine retracted a high-profile story about an alleged gang rape on the University of Virginia (UVA) campus. *Rolling Stone* also continued to face several legal challenges related to the retracted story during late 2015 and early 2016.

Actor's Profile of Drug Lord Ignites Criticisms

On Jan. 9, 2016, *Rolling Stone* published a story, "El Chapo Speaks," by actor Sean Penn, in which he recounted a secret meeting that he had in Mexico with Joaquín "El Chapo" Guzmán, a drug lord and leader of the Sinaloa Cartel. Guzmán, who oversaw a \$3 billion drug trafficking enterprise, was the target of an international manhunt after he escaped a Mexican prison in July 2015. Penn's first-person narrative detailed several of the precautions he took prior to meeting with Guzmán in order to evade government surveillance, as well as the role that Mexican actress Kate del Castillo played in facilitating a meeting. The actor recounted his secretive travels into Mexico and described a dinner meeting with Guzmán, which was held at an undisclosed rural hideout.

The story also included several questions that Penn later sent to Guzmán after the dinner meeting, using del Castillo as an intermediary. The actor included questions about Guzmán's upbringing, views about drug trafficking, and his escape from prison, among others. Penn reported Guzmán's responses to the questions verbatim, which the drug lord had answered in a self-recorded video message that Guzmán provided to the actress. Penn concluded his story noting that Mexican

authorities had re-captured Guzmán on January 8, which was the day prior to the article's publication. *Rolling Stone* also included a brief disclaimer at the beginning of Penn's story, stating, "Some names have had to be changed, locations not named, and an understanding was brokered with the subject that this piece would be submitted for the subject's approval before publication. The subject did not ask for any changes."

After *Rolling Stone* published "El Chapo Speaks," many journalists and

"When you're not really challenging the person and have agreed to submit the story for approval, it sounds more like Hollywood entertainment. It's not on par with the sacrifice of many of my colleagues in Mexico and throughout the world who have lost their lives fighting censorship."

— Alfredo Corchado,
Mexico City Bureau Chief,
Dallas Morning News

press observers criticized both Penn and the magazine for how the story was handled. Specifically, critics raised the point that Mexican journalists work in an extremely dangerous environment in which drug cartels regularly threaten and kill reporters. *The Washington Post* reported in December 2015 that 88 journalists had been killed in Mexico during the course of the previous 20 years. Editors and reporters take potentially deadly risks when defying censorship demands from drug cartels, according to the *Post*. In a Jan. 11, 2016 interview with the *Post*, Alfredo Corchado, Mexico City bureau chief for the *Dallas Morning News*, argued that the decision to allow the drug lord prior review of the story created the impression that Penn's account was for entertainment purposes rather than actual journalism. "When you're not really challenging the person and have agreed to submit the story for approval, it sounds more like Hollywood entertainment," Corchado told the *Post*. "It's not on par with the sacrifice of many of my colleagues in Mexico and

throughout the world who have lost their lives fighting censorship."

During a January 11 discussion on National Public Radio's (NPR) "All Things Considered," NPR media correspondent David Folkenflik was also critical of *Rolling Stone's* decision to give Guzmán final approval of the story as well as failing to create a proper context for the story. "[The magazine] agreed to allow [Guzmán] to review and demand changes in the article before publication. *Rolling Stone* says he

chose not to do so. But what an abrogation, what a relinquishment of editorial control and authority," Folkenflik told host Ari Shapiro. "Although *Rolling Stone's* capable of some terrific journalism — in this case, proved not up to the task of rendering the complexity, the deadliness of what

Guzmán does, the destructiveness, the toll in [the United States] as well as his own [country]. And in exploring this with voices outside of Guzmán's own point of view, as limited as it was, it was a pretty narrow interview itself, pretty unrevealing and pretty, I thought, self-indulgent on Sean Penn's part."

The Poynter Institute's chief ethicist Kelly McBride wrote in a January 11 post on the organization's website that Penn's editors should bear the brunt of criticism rather than the actor himself. McBride noted several different ways that editors could have prepped Penn for his interview with Guzmán, including explaining to Penn that a journalist's loyalty is always with the readers, not the subject; asking to see Penn's interview questions prior to his meeting to ensure they are neutral and hold the source accountable; advising that prior review is rarely an acceptable journalistic practice; and explaining that any story should be "well-reported and intellectually honest." McBride suggested that *Rolling Stone's* editors seemed to fail on several of these points.

"It's common for a writer's ambitions to outpace his talents. (Sean Penn, you are no Hunter S. Thompson). That's what editors are for. ... The best editors lift writers above the level they might reach on their own," McBride wrote. "The editor's role on the front end is the easy work. All he had to do was prepare Penn to set aside his own ego and go into the interview with his loyalties firmly on the side of [*Rolling Stone's*] audience. ... During the actual writing, an editor should have been working with Penn to identify a structure, build a coherent argument and then challenge readers to see a complicated character operating in a complicated system." McBride argued that Penn's story could have been improved had an editor required the actor to provide data or comments from experts that verify or challenge Guzmán's points, including discussions with economists, law enforcement specialists, family members of a victim of cartel violence, and regional economic data, among other information.

In a January 11 interview on Southern California Public Radio's "AirTalk," Jane Kirtley, Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota, also argued that Penn's interview and the subsequent arrest of Guzmán could create future security concerns for Mexican journalists, particularly because the drug lord was arrested shortly after his meeting with Penn. "Journalists in Mexico face incredible, incredible pressure and physical threats to their reporting. It's really hard to be a good journalist in Mexico because it's just not safe. It's troubling to me that Mr. Penn, whatever his motives, would sort of waltz down there to do an interview like this," Kirtley said. "And I think he may not fully appreciate that it may really pose threats to journalists who are pursuing conventional stories about drug cartels and others, because of this very ambiguous relationship he had [as a journalist]. Was he working with the authorities and will [the drug cartels] now assume that anybody calling themselves a journalist will basically be a pipeline to the authorities?"

Despite the criticisms, *Rolling Stone* publisher Jann Wenner praised Penn's story in a January 11 interview with CNN. The publisher contended that many other news organizations would have made the same editorial choices as

Rolling Stone. "I think anybody would have done what I did. ... [The argument against prior review is] also totally hypothetical until you're dealing with what's real. Who knew what exactly he might want or might not want to change?" Wenner said. "You deal with it when you have to deal with it. ... [The story is] a strong statement that we're a powerful journalistic organization. It's just a reaffirmation of that fact."

Penn also pushed back against the widespread criticism of his *Rolling*

"Journalists in Mexico face incredible, incredible pressure and physical threats to their reporting. It's really hard to be a good journalist in Mexico because it's just not safe. It's troubling to me that Mr. Penn, whatever his motives, would sort of waltz down there to do an interview like this."

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Stone story during a January 17 interview with CBS' "60 Minutes," noting that the decision to grant Guzmán prior review was misunderstood. "What was brokered for me to have the interview with El Chapo was that I would finish the article, send it to him, and if he said no, then that was no harm, no foul to the reader. ... It would never be printed," Penn told interviewer Charlie Rose. Penn also disputed many criticisms that his story was for entertainment purposes rather than journalism. "I can be very, you know, flamboyant in my words sometimes. I can get angry like many people can. I'm really sad about the state of journalism in our country. It has been an incredible hypocrisy and an incredible lesson in just how much they don't know and how disserved we are," Penn said. "Again, journalists who want to say that I'm not a journalist, well, I want to see the license that says that they're a journalist."

Legal Challenges, Ethical Questions Linger for Rolling Stone over Retracted Campus Rape Story

Several critics of "El Chapo Speaks" drew connections to *Rolling Stone's* earlier mishandling of "A Rape On

Campus," which reported the alleged gang rape of University of Virginia (UVA) student "Jackie" during a fraternity party in 2012. The November 2014 story, written by Sabrina Rubin Erderly, criticized university officials for being more concerned about the school's reputation than properly addressing sexual assaults on campus. Erderly's report also suggested that sexual assaults were prevalent among UVA's fraternity culture. After the story gained national prominence, news

organizations conducted further investigations that determined that "Jackie" had probably fabricated much of her account, undermining Erdely's reporting for *Rolling Stone*.

In April 2015, the Columbia School of Journalism (Columbia) published its findings from

a study conducted at the request of the magazine. Columbia found that *Rolling Stone* had failed to follow proper journalistic ethical conduct as well as basic reporting and editorial processes, including failing to corroborate derogatory information, using pseudonyms that unnecessarily obscured key information, ignoring the concerns of staff fact checkers, and providing inadequate information to the fraternities when asking for comment, among other problems. *Rolling Stone* retracted "A Rape on Campus" the same day that Columbia published its report.

In May 2015, UVA Associate Dean of Students Nicole Eramo, who was one of the administrators depicted in the story, filed a defamation lawsuit against *Rolling Stone* in Virginia state court, claiming that the magazine had cast her as "the chief villain of the story." *Rolling Stone* later had the case removed to the United States District Court for the Western District of Virginia. In July 2015, three members of Phi Kappa Psi, the fraternity where the alleged rape took place, filed a defamation lawsuit in the United States District Court for the Southern District

Rolling Stone, continued from page 21

of New York against the magazine claiming that people had come to believe that they were the perpetrators of the crime. In November 2015, the Phi Kappa Psi fraternity chapter at UVA also filed a defamation lawsuit in the Virginia State Circuit Court of the City of Charlottesville against *Rolling Stone* seeking \$25 million in damages. The complaint alleged that members of the fraternity had received threats online and were harassed on campus as a result of the story. Additionally, the fraternity claimed that they faced significant challenges in recruiting new members after *Rolling Stone* published the story. (For more information about “A Rape on Campus” and the subsequent controversy, see “News Organizations Backpedal after Failures to Fact Check, Anchor’s False Stories,” in the Winter/Spring 2015 issue of the *Silha Bulletin*, and “Update: Rolling Stone Continues to Face Backlash for Campus Rape Story” in the Summer 2015 issue.)

In early 2016, press observers continued to discuss the ethical ramifications for journalists after “A Rape on Campus.” Particularly, questions revolved around why news organizations had not publicly identified Jackie despite the fact that much of *Rolling Stone*’s story about her had been debunked. In a Jan. 11, 2016 story, *The Washington Post*’s Paul Farhi reported that while the *Post* was investigating the *Rolling Stone* story, it had made an agreement with Jackie not to report her full name in exchange for further details about her experience. “We told her we wouldn’t name her, in large part because we thought she was a sex-assault victim at the time and we don’t name victims of sexual assault victims without their permission,” the *Post*’s Metro editor Mike Semel told Farhi. “That agreement for anonymity needs to be considered until we are absolutely certain there was no assault at all.”

In contrast, former *Des Moines Register* editor Geneva Overholser argued that Jackie’s name should have been revealed to the public, according to the *Post*. When Overholser was editor, the *Register* won a Pulitzer Prize in 1991 for a series of stories about an Iowa rape victim. The woman at the center of

the story gave permission for her name to be printed, which sparked a national conversation among journalists about naming rape victims. “Nothing affects public opinion like real stories with real faces and names attached. Attribution brings accountability, a climate within which both empathy and credibility flourish,” Overholser told Farhi. “I think [Jackie] should have been named in the first place. [The protection of the anonymity of alleged rape victims] was never one for journalists to afford,

“[The protection of the anonymity of alleged rape victims] was never one for journalists to afford, because it implies we know what party deserves protection when someone brings charges of rape. It implies that we can determine guilt or innocence.”

Geneva Overholser,
former editor of the *Des Moines Register*

because it implies that we know what party deserves protection when someone brings charges of rape. It implies that we can determine guilt or innocence.”

Columbia Journalism School Dean Steve Coll, who was lead author of the critical report on *Rolling Stone*’s handling of “A Rape on Campus,” told the *Post* that he believed not revealing Jackie’s true identity was the correct decision. “It’s an unusual situation, and I understand the argument on the other side, but I would not name her,” Coll said. “She never solicited *Rolling Stone* to be written about. She’s not responsible for the journalism mistakes. To name her now just feels gratuitous, lacking sufficient public purpose. That could change depending on how the legal cases unfold, but that’s my sense now.”

The litigation that resulted from “A Rape on Campus” also continued to move forward during the spring of 2016. On Jan. 8, 2016, *The Washington Post* reported that attorneys for Eramo filed motions in federal district court that would require Jackie to produce documents that detailed her communications with *Rolling Stone*,

Erdely, and various UVA administrators and staff. In the motions, Eramo’s attorneys argued that Jackie had fabricated the story in an attempt to capture the attention of a classmate whom was a romantic interest. The *Post* reported that attorneys for Jackie, who was not a party in the defamation suit, argued that she was a victim of a sexual assault and should be shielded from Eramo’s request. On January 12, U.S. District Court Chief Judge Glen E. Conrad said in court that he would

grant Eramo’s request for Jackie’s documents.

On February 20, *Newsweek* reported that Judge Conrad also ordered Jackie to appear in court so that she could be deposed as part of the lawsuit between Eramo and *Rolling Stone*. However, *The Washington*

Post reported on March 30 that Jackie’s attorneys filed motions asking the judge to reconsider his order. “Forcing her to revisit her sexual assault, and then the re-victimization that took place after the *Rolling Stone* article came out, will inevitably lead to a worsening of her symptoms and current mental health,” Jackie’s attorneys wrote in the court filings, according to the *Post*. Despite the opposition, Judge Conrad ruled on April 4 that Jackie would be required to sit for a deposition under oath on April 7. CNN reported on April 5 that the judge placed several limitations on Jackie’s deposition, including keeping the location secret, placing the records and transcripts of the deposition under seal, and limiting the deposition to five hours over a two-day period.

As the *Bulletin* went to press, the other lawsuits against *Rolling Stone* related to “A Rape on Campus” remained in preliminary stages of litigation.

CASEY CARMODY
SILHA BULLETIN EDITOR

Ninth Circuit Rulings Set Important Precedents for First Amendment Cases

In late 2015 and early 2016, the influential U.S. Court of Appeals for the Ninth Circuit dealt with a pair of cases that could have implications for students' freedom of speech as well as that of filmmakers. In the first case, the Ninth Circuit ruled that universities may consider students' speech when

NINTH CIRCUIT DECISIONS

making professional program certification decisions. In the other, the Ninth Circuit upheld a dismissal of a right of publicity claim against the makers of the motion picture, "The Hurt Locker."

Professional Codes in Higher Education Threaten Student Speech

On Dec. 29, 2015, a unanimous three-judge panel for the Ninth Circuit found that the University of Hawaii did not violate a student's First Amendment rights by terminating his enrollment in an educator-training program after he made remarks that were deemed unacceptable for professional program students. The panel upheld the student's suspension from the program, finding that "universities may consider students' speech in making certification decisions, so long as their decisions are based on defined professional standards, and not on officials' personal disagreement with students' views." *Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015).

Mark Oyama was a student at the University of Hawaii's secondary school teacher certification program when he was denied a student-teaching placement that was required for him to complete his course of study in the College of Education. The university claimed that Oyama had made disturbing remarks to his instructors, both in conversation and in the course of class assignments, which the administrators viewed as unsuitable for working with children.

For example, according to court documents Oyama once stated that he believed "it would be fine for a twelve-year-old student to have a 'consensual' relationship with a teacher." Oyama acknowledged that the law required teachers to report such relationships when they learned of them, and "Oyama stated that he would obey the law and report the relationship, but still believed that such a 'consensual' relationship was not wrong."

Based in large part on these statements, College of Education administrators denied Oyama admission to the student teaching program, which meant that he could not receive a teaching certificate. Oyama argued that the decision infringed upon his First Amendment rights in his unsuccessful challenge to the program's decision through a University of Hawaii administrative appeals process.

In April 2013, the United States District Court for the District of Hawaii sided with the university in an opinion that relied heavily on the U.S. Supreme Court's ruling in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a case in which the court allowed school administrators to curtail First Amendment rights for K-12 students in school-sponsored activities if the restrictions were "reasonably related to a legitimate pedagogical purpose." But the U.S. Supreme Court has never extended that standard to the college level.

The Ninth Circuit chose not to apply *Hazelwood* in the same way that the district court had done. Rather, the appellate court fashioned its own test, writing that the university's rejection passed constitutional muster because it "related directly to defined and established professional standards, was narrowly tailored to serve the University's core mission of evaluating Oyama's suitability for teaching, and reflected reasonable professional judgment." The Court noted that several circuits, including the First, Sixth, Tenth and Eleventh, have adopted similar "certification" frameworks.

In a Dec. 29, 2015 post on the Student Press Law Center (SPLC) website, SPLC Executive Director Frank LoMonte wrote that the test appears to be derived in part from the Minnesota Supreme Court's 2012 ruling in *Tatro v. University of Minnesota*, which created a First Amendment exception for college students' speech that violates "established professional conduct standards." 816 N.W.2d 509 (Minn. 2012). In *Tatro*, the court found no constitutional violation when the University of Minnesota imposed sanctions on a mortuary science student who had posted on Facebook irreverent comments about the corpse she was assigned to dissect in one of her classes. (For more on the *Tatro* decision, see

"Minnesota Supreme Court Sides with University on Punishment for Facebook Posts" in the Summer 2012 issue of the *Silha Bulletin*.)

In *Oyama*, Judge Kim McLane Wardlaw, writing for the three-judge panel, reasoned that "the University's decision was directly related to defined and established professional standards" set by the Hawaii Department of Education and the University's national accreditation agency. "The First Amendment does not prevent the University from denying Oyama's student teaching application after determining that his statements reflected a failure to absorb these defined and established professional standards," Judge Wardlaw wrote.

Many First Amendment advocates and legal scholars criticized the Court's decision, arguing that such censorship power in the hands of college administrators could chill expression and suppress important minority viewpoints. In a Dec. 29, 2015 post on *The Washington Post's* "Volokh Conspiracy" blog, University of California Los Angeles School of Law professor Eugene Volokh wrote that the Ninth Circuit's decision granted university administrators wide-ranging authority to regulate expression. "The court's rationale could let universities suppress a vast range of student speech. ... Think of how many other views might be suppressed on the grounds that they are 'deemed not in alignment' with professional rules, especially once professional organizations realize that they have the power to effectively authorize such speech restrictions," Volokh wrote. "I think this is a very dangerous decision, not just on its own facts but on what it signals to university administrators for the future. Expect many more situations in the future in which students are kicked out of higher education programs for 'views ... deemed not in alignment with standards set by' government authorities."

In a Jan. 15, 2016 commentary on the *Huffington Post*, Foundation for Individual Rights in Education (FIRE) Director of Legal and Public Advocacy Will Creeley speculated on the impact that the ruling could have on unpopular viewpoints. "Impossibly broad, hopelessly vague prohibitions like this violate the First Amendment. How can students be sure exactly what speech does and does

Ninth Circuit, continued on page 24

Ninth Circuit, *continued from page 23*

not ‘transgress’ a college administrator’s understanding of ‘professional boundaries?’” he wrote. “Worse still, empowering college administrators to punish students for speech that runs afoul of vague rules all but guarantees viewpoint-based censorship. An elastic ban on ‘behavior unbecoming of the profession’ may be invoked all too easily by an administrator to punish speech that he or she simply dislikes, First Amendment be damned.”

In his December 29 post on the SPLC website, LoMonte suggested that the decision would impact students’ speech on social media. “While it appears clear from the Ninth Circuit’s ruling that this new and more censorship-forgiving standard will apply only to students in heavily regulated professional programs, college attorneys predictably will attempt to apply it more expansively to anything ‘unprofessional’ published by any student on social media,” LoMonte wrote.

Ninth Circuit Dismisses Publicity Claim Against the film “The Hurt Locker”

On Feb. 17, 2016, the U.S. Court of Appeals for the Ninth Circuit upheld the Central District of California’s dismissal of a publicity rights claim against the motion picture, “The Hurt Locker.” The plaintiff, Army Sergeant Jeffrey Sarver, an explosives technician in Iraq, claimed the film appropriated his life story without his consent. The Ninth Circuit held that even if the filmmakers had used aspects of Sarver’s story in creating “The Hurt Locker,” their use was protected under the First Amendment. *Sarver v. Chartier*, 813 F.3d 891 (9th Cir. 2016).

The critically-acclaimed film tells the story of fictional Army Sergeant First Class William James as he leads a team of specialists who disarm explosive devices during the Iraq War. The screenwriter, Mark Boal, based the screenplay for “The Hurt Locker” on his personal coverage of the Iraq War where he observed Sarver’s work in combat zones and conducted further interviews while both were in the United States. Sarver filed a lawsuit in the United States District Court for the District of New Jersey in March 2010, which was later transferred to the United States District Court for the Central District of California, arguing that Boal, without authorization, published a factual account about Sarver in *Playboy* and then later fictionalized the story in the film. Sarver claimed the film violated his

“right of publicity” — his right to control the commercial use of his identity and elements of his life story.

The California federal district court dismissed all of Sarver’s claims, concluding that the state’s anti-SLAPP (Strategic Lawsuit Against Public Participation) statute applied because the defendants were engaged in the exercise of free speech in connection with a public issue, and that the film’s use of Sarver’s identity was transformative, meaning that the filmmakers had transformed “The Hurt Locker” into an independent expressive work rather than primarily relying on Sarver’s likeness or personal history. The anti-SLAPP statute was enacted to allow for early dismissal of meritless actions that might otherwise inhibit the exercise of First Amendment rights through costly and time-consuming litigation. The statute authorizes judges to throw out civil complaints when defendants can demonstrate that the First Amendment protects their actions. Cal. Civ. Proc. Code § 425.16(f). Sarver appealed the federal district court’s decision.

On appeal, a unanimous three-judge panel for the Ninth Circuit agreed with the district court’s application of the California anti-SLAPP statute. Judge Diarmuid O’Scannlain, writing for the panel, held that the motion picture was entitled to First Amendment protection in part because the Iraq War and Sarver’s work was an “issue of public concern.” The judge noted that if Sarver’s specific biographical details or characteristics were depicted in the film, the depictions were “displayed only in the context of the character’s experiences fighting in Iraq” and were “inherently entwined with the film’s alleged portrayal of his participation in the Iraq War.” Judge O’Scannlain added, “We conclude that this focus on the conduct of the Iraq War satisfies California’s standards for determining whether an issue is one of public concern. That war, its dangers, and soldiers’ experiences were subjects of longstanding public attention.”

The opinion also attempted to draw a dividing line between the public’s First Amendment interests and the personal commercial interests protected by the right of publicity. The U.S. Supreme Court has addressed publicity rights only once, which was in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In that case, Zacchini, a carnival entertainer, sued an Ohio television station after it recorded and aired his human

cannonball act in its entirety without his consent. He argued that by showing the whole act, he could no longer make a profit from his performance. The Supreme Court agreed that he was deprived of a valuable commercial property right. The Supreme Court held that the First Amendment interest in broadcasting the entire performance was minimal because it would have prevented Zacchini from charging an admission fee for what the television-viewing public had already enjoyed for free. Most other right of publicity cases have involved celebrities challenging the use of their images in advertising without their consent.

However, the Ninth Circuit distinguished the case at hand from the previous cases establishing publicity rights by holding that “The Hurt Locker” did not appropriate the economic value of Sarver’s persona or seek to capitalize on his celebrity image. Judge O’Scannlain stressed that *Zacchini* only upholds “the right of publicity in a variety of contexts where the defendant appropriates the economic value that the plaintiff has built in an identity or performance.” The Court went on to conclude that Sarver had not created an “economic value in a marketable performance or identity.”

As a result, the panel held that Boal had not infringed upon Sarver’s right to publicity. “Neither the journalist who initially told Sarver’s story nor the movie that brought the story to life stole Sarver’s ‘entire act’ or otherwise exploited the economic value of any performance or persona he had worked to develop,” O’Scannlain wrote. “In sum, ‘The Hurt Locker’ is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life — including the stories of real individuals, ordinary or extraordinary — and transform them into art, be it articles, books, movies, or plays.” The Court also dismissed other more minor allegations by Sarver including a defamation claim, a false light invasion of privacy claim, and an intentional infliction of emotional distress claim.

In a Feb. 17, 2016 interview with *The Hollywood Reporter*, Boal praised the Ninth Circuit’s decision. “I am pleased that the court found that artistic expression in films such as [‘The Hurt Locker’] is fully protected by the First Amendment. This is an important victory for all filmmakers,” Boal said.

SARAH WILEY
SILHA RESEARCH ASSISTANT

Twitter's Change in Terms of Service to Limit "Harmful Speech" Garner Criticism

On Dec. 29, 2015, Twitter announced changes to its terms of service. The changes targeted violent posts, including digital harassment and terroristic threats, allowing Twitter more explicit power to suspend or shut down accounts

SOCIAL MEDIA engaged in this conduct. After announcing these changes, Twitter suspended the accounts of two controversial politically conservative users, raising questions from critics suggesting that Twitter's decision to place limitations on users' content was not adhering to its stated free expression ideals. However, others noted that Twitter's status as a private entity permitted the company to strictly regulate users, even though such actions might be misguided.

In a December 2015 post on the company's blog, Twitter announced that it was changing its terms of service over how it would regulate posts that the company deemed to be violent. Twitter officials explained in the blog post that they aimed to decrease digital harassment and planned to take steps to identify users who tweeted "violent" or "hateful" speech. The company also updated its "hateful conduct" policy to ban attacks or threats against people "on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or disease."

The change in the terms of service indicated that Twitter would be more engaged in suspending or shutting down accounts of people who engage in "hateful conduct" or whose "primary purpose is inciting harm towards others," according to a Dec. 30, 2015 CNN story. Another major change was the definition of "violence," which now "includ[ed] threatening or promoting terrorism," according to Twitter's post. The change in the terms of service also closed a loophole allowing people to use multiple accounts for the sole purpose of avoiding suspension after posting messages Twitter deemed to be terroristic or violent, meaning that people could be effectively barred from using Twitter. In the past, Twitter banned the promotion of violence

and terrorism on its site but did not explicitly say people involved in such practices would be kicked off the social network.

CNN reported that the changes to Twitter's terms of service came at a time when government officials and others were pushing for social media and technology companies to help fight terrorism and other forms of abuse on social media sites, particularly

"As always, we embrace and encourage diverse opinions and beliefs — but we will continue to take action on accounts that cross the line into abuse."

— Megan Cristina,
Trust and Safety Director for Twitter

in the wake of the November 2015 Paris attacks and the December 2015 shootings in San Bernardino, Calif. The Islamic State of Iraq and Syria (ISIS), the terrorist group that regularly uses social media to promote its activities, was probably the target of these policy changes, according to CNN Money's story. ISIS has previously used Twitter to claim responsibility for terrorist acts and to spread propaganda. In some instances, the extremist group has used Twitter to celebrate terrorist attacks and publicize executions. In the past six months, Twitter suspended 125,000 accounts connected to the Islamic State, according to a January 2016 company report. *USA Today* reported on February 5 that the January report was the first time Twitter shared specifics on the number of accounts it had deleted due to terrorism-related content. (For more information on ISIS' use of social media platforms, see the section titled *Missing American Journalists Executed by Islamist Militants* in "Journalists Arrested During Protests in Missouri; Journalists Abroad Face Dire Situations" in the Summer 2014 issue of the *Silha Bulletin*.)

Terrorism Research and Analysis Consortium Editorial Director Veryan Khan told *USA Today* that even with the updated terms of service, ISIS' use of Twitter would not be significantly curbed. She explained that ISIS had been preparing its sympathizers for

these types of updates to Twitter's operating mechanisms. "How to' videos have been circulating over this month on how to create dozens of back up accounts easily, including creating false working phone numbers," Khan said. "I think the bounce back for the Islamic State will be fairly effortless."

However, Twitter's changes to its policy were not solely focused on terrorism. In addition to the changes

to the "hateful conduct" definition, the updated section discussing abusive behavior became the largest section of Twitter's new rules. The company's policy statement

regarding the section informed users that "[Twitter does] not tolerate behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice." In the December blog post, Twitter's trust and safety director Megan Cristina wrote, "As always, we embrace and encourage diverse opinions and beliefs — but we will continue to take action on accounts that cross the line into abuse."

Others noted that part of Twitter's reasoning for the changes was to prevent online abuse of female journalists, a problem that several social media sites have been attempting to solve. The *Columbia Journalism Review (CJR)* reported on March 18, 2016 that a 2014 report by the International Women's Media Foundation (IWMF) and International News Safety Institute (INSI) researchers found that a quarter of all harassment aimed at female journalists occurred online. Data collected by U.K.-based Demos, an independent think tank that studies how social media affects society, indicated that women journalists are three times more likely to be on the receiving end of online abuse than their male colleagues, according to *CJR*. Dunja Mijatovic, a representative on freedom of the media for the Organization for Security

Twitter, continued from page 25 and Co-operation in Europe (OSCE), told the *CJR* that Demos' data should raise concerns over the treatment of female journalists online. "We're seeing rape threats, death threats against professionals because of stories where they're revealing corruption in their societies," Mijatovic said. "It's not only about them being critical journalists. It's also about them being female. Now we're producing tools and advice for government[s] on how to deal with this."

In response to such data and as part of the larger policy changes, Twitter enhanced its "block" feature allowing users greater ability to determine who can see their accounts, increased the number of abuse reports that it reviewed, and banned revenge porn. A Twitter spokesperson told *CJR*, "Our rules are designed to allow our users to create and share a wide variety of content in an environment that is safe and secure for our users." *The Washington Post* reported on Jan. 3, 2016 that Twitter also announced changes to how it would respond to users whose messages appeared to suggest that they planned to commit suicide or self-harm. Twitter's updated policy includes "reaching out to that person expressing our concern and the concern of other users on Twitter or providing resources such as contact information for our mental health partners." Twitter's updated policy is available at <https://twitter.com/tos?lang=en>.

Twitter officials acknowledged that enforcement of its new policies could require a balancing act. "Keeping users safe requires a comprehensive and balanced approach where everyone plays a role," Cristina wrote in the December post. "We will continue to build on these initiatives to empower our users and ensure that Twitter remains a platform for people to express themselves." In a February 5 blog post, Twitter announced that it had increased the size of its teams of employees who examine suspected terrorist accounts and search for automated accounts that publish extremist views as part of its steps to enforce the new policies. Twitter officials wrote that the goal was to react more quickly to terrorist and other violent content on the services. Nevertheless, Twitter recognized that the monitoring of accounts still required

judgment calls. "There is no 'magic algorithm' for identifying terrorist content on the Internet, so global online platforms are forced to make challenging judgment calls based on very limited information and guidance," officials wrote in the post.

Twitter found both support and criticism of its decision to update its policies regarding users' posts. In a Dec.

"'How to' videos have been circulating over this month on how to create dozens of back up accounts easily including creating false working phone numbers. I think the bounce back for the Islamic State will be fairly effortless."

— **Veryan Khan,**
Editorial Director,
Terrorism Research and Analysis Consortium

30, 2015 interview with CNN, Rabbi Abraham Cooper, head of the Simon Wiesenthal Center in Los Angeles' digital terrorism and hate project, expressed his support for Twitter making an attempt to stop the terrorist activity on their site. "If this signals that Twitter is finally going to become proactive and shutting out the ISIS's of the world from their service, it's a huge step forward. It will definitely help degrade the-all-too effective online marking campaigns of ISIS," he said. In the same story, Rep. Adam Schiff (D-Calif.), the ranking member of the House Permanent Select Committee on Intelligence, agreed that the changes made by Twitter were positive. "ISIS has eclipsed al Qaeda as the foremost terror threat we face through its slick propaganda and sophisticated use of social media to amplify their message and recruit followers, both in the United States and abroad," Rep. Schiff told CNN.

Others criticized Twitter for several of the changes in its rules to ban certain types of speech because the terms of the new policies were unclear, which meant that almost any speech could be viewed as "hateful conduct." *The Washington Post* reported on January 3 that *The National Review's* Katherine Timpf suggested that Twitter's new policy would focus on limiting the posts of people with conservative views during an appearance on Fox News' "Fox and Friends." "This language is so

vague, that you could really get anyone in trouble that you want to," Timpf said. Several days later, Timpf's concerns appeared to have merit.

On Jan. 8, 2016, Twitter removed the verification status of *Breitbart News* tech editor Milo Yiannopoulos. Twitter announced that his verification was removed "due to recent violations of the Twitter Rules," according to a letter

Yiannopoulos received from Twitter that he later posted on his account page. A verified status on Twitter is signified by a blue checkmark next to the user's name on their profile and requires users to complete a process confirming their identity. This

is an important perk for journalists, politicians, celebrities, and other well-known public figures who are often the target of accounts that attempt to impersonate them. Verified accounts also show up first in search lists when users are searching for accounts to follow.

Although Twitter did not tell Yiannopoulos what specific behavior led to the revocation of his verified status, he was well known for posting inflammatory messages on Twitter, especially ones that target feminism and social justice causes. Yiannopoulos was also an active participant in #Gamergate, a movement that claimed to have concerns over ethical reporting in video game journalism but regularly threatened and harassed female video game developers, critics, and journalists through social media platforms.

Yiannopoulos faced several Twitter suspensions in the past, but denied that he had done anything wrong to deserve losing his verified status. The controversial user criticized Twitter for its decision. "[Twitter's rules are] opaque and inconsistently enforced, but to the extent they are set out, they misrepresent ridicule and criticism as abuse and harassment," Yiannopoulos told *The Wall Street Journal* in a Jan. 11, 2016 interview. He also suggested that he was targeted because of his conservative ideology and viewpoints.

The Wall Street Journal reported that Twitter's decision to strip Yiannopoulos

of his verified status demonstrated how the enforcement of its new policies might be difficult, particularly because the social media platform had prided itself on being a champion of open expression on the Internet. Although the company did not suspend Yiannopoulos' account again or permanently ban him from the site, Twitter officials still weakened the power of his account by removing his verified status, which the controversial *Breitbart* reporter claimed was censorship. "Effectively they have privileged progressive opinions over mine and reduced my power and influence in the marketplace. That's a real thing and they've done it on a whim, for political reasons, while refusing to explain why," Yiannopoulos said during a January 12 interview with *Fusion*.

In February 2016, Twitter also faced further questions from critics who argued that the platform was not supporting its claims of permitting free expression on its website after the company decided to ban conservative blogger Robert Stacy McCain, according to a February 23 story by the *New York Post*. McCain was also known for his extremely critical posts that targeted Democrats as well as feminists. Opponents of the decision argued that McCain's commentary should be considered harsh political speech rather than harassment or violent commentary. In early March 2016, the hashtag #FreeStacy became a "trending" topic on Twitter as thousands of users criticized his suspension from the social media site.

Although many critics raised concerns over Twitter's handling of controversial users, attorney Ken White argued in a Feb. 20, 2016 post on the blog "Popehat" that the social media platform's actions did not raise any freedom of expression concerns from a legal standpoint because the company was engaging in private speech. Rather,

"Corporations are people! They don't lose rights because they get too big or because someone thinks they look like public entities if you squint. ... Whether or not you support anti-discrimination laws governing private entities, they can't be reconciled completely with free speech and free association rights."

**— Attorney Ken White,
Blogger for "Popehat"**

he criticized Twitter for attempting to present itself as a platform where users can engage in unfettered expression while also being safe from discriminatory speech.

"Rather than indulging in cries that Twitter is engaged in fascism, or book-burning, or Nazism, or totalitarianism (all of which I've seen said today), I'm saying that Twitter is engaging in a mix of private speech and product development that I don't like, and demonstrating that its marketing patten about free expression has traveled beyond the realm of acceptable sales puffery into the noisome Kingdom

of Bullshit," White wrote. "I classify Twitter's action as bad customer service and as private speech I don't like because of my conservative views. Those views include the following: private companies (which are individuals organized to do things as efficiently and safely as possible) have a right to free speech and free association.

Corporations are people! They don't lose those rights because they get too big or because someone thinks they look like public entities if you squint. ... Whether or not you support anti-discrimination laws governing private entities, they can't be

reconciled completely with free speech and free association rights. Or, put in law-professor-speech, anti-discrimination values and free speech values are in tension."

As the *Bulletin* went to press, Yiannopoulos' Twitter account remained unverified, and McCann continued to remain banned from Twitter.

SCOTT MEMMEL
SILHA RESEARCH ASSISTANT

The *Silha Bulletin* is also available at the University of Minnesota
Digital Conservancy.

Go to:

<http://conservancy.umn.edu/discover?query=Silha+Bulletin>
to search past issues.

Iran Frees American Reporter; Protections for Expression Face Significant Challenges Elsewhere

In the spring of 2016, *The Washington Post* received news that one of its reporters would be released from an Iranian prison after being held for more than a year. The journalist's release was a small step forward for free expression. However, free expression protections

ENDANGERED JOURNALISTS

still faced several challenges, as individuals domestic and abroad continued to face punishments for exercising their expressive rights. In the United States, a Minnesota attorney, who is known for his representation of unpopular activists, faced the possibility of criminal prosecution for recording police during a protest. In a separate case, a journalist who was convicted of violating a federal anti-hacking law was sentenced to serve 24 months in prison. Internationally, German officials allowed a prosecution under an obscure law prohibiting insults against foreign leaders to move forward against a satirist after he read an offensive poem on television that criticized the president of Turkey.

Washington Post Reporter Freed after Spending More than 500 Days in Iranian Prison

On Jan. 16, 2016, *The Washington Post* reported that Iran had agreed to release reporter Jason Rezaian, who had spent 544 days in Iranian prison after he was arrested on unspecified charges. The reporter was one of five Americans whom Iranian officials agreed to release in exchange for the United States granting clemency to seven Iranians charged with or imprisoned for violating U.S. sanctions placed on Iran, according to the *Post*. Additionally, the United States agreed to drop pending charges against 14 Iranian individuals living outside of the United States who were also accused of violating sanctions against Iran. Press advocates praised the release of Rezaian but continued to raise concerns over Iran's treatment of free expression.

Rezaian, who holds dual American and Iranian citizenships, was arrested in July 2014, along with his wife Yaganeh Salehi, who was a reporter for the United Arab Emirates' *The National*, and two unnamed reporters. Salehi and

the other journalists were later released on bail, but Iranian officials continued to hold Rezaian in Evin Prison, one of Iran's notoriously inhumane facilities. Iranian officials did not bring formal charges against Rezaian until April 2015. At the time, Rezaian's attorney, Leila Ahsan, told *The Washington Post* that the journalist faced several vague charges, including "collaborating with hostile governments" and "propaganda against the establishment." In October 2015, Iranian officials announced that Rezaian had been convicted of several charges but did not publicly disclose any specifics details. In November 2015, Iran announced that Rezaian had been sentenced to a prison term for his convictions but again refused to provide further information about the case. According to a January 16 press release from The Committee to Protect Journalists (CPJ), Rezaian's imprisonment of 544 days was longer than any other international journalist in Iran. (For more information on Rezaian's arrest and imprisonment, see "Journalists Arrested During Protests in Missouri; Journalists Abroad Face Dire Situations" in the Fall 2014 issue of the *Silha Bulletin*, "Journalists Abroad Face Uncertain Legal Challenges; U.S. Television News Reporters Slain During Live Report" in the Summer 2015 issue, and "Journalists Face Troubling Criminal Convictions Domestically and Abroad" in the Fall 2015 issue.)

The announcement of Rezaian's release came the same day as the United States and European Union officials agreed to lift several economic sanctions against Iran in exchange for Iran committing to dismantling several parts of its nuclear infrastructure. According to a January 17 story by the *Post*, the release of Rezaian and other prisoners was not officially part of the deal lifting sanctions. However, the *Post* reported that U.S. Secretary of State John Kerry often raised questions over the status of the imprisoned U.S. citizens during the course of negotiations with Iran. The Iranian judiciary also appeared to make announcements or hold hearings regarding imprisoned U.S. citizens during several sensitive times for the nuclear negotiations between Iran and the world, according to the *Post*. After

his release from prison, government officials had Rezaian flown to Germany to receive medical treatment at a U.S. military facility. On January 22, the *Post* reported that *Washington Post* and Amazon Chief Executive Officer Jeff Bezos met with Rezaian and the journalist's family in Germany before flying them back to the United States on a private jet.

The announcement of Rezaian's release was welcome news for several journalists and press advocates. On January 17, *Washington Post* publisher Frederick J. Ryan Jr. thanked everyone who had helped ensure that Rezaian was released from Iranian custody. "Friends and colleagues at *The Washington Post* are elated by the wonderful news that Jason Rezaian has been released from Evin Prison and has safely left the country with his wife, Yeganeh Salehi," Ryan said, according to the *Post*. "We are enormously grateful to all who played a role in securing his release. Our deep appreciation also goes to the many government leaders, journalists, human rights advocates and others around the world who have spoken out on Jason's behalf and against the harsh confinement that was so wrongly imposed upon him."

In a January 16 press release, CPJ's Middle East and North Africa Program Coordinator Sharif Mansour said that the release of Rezaian was positive news but criticized Iran's poor record on the treatment of journalists. "We welcome news of the release of Jason Rezaian, who should never have been imprisoned in the first place," Mansour said, according to the press release. "The farce of a judicial process that kept him in custody for 544 days has earned Tehran nothing but scorn from the international community. The Iranian government should begin taking steps immediately to improve its press freedom record by releasing all journalists imprisoned in relation to their work." In 2015, CPJ ranked Iran as the third worst jailer of journalists in the world, according to the organization's annual prison census.

In a January 20 statement published by *The Washington Post*, Rezaian said that he hoped to return to reporting on affairs between the United States and Iran, but, for the moment, he would take

time off from journalism. “I’ve spent a lot of my life writing about the United States and Iran, and I never imagined — and never wanted — to become part of the story, particularly at such an extraordinary moment. I want to get back to writing the U.S.–Iran story at some point in the future,” Rezaian said in the statement. “But I won’t be saying anything further for a while. I hope everyone will respect my need for privacy as I take some time for myself and for my family. For now, I want to catch up with what’s being going on in the world watch a Warriors [basketball] game or two, and see the Star Wars movie.”

Minneapolis Drops Charges Against Attorney who Recorded Police

On April 8, 2016, the *Star Tribune* reported that the Minneapolis City Attorney’s office announced that it was dropping several charges against attorney Jordan Kushner, who was arrested in November 2015 after he recorded police officers interacting with protesters at the University of Minnesota. Kushner, who has regularly represented demonstrators after they have been arrested, claimed that he was innocent because he had a First Amendment right to record officers. The attorney also suggested that the prosecutors were politically motivated because of his legal support for protesters and criticisms of the Minneapolis City Attorney’s office, which prosecutors denied.

In a Feb. 9, 2016 story, the *Star Tribune* reported that Kushner was arrested at the University of Minnesota Law School during a Nov. 3, 2015 public lecture given by Moshe Halbertal, a controversial scholar who has worked on the Israel Defense Forces’ code of ethics. During the lecture, several pro-Palestinian activists began shouting and interrupting Halbertal. Kushner, who was in attendance as an observer of the lecture rather than a demonstrator, used his phone to record police officers as they began ushering protesters out of the lecture hall. After Kushner asked about the treatment of one particular protestor, police officers told the attorney to stop recording. Kushner argued with officers over whether he had a First Amendment right to record police. The attorney was then arrested and escorted out of the building. In their report, officers alleged that Kushner had shouted and argued when he was told to stop recording

and struggled throughout the arrest. In a February 4 story, the *Minnesota Daily* reported that the Minneapolis City Attorney’s office later brought three misdemeanor charges against Kushner, including disorderly conduct, trespassing, and obstruction of justice.

However, Kushner maintained his innocence, explaining that he had received a formal invitation from the law school to attend the event, according

“All of the cases I have reviewed made it clear, that there’s a constitutional right [to record police] under the First Amendment. But they’ve got the guns, and badges, and they want total control of the situation they’re in. They won’t allow questioning by anyone.”

— Attorney Jordan Kushner

to the *Star Tribune*’s February 9 story. Kushner also said that he had e-mailed demonstration organizers prior to the lecture to discourage them from interrupting Halbertal because it could alienate any allies and foreclose the chance of any dialogue with others who were attending the event. The *City Pages* reported on March 2 that witnesses also said that Kushner simply argued with officers over his right to record video but did not appear to physically resist the officers’ directions.

Kushner also maintained that the First Amendment protected his actions. “All of the cases I have reviewed made it clear, that there’s a constitutional right [to record police] under the First Amendment,” Kushner told the *City Pages* in a Jan. 20, 2016 interview. “But they’ve got the guns, and badges, and they want total control of the situation they’re in. They won’t allow questioning by anyone.” In a March 2 interview with *City Pages*, Kushner also suggested that the charges were politically motivated because he had signed a letter by the Minnesota chapter of the National Lawyers Guild that criticized City Attorney Susan Segal for the way in which she advised the city to spend \$150 million of taxpayer money on the Minnesota Vikings’ stadium without voter approval. Kushner’s was the first signature on the letter, according to *City Pages*. However, Segal denied the accusation in a written statement to *City Pages*, noting that she had offered

to settle the charges against Kushner in the same way she had with several protestors from the November 3 event.

Prior to the charges being dropped, city prosecutors and Kushner clashed several times during pre-trial hearings. In the February 9 story, the *Star Tribune* reported that Kushner had asked during pre-trial proceedings to represent himself along with a co-counsel. City attorney Sarah Becker,

who was handling the prosecution, opposed the motion, saying that Kushner would offer evidence during the trial in situations when he was not on the witness stand. During that same hearing, Becker also orally requested a gag

order on trial participants and criticized Kushner for giving an interview to *City Pages*. The trial judge refused to issue the order but said that Becker could file a motion requesting a gag on participants. The *Star Tribune* reported on March 29 that city attorneys filed the gag order motion, which Kushner opposed.

However, the Minneapolis City Attorney’s office dropped the charges on April 8, according to the *Star Tribune*. The newspaper reported that Segal explained that she was dismissing the charges so that the city attorney’s office could focus on other cases, but said, “the evidence supports the charges brought by the University of Minnesota police. There has been no change in our opinion of the facts.” Kushner told the *Star Tribune* that he doubted Segal’s reasoning because if she believed the law enforcement reports, “it would be irresponsible for her to drop the charges.” Rather, Kushner suggested that the charges were dropped “because it was clear that the allegations in the police reports were false.”

Former Tribune Company Journalist Sentenced to 24 Months in Prison after Hacking Conviction

On April 13, 2016, U.S. District Judge Kimberly J. Mueller sentenced journalist Matthew Keys to 24 months in prison after he was convicted in October 2015

Endangered, continued from page 29

of violating the Computer Fraud & Abuse Act (CFAA). 18 U.S.C. § 1030. A jury in Sacramento, Calif. found Keys guilty on all three counts that prosecutors charged him with, including conspiracy to commit computer hacking, transmission of malicious code causing unauthorized damage to a protected computer, and attempting to transmit malicious code to cause unauthorized damage to a protected computer. Federal prosecutors brought the charges in 2013, accusing Keys of providing hacker activist group “Anonymous” with log-in credentials to the Tribune Company’s content management system and encouraging the group to “go fuck some shit up.” According to the indictment, Keys provided the group with the credentials after he was fired from his job with a Sacramento-area television station that the Tribune Company owned. A hacker with the pseudonym “Sharpie” then used the credentials to access the Tribune Company servers and made alterations to news story headlines on the Tribune-owned *Los Angeles Times*’ website. The changes were corrected after 40 minutes. Throughout his trial, Keys maintained his innocence and said that unknown parties captured his login information while he was investigating Anonymous in online chat rooms. (For more information about Keys’ conviction, see “Journalists Face Troubling Criminal Convictions Domestically and Abroad” in the Fall 2015 issue of the *Silha Bulletin*.)

Ars Technica reported on April 13 that prosecutors had initially requested that Judge Mueller impose a sentence of five years. During the sentencing hearing, Assistant United States Attorney Matthew Segal argued that Keys deserved a significant punishment due to an unrepentant attitude. “This is a person, for whom his own aggrandizement, is willing to attack any institution that threatens him: the press, broadcast media, print media, law enforcement, the jury system,” Segal said, according to *Ars Technica*. “This wasn’t mischief, this was rage driven by profound narcissism.”

However, Keys’ attorney Jay Leiderman requested that he not be required to serve any time in prison because the CFAA was an outdated law. “It is a horse and buggy law in a jet plane society,” Leiderman said during the hearing. “It doesn’t account for

the modern Internet, the punishments do not fit the crime.” Leiderman also explained that Keys intended to appeal his conviction, which is why he had steadfastly refused to apologize for any sort of wrongdoing. “An apology is impossible at this point because we’re going to appeal. At some point these [CFAA] cases are going to go to the Supreme Court, and frankly why not us?”

The maximum possible sentence available under the law for the three convictions was 25 years in prison, but Judge Kelly imposed a two-year sentence. “When this court tries to make sense of what Mr. Keys did for a limited period of time, it was out of pique, it was out of anger at his former employer,” Judge Mueller said during the sentencing hearing, according to *Ars Technica*. “He arrogated to himself the decision to affect the content of a journalistic publication. In practical effect, at least with respect to the *Los Angeles Times* webpage, the effect was relatively modest and did not do much to actually damage the reputation of that publication. But the intent was to wreak further damage which could have had further consequences.” However, the judge acknowledged that Keys was a contributing member of society and had not run afoul of the law since the prosecution was initiated, which led to her decision to cut the prosecutors’ requested sentence down to 24 months.

In an interview with *Ars Technica*, Keys also explained his decision to fight the case in court rather than accepting one of the three plea deals that prosecutors offered him. “I took this case to trial because I feel it can have a serious impact on [the CFAA, which] is really broken,” Keys said. “I would hope that through this experience, there are people who are out there that look at this and go: ‘You know what, this is bullshit.’ It’s bullshit that the government is invoking national security and terrorism laws and they do it all the time, and they’re doing it here. Where’s the bottom?”

Others have also criticized prosecutors obtaining criminal convictions under the CFAA, which was enacted in 1984 prior to the modern conception of the Internet. In an April 13 post on *Slate*’s “Future Tense” blog, *Columbia Journalism Review* contributing editor and *Slate* correspondent Justin Peters argued that

Keys’ conviction and sentence under the CFAA should be worrisome. “Keys was convicted of violating America’s terrible Computer Fraud and Abuse Act, a federal computer-crime statute so broad and vague that you’ve probably already violated it several times a year. [The CFAA] gives federal prosecutors the latitude to categorize a wide range of computer-related activity as felonious, and to willfully and regularly conflate the malicious with the innocuous. Have you ever used a friend’s password to access her Netflix or HBO Go accounts without paying for them, or used some other means to evade a paywall or otherwise violate a website’s terms of service? Congratulations! You’re a potential felon,” Peters wrote. “The Department of Justice doesn’t make a habit of prosecuting frugal cord-cutters, of course. But the CFAA is written broadly enough that a U.S. attorney could throw the book at you for so absurdly minor an infraction, if she wanted to. That’s precisely the problem: A law that qualifies basically everything as a crime means that ambitious computer-crime prosecutors can count anything as one, and bring criminal prosecutions against people who have no business going to prison.”

Ars Technica reported that Keys was ordered to report to federal prison in California on June 15, 2016, but that Leiderman would move to have the incarceration stayed pending appeal.

German Comedian Faces Prosecution over Poem Insulting Turkish President

On April 15, 2016, German Chancellor Angela Merkel announced that government authorities would allow a criminal prosecution of German satirist Jan Böhmermann to proceed after the comedian read a crude poem on television critical of Turkish President Recep Erdogan. *The New York Times* reported on April 15 that Turkish officials had requested the prosecution of Böhmermann under an obscure German law enacted in 1871 that prohibits insulting foreign leaders. Several free expression advocates have criticized Merkel for allowing a possible prosecution to move forward. Critics also drew attention to Turkey’s increasingly poor treatment of journalists and free expression under Erdogan’s leadership.

On March 29, 2016, the Associated Press (AP) reported that Turkish officials initially began raising complaints over the depiction of Erdogan in a video aired by German comedy show “Extra 3” on March 17. The video contained a parody song as well as various images that criticized Erdogan as being a thin-skinned authoritarian who regularly sought to punish journalists and other critics in opposition to him. Turkish officials then summoned the German ambassador to Ankara in order to express their displeasure with the video and request that broadcasters stop airing it. After news of the Turkish officials’ requests broke, Böhmermann read a poem criticizing Erdogan during the March 31 airing of the German comedy show, “Neo Magazin Royale.” The satirical poem suggested that Erdogan had sex with goats, took pleasure in repressing Turkish minorities, and enjoyed child pornography, according to an April 7 story by *The Washington Post*. Prior to reading the poem, Böhmermann argued that the video from “Extra 3” clearly fell within Germany’s protections for free expression and acknowledged that his poem likely fell outside of such protections.

In the same story, *The Washington Post* reported that Turkish Prime Minister Ahmet Davutoglu later criticized the poem, stating that any insult directed toward Erdogan was akin to an insult directed toward all Turkish people’s honor. On April 11, *The New York Times* reported that Turkish officials filed a formal request with the German government to prosecute Böhmermann under a German law that prohibited insults against foreign leaders. However, the law permits prosecutions to move forward only after the German government has consented. The *Post* reported that Merkel announced on April 15 that the German government would allow its court system to determine whether Böhmermann was guilty of insulting Erdogan. “In a country under the rule of law, it is not up to the government to decide,” Merkel said, according to the *Post*. “Prosecutors and courts should weigh personal rights against the freedom of press and art.” Merkel also announced in the April 15 statement that she would seek to repeal the German law that Böhmermann is accused of violating.

Free expression advocates criticized Merkel’s decision to allow a prosecution against Böhmermann to proceed. Specifically, critics argued that the German chancellor’s decision was based on a desire to ensure political deals made with Turkey did not fall apart. “Why would Ms. Merkel choose Mr. Erdogan over her own citizens’ free speech? One reason: the recent agreement between the European Union and Turkey to staunch the flow

“In a country under the rule of law, it is not up to the government to decide. Prosecutors and courts should weigh personal rights against the freedom of press and art.”

— German Chancellor Angela Merkel

of refugees entering the Continent. Under the accord, those caught crossing the sea between Turkey and the Greek islands are now sent back in exchange for a payment of three billion euros and Europe’s commitment to take in up to 72,000 additional Syrian refugees,” wrote *Der Tagesspiegel* opinion page editor Anna Sauerbrey in an April 15 op-ed for *The New York Times*. “But what seemed like a policy breakthrough became a political albatross. Had Ms. Merkel refused to prosecute Mr. Böhmermann, Turkey could have pulled out of the deal. She has opted for the second, bad option, sullyng her own liberal virtues.”

In an April 26 op-ed for *Newsweek*, English PEN director Jo Glanville criticized Erdogan for seeking a prosecution of Böhmermann. Glanville also argued that Erdogan’s dogged pursuit of seeking punishments against his critics had created a dangerous atmosphere for expression in Turkey. “[Erdogan’s] policy of prosecuting anyone who dares to criticize or mock him has long been worthy of parody. According to the country’s justice minister, more than 1,800 cases of insult against the president are currently awaiting prosecution. Cases over the past six months include Dr. Bilgin Ciftci, who compared Erdogan to Gollum in the Lord of the Rings films,” Glanville wrote.

“Others to fall foul of the law include a group of students who called Erdogan a light bulb and another who threw darts at his picture. ... This is the world — surely — of a totalitarian dictator, not of a democratically elected politician. Criminal defamation as a political tool for intimidating, bullying and silencing the Turkish population has become routine, in a country where free speech is now in unprecedented crisis.”

In 2015, the Committee to Protect

Journalists’ (CPJ) annual prison census ranked Turkey as one of the world’s worst jailers of journalists. In a Dec. 15, 2015 post on its website, CPJ reported that Turkey was holding 14 journalists in jail at the end of 2015. CPJ also noted

that Turkey had been the worst jailer of journalists in 2012 and 2013. In a Dec. 18, 2013 post, CPJ reported that Turkey had been holding 61 journalists in jail during October 2012, which was reduced to 49 journalists by December 2012. However, Turkey was holding 40 journalists in jail at the end 2013, which was more than either Iran or China, according to CPJ.

The New York Times reported on April 16 that Böhmermann announced that he would be taking an extended break from his show until the controversy settled down. On May 3, *The Guardian* reported that Böhmermann was critical of Merkel during his first public interview after she made her decision to allow the prosecution to move forward. “The chancellor must not wobble when it comes to freedom of speech,” Böhmermann said in an interview with German newspaper *Die Zeit*, according to *The Guardian*. “But instead she filleted me, served me up for tea [to Erdogan.]” As the *Bulletin* went to press, trial proceedings regarding Böhmermann’s case had not yet begun.

CASEY CARMODY
SILHA BULLETIN EDITOR

Media Law Issues at Forefront in Several States

In the spring of 2016, several states confronted legal questions that raised important issues for state media law policy. Issues included a South Carolina state legislator proposing a “journalist registry” as a way to make a political point, Florida considering legislation that would amend its public records law, the introduction of a bill in Minnesota that

STATE LAW UPDATES

would criminalize “revenge porn,” and a movie theater in Utah facing the suspension of its liquor license after it showed a R-rated superhero movie.

South Carolina Representative Introduces the Responsible Journalism Registry Bill

On Jan. 19, 2016, South Carolina state Rep. Mike Pitts (R-Laurens) introduced a bill proposing a mandatory registry for journalists in the state. Under the bill, media outlets would need to follow several requirements when hiring and managing employees who would work as journalists. In a January 20 story, National Public Radio (NPR) reported that news organizations would be obligated to conduct criminal record background checks on prospective hires, as well as provide assurances that a person “is competent to be a journalist.” Journalists would be ineligible for the registry if they had “demonstrated a reckless disregard of the basic codes and canons of professional journalism associations, including a disregard of truth, accuracy, objectivity, impartiality, fairness, and public accountability,” according to NPR. The bill also created punishments carrying varying levels of consequences for working as or hiring an unregistered journalist. Anyone working as a journalist prior to registering would face a potential fine of \$25. Second offenses would be misdemeanors punishable by a \$100 fine and up to 15 days in jail, and repeat offenders would face \$500 fines and 30 days in jail, according to a Jan. 22, 2016 *Washington Times* story. The full text of the bill is available at http://www.scstatehouse.gov/sess121_2015-2016/bills/4702.htm.

Rep. Pitts said that the bill was designed to follow the framework of the state’s process to obtain a concealed

weapons permit, according to NPR. The resemblance led many observers to suggest that the proposal was intended as a political statement and it would be likely to be withdrawn. Although the bill was sent to the Committee on Labor, Commerce and Industry, Rep. Pitts appeared to later confirm many critics’ beliefs that the bill was intended to make a point. According to a January 20 story by *U.S. News and World Report*, Rep. Pitts published a Facebook post explaining his rationale for introducing the controversial bill.

“I filed this legislation as an experiment to make a point about the media and how they only care about the constitution when it comes [to] their portion of the 1st Amendment,” wrote Rep. Pitts. “They constantly attack people who follow their Christain [*sic*] beliefs and attempt to portray them as bigots, and they certainly do not like the fact that normal everyday Americans gather to petition the government and air grievances. Look no further than how they have demonized the Tea Party. Furthermore, they love to trample on our 2nd Amendment rights to ‘Keep and Bear Arms’. If they had their way, there would be no 2nd Amendment.”

Rep. Pitts also attempted to clarify the bill in a January 19 interview with Charleston’s *The Post and Courier*, in which he said the bill was not a reaction to a news story and that he did not view himself as a “press hater.” Instead, he wanted the bill to generate a discussion over how news organizations depict issues related to Second Amendment rights. “It strikes me as ironic that the first question is constitutionality from a press that has no problem demonizing firearms,” Rep. Pitts said. “With this statement I’m talking primarily about printed press and TV. The TV stations, the six o’clock news and the printed press [have] no qualms demonizing gun owners and gun ownership.”

In a January 20 interview with NPR, Bill Rogers, executive director of the South Carolina Press Association, told NPR that his organization “would fight [the bill] tooth and nail” regardless of whether it was a joke, a publicity stunt, or a serious bill. Rogers also stated that he did not believe the measure had any realistic chance to move forward because the bill was “outrageous and unconstitutional.” In a January 20

interview with *U.S. News and World Report*, University of California Los Angeles law professor Eugene Volokh was also critical of Rep. Pitts’ decision to introduce the bill. “Say what you like about revising gun laws — but don’t introduce bills that would clearly violate the First Amendment, even as a way to make a rhetorical point,” Volokh said.

Charles Bierbauer, a University of South Carolina journalism professor and dean of the College of Information and Communications, agreed that Rep. Pitts’ decision to introduce the bill was poorly conceived political point. “It says here in the building where I work that ‘Congress shall make no law ... abridging the freedom of speech, or of the press,’” Bierbauer told *The Post and Courier* on January 19. “These are nuisance bills that allow an elected official to say, ‘I proposed to bring down those muckrakers.’”

As the *Bulletin* went to press, the South Carolina legislature had not taken any further action on the bill, but Rep. Pitts had not withdrawn the bill from consideration.

Florida Lawmakers Look to Amend States’ Public Records Law

On Jan. 20, 2016, the *Miami Herald* reported that Florida lawmakers introduced legislation that sought to remove a statutory requirement for government officials who intentionally violate the state’s public records law to pay attorneys’ fees when citizens take them to court. This revision would create a major change for open records enforcement in the state. Under Florida’s state constitution, members of the public have the right to access public records. However, the Florida Public Records Act, also known as the Florida Sunshine Law, provides individuals with only one way of enforcing that right, which is filing a lawsuit against an agency, according to Jan. 26, 2016 story in the *Tampa Bay Times*. If a state court finds that an agency violated the open records law, the law requires that the court order the agency to turn over the records as well as pay costs and attorneys fees associated with the case. According to the wording of the law, courts do not have any discretion over whether there are situations in which governmental agencies should not be

required to pay the attorney fees of a complainant, making the costs and fees provision one of the strongest public records enforcement mechanisms in the country.

However, the proposed bills, HB 1021 by state Rep. Greg Steube (R-Sarasota) and SB 1220 by Sen. Rene Garcia (R-Hialeah), sought to change the wording from “shall” to “may” award attorneys’ fees. According to a Jan. 22, 2016 story by the *Columbia Journalism Review (CJR)*, this seemingly minor change would have had several negative consequences, including reducing the number of lawsuits over public records access, and removing the threat of guaranteed attorney fees as an effective deterrent for government officials who fail to properly comply with the state’s public record law. *CJR*’s story suggested that the bill would have eliminated the public’s only way of seeking redress when government officials violate the public records laws.

Despite the concerns, Rep. Steube said that the change would not prevent people from filing public-records lawsuits or from recouping legal fees. Instead, the fee issue would be up to judges, as with other state laws that gave judges discretion on awarding fees. “I think this bill really gets at the crux [of a problem] because I don’t think people are going to be inhibited from access to public records” or being awarded attorneys fees “if it’s egregious and the public entity is not acting in good faith,” Rep. Steube said during a House Governmental Operations Appropriations Subcommittee Meeting, according to a February 2 story by the *Tampa Bay Times*. The *Times* reported that supporters of the change also argued that the amendment would stop abuse of the state’s open record laws by “bad actors” who inundate local governments with public-records requests as a strategy to file lawsuits and get legal fees. That subcommittee later approved the bill on an 11-1 vote.

Despite legislators’ assurances, government openness advocates remained unconvinced that the change would have minimal impact. Barbara Petersen, director of the First Amendment Foundation, sent a letter to other opponents of the bill outlining several consequences. “Without a penalty provision when the government is wrong, there is no incentive to be transparent and provide citizens with access to information

about governmental decision-making,” Petersen wrote in the letter, according to the Jan. 20, 2016 story by the *Miami Herald*. “The result will be fewer challenges brought by citizens, which will certainly result in less government transparency.”

Rich Templin, lobbyist for the AFL-CIO and a member of the Sunshine Coalition, a group of public records advocates led by the First Amendment Foundation, acknowledged that abusive requests under Florida’s open records law do occur, but that the bill went too far. “This legislation is basically an atomic bomb to solve a cockroach

“Without a penalty provision when the government is wrong, there is no incentive to be transparent and provide citizens with access to information about governmental decision-making. The result will be fewer challenges brought by citizens, which will certainly result in less government transparency.”

— Barbara Petersen,
Director, First Amendment Foundation

problem,” he said, according to the *Miami Herald*. “If we don’t want to pay attorneys fees, then don’t violate the law, don’t keep things secret. The only time attorneys fees are awarded is when the law has been broken.”

The *Miami Herald* also reported that the Sunshine Coalition suggested several changes to Florida’s open record law that would help ease officials’ concerns about how to comply with law without removing the fees provision. The suggestions include requiring government agencies to post the name and identification of the public records custodians on their website and allowing individuals to pursue lawsuits only after they provide notice to the custodians about possible litigation and gave them five days to comply. The group said these suggestions would help prevent people from recovering large legal fees when officials mistakenly violate mere technicalities of the law.

Although the proposed amendments later died in the Florida House State Affairs Committee, the public debate over the proposed legislation was further informed by a Florida Supreme Court decision that upheld the current language of the statute. On April 14,

2016, the Florida Supreme Court ruled in a 5-2 decision that when government agencies violate public records laws, they are liable for the legal fees of citizens because the only recourse after records requests are improperly denied is to file a lawsuit. *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, No. SC13-1315, 2016 WL 1458515 (Fla. Apr. 14, 2016). The *Tampa Bay Times* reported on April 14 that the court’s decision appeared to stem directly from the proposals made by lawmakers earlier in the year to amend the statute. Despite the fact that the Florida statute states that

public agencies “shall” award legal fees, Florida’s state appellate courts in recent years have issued conflicting rulings over whether the language should be strictly interpreted with some courts not requiring public entities to pay legal fees despite violating the law, according

to the *Times*.

The case arose in 2009 when Curtis W. Lee requested public records related to Jacksonville’s pension fund from the Board of Trustees of the Jacksonville Police and Fire Pension Fund. In 2011, Lee challenged the boards’ decision to require him to pay an hourly photocopying fee and an hourly supervisory fee in order to receive the requested records. This resulted in a Florida state trial court’s final declaratory judgment that the fund had violated the public records law, which was later affirmed by Florida’s First District Court of Appeal.

Lee also filed a motion to recover attorney’s fees. The trial court judge rejected Lee’s motion because the Board of Trustees’ violations of the Public Records Act were “‘not knowing, willful or done with a malicious intent’ and ‘did not amount to an ‘unlawful refusal,’ as is required for an award of attorney’s fees.” However, the First District Court of Appeal sided with Lee, holding that the public agency’s actions were nevertheless in violation of the Public Records Act, “even though the ‘agency’s violation was neither knowing,

State Law, continued on page 34

willful, nor done with malicious intent.” *Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, 113 So. 3d 1010 (Fla. 1st DCA 2013). The Board of Trustees appealed the appellate court’s decision to the Florida Supreme Court.

In the court’s majority opinion, Justice Barbara Pariente noted the importance of strictly interpreting the language of the statute. She wrote that the provision “has the dual role of both deterring agencies from wrongfully denying access to public records and encouraging individuals to continue pursuing their right to access public records.” The majority opinion also explained, “In accordance with case law liberally construing the Public Records Act in favor of open access to public records, the reasonable statutory construction of the attorney’s fee provision, and the letter and spirit of the constitutional right to inspect or copy public records, we hold that a prevailing party is entitled to statutory attorney’s fees under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied.”

However, Justice Charles Canady argued in his dissent that agencies should not be forced to pay the attorney’s fees. Canady wrote that “the provision of the Public Records Act imposing liability for attorney’s fees on custodians of public records, cannot reasonably be read in isolation from... the statutory provision that establishes the duty of custodians of public records to respond “in good faith” to requests to inspect or copy records.” Joined by Justice Ricky Polston, Canady suggested that the custodian did not unlawfully refuse to comply with the law but instead acted in “good faith,” even though Lee was still prohibited from seeing the records after refusing to follow the outlined conditions by the Board of Trustees. This “good faith” effort was in contrast to a “positive unwillingness” that occurs when a custodian refuses to comply with the law. Because the custodian acted in “good faith,” Canady argued that the attorney’s fee provision “[was] not applicable.”

In an April 21, 2016 editorial, the *Panama City News Herald* praised the decision of the Florida Supreme

Court. “The [court’s decision] ruled that public agencies that violate the state’s open-records laws are liable for the legal fees of citizens, even if the error in compliance was made in ‘good faith.’ Contrast that with bills before the Florida House and Senate this year that sought to make such payments — which under current law are mandatory — subject to a judge’s discretion,” the editorial board wrote. “Thankfully, those measures failed to pass. ... [W]ith no guarantee that they could recover attorney fees, private citizens would be discouraged from pursuing potentially costly legal action to ensure their right to access public records. The legislation would’ve had a chilling effect on open-records requests. ... Three cheers to the court for refusing to water down a public right that is fundamental to maintaining open government. It is a right to be exercised by everyone, not just those with deep pockets.”

Minnesota Legislature Considers Criminalizing “Revenge Porn”

During Minnesota’s 2016 legislative session, State Rep. John Lesch (DFL-St. Paul) introduced a “revenge porn” bill, HF 2741, that would criminalize the online distribution of nude photos or other sexually explicit content of another person without consent. The law would also require prosecutors to show that an alleged perpetrator knew that the person depicted in the pictures believed the images would remain private and had not agreed to share the images any further. According to a May 3, 2016 *MinnPost* story, Minnesota’s bill would make the act a gross misdemeanor or a felony, depending on the circumstances. If approved by the state legislature and Gov. Mark Dayton, the revenge porn bill would make Minnesota the 27th state to pass a law prohibiting the distribution of such material. Sens. Barb Goodwin (DFL-Fridley), Chris A. Eaton (DFL-Brooklyn Center), Kari Dzedzic (DFL-Minneapolis), and Dan D. Hall (R-Burnsville) also introduced similar legislation, SF 2713, in the Minnesota Senate.

The St. Paul *Pioneer Press* reported in June 2015 that Lesch was beginning to craft the “revenge porn” statute after the Minnesota Court of Appeals’ ruling in *State v. Turner*. In the May 2015 decision, a three-judge panel found that Minnesota’s criminal defamation statute violated the First Amendment’s

protections of speech because it had the potential to criminalize true statements. *State v. Turner*, No. A14-1408 (Minn. Ct. App. May 26, 2015). Prosecutors across Minnesota had been using the criminal defamation statute as a way to combat speech that could be considered harmful but was not specifically prohibited by law, such as impersonating others online or revenge porn. (For more information on this case, see “Minnesota Court of Appeals Declares Defamation Statute Unconstitutional” in the Summer 2015 *Silha Bulletin*).

In a June 2015 interview, Rep. Lesch told the *Pioneer Press* that “Revenge porn is a specific type of crime that needs its own law. It can’t crawl under the parameters of a catch-all like criminal defamation or disorderly conduct.” In an interview with the *Star Tribune* on Feb. 7, 2016, Rep. Lesch also said, “The massive proliferation of images, videos and photos in recent years has made this a problem that needs to be addressed. We need to get this addressed soon otherwise there’s going to be a lot of people who end up losing jobs or reputation.”

The proposed bill has received support and faced criticisms from within the state as well as from across the country. In the February 7 *Star Tribune* story, New York attorney Carrie Goldberg, who specializes in cases involving revenge porn, voiced her support of the bill, noting that victims of revenge porn often face emotional distress after personal images are distributed on the Internet. “It’s pretty impossible to get a job, or to go on a date, to get an apartment, to get a roommate without your name being typed into Google,” Goldberg said. “It’s pretty devastating for victims [when their] first few pages of search engine results lead to links of pornography.”

During a March 29, 2016 Minnesota House Public Safety and Crime Prevention Policy and Finance Committee hearing, Caroline Palmer, the legal affairs manager at the Minnesota Coalition Against Sexual Assault (MCASA) also expressed support for the bill. “There really is a critical point where free speech and privacy rights meet. We must find a balance and recognize the responsibility that a person has when they control a private image of another person,” Palmer said. “Privacy is a fundamental right in our country and [MCASA]

believe[s] that it's really important that victims have an opportunity to assert this privacy right."

However, American Civil Liberties Union (ACLU) of Minnesota legislative director Benjamin Feist told the *Star Tribune* that the bill had the potential to criminalize protected First Amendment speech. "The way to combat that from our position here is to make sure you do have clear intent and clear knowledge that you're doing this to cause harm," he said. On April 2, 2016, *Ars Technica* reported that the Motion Picture Association of America (MPAA) also opposed the proposed revenge porn law, arguing it could overly restrict speech. In a letter to Minnesota lawmakers, the MPAA wrote that the bill "could limit the distribution of a wide array of mainstream, Constitutionally-protected material, including items of legitimate news, commentary, and historical interest. These items are part of news, public affairs, entertainment or sports programming, and are distributed in motion pictures, television programs, audiovisual works of all kinds, via the Internet and other media." *Ars Technica* reported that the group's letter added that "images of Holocaust victims, or prisoners at Abu Ghraib, or the Pulitzer-Prize winning photograph entitled 'Napalm Girl' — which shows a young girl running screaming from her village, naked, following a Napalm attack — could be prohibited under the terms of this legislation."

On May 2, 2016, the Minnesota Senate voted 62-3 to pass its version of the bill. On May 5, 2016, the Rep. Lesch moved that the House of Representatives adopt the Senate's version of the bill, which was identical to the House version with minor exceptions. On May 16, the state House of Representatives voted 128-0 to pass the bill. As the *Bulletin* went to press, Gov. Dayton had not yet signed the bill.

Movie Theater Faces Revocation of Liquor License after Showing "Deadpool"

On April 16, 2016, television news station Fox 13 in Salt Lake City, Utah reported that a local movie theater that served alcohol was facing a suspension of its liquor license over the showing of an R-rated superhero film. The theater, called Brewvies, allows customers over

21 to have the option of purchasing beer. However, state officials claimed that by screening "Deadpool," the theater violated state liquor license regulations forbidding establishments that sell alcohol to show sex acts or nudity in violation of the state obscenity law. The movie includes several instances of nudity and scenes involving sexual activity between characters.

After the theater screened the movie in February 2016, the Utah State Bureau of Investigation submitted a complaint to Utah's Department of Alcoholic Beverage Control (DABC), alleging that Brewvies had violated the state's Alcoholic Beverage Control Act. Utah Code Ann. § 32B-1-504. The DABC issued a complaint against Brewvies on March 31 and scheduled a preliminary administrative hearing for April 20. The theater had faced similar complaints in the past over its showing of other R-rated movies, including "The Hangover, Part II," "Ted 2," and "Magic Mike XXL," according to Fox 13. The *Salt Lake Tribune* reported on April 24 that the theater faces a maximum fine of \$25,000 and a 10-day suspension of its liquor license.

On April 17, 2016, Brewvies filed a civil rights lawsuit under 42 U.S.C. § 1983 in the United States District Court for the District of Utah against the DABC, citing an infringement of its First Amendment rights. In the lawsuit, Brewvies attorney Rocky Anderson argued that the state's statute regulating liquor establishments was antiquated and unconstitutional, calling the regulations a "chilling effect on free speech" when the DABC "threaten[ed] to punish Brewvies for showing films protected under the First Amendment and the Utah Constitution." Anderson also wrote in the lawsuit that any claims that "Deadpool" could be considered obscene were inaccurate because "taken as a whole, the film has serious literary, artistic, political, or scientific value." The entire complaint is available at <https://www.scribd.com/doc/309776744/Brewvies-Lawsuit>.

Fox 13 reported on April 26 that DABC Commissioner Jeff Wright welcomed the lawsuit. "The department and the commission collectively look forward to the legal process and clarification of laws we did not create, we did not write, but we are bound

to enforce," he said in a statement, according to Fox 13. "I would ask for civility in this debate and remind people that civility is the shortest distance between two people."

Democratic candidate for Utah Attorney General Jon Harper also voiced his concerns that the DABC's actions against Brewvies were an infringement of the First Amendment. During an April 2016 meeting of the commission board, he accused the DABC of "unconstitutionally censoring and chilling the First Amendment rights of Brewvies and its customers." He also said, "The citizens and businesses of Utah are tired of wasting taxpayer money on futile litigation in defense of unconstitutional laws." On April 26, *The Salt Lake Tribune* reported that actor Ryan Reynolds, who depicted the title character in "Deadpool," also expressed his displeasure over the DABC's actions. "Thank god, they've found a way to legislate fun," Reynolds wrote sarcastically in an April 24 post on Twitter. *The Tribune* also reported that Reynolds had donated \$5,000 to an online crowd-funding campaign intended to help Brewvies with legal expenses.

In a hearing in federal court on May 3, 2016, the DABC agreed not to take any formal action against the theater while the lawsuit moved forward, according to a Fox 13 story published the same day. This agreement meant the case can move directly to summary judgment where U.S. District Court Judge David Nuffer will decide whether the law is constitutional. As the *Bulletin* went to press, Nuffer had not made his ruling. Anderson told Fox 13 that if Brewvies lost, he intended to appeal the decision to the U.S. Court of Appeals for the Tenth Circuit in Denver.

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Additional information coming soon!