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Supreme Court Strikes Down Law Banning Depictions of Animal Cruelty, Citing 'Alarming Breadth' of Statute

On April 20, 2010, the Supreme Court of the United States struck down a federal law imposing criminal penalties on anyone who knowingly "creates, sells, or possesses a depiction of animal cruelty . . . for commercial gain," saying it was overly broad and violated the First Amendment right to free speech.

The justices voted 8-1 in *United States v. Stevens,* No. 08-769, 2010 U.S. LEXIS 3478 (U.S. April 20, 2010), to uphold a 3rd Circuit U.S. Court of Appeals decision to throw out the criminal conviction of Robert Stevens of Pittsville, Va., who was sentenced to three years in prison for videos he made of pit bull fights.

Stevens was convicted under 18 U.S.C. § 48, which criminalized anyone who "knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of . . . commercial gain." The law had an exception for "any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value," and defined "depiction of animal cruelty" as "any visual or auditory depiction . . . of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place" in that State.

The opinion, authored by Chief Justice John Roberts, noted that § 48 was enacted in 1999 to limit the Internet sales of so-called "crush videos," which feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. According to the opinion, crush videos often depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes in order to appeal to "persons with a very specific sexual fetish."

Although Stevens did not make crush videos, he ran a business called Dogs of Velvet and Steel, which included a website through which he sold videos of pit bulls engaged in dog fights and attacking other animals. After he was indicted for the videos under § 48, Stevens moved to dismiss the charges against him, arguing that the law violated the First Amendment.

The district court denied Stevens' motion by comparing the videos to child pornography, which is not protected by the First Amendment. Stevens was subsequently convicted and sentenced to 37 months in prison and three years supervised release.

The 3rd Circuit reversed, and declared § 48 an unconstitutional content-based regulation of protected speech. In its analysis, the 3rd Circuit said that the statute was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. The court also declined to recognize a new category of unprotected speech for depictions of animal cruelty, and rejected the government's comparison between the dog fight videos and child pornography. (For more on the lower court opinions in *Stevens*, see "U.S. Supreme Court Will Hear Animal Cruelty Video Case" in the Spring 2009 Silha *Bulletin*.)

In its opinion, the Supreme Court first analyzed whether depictions of animal cruelty were a category of speech that fell completely outside the protection of the First Amendment.

The government argued that some speech, such as obscenity, fraud, and incitement, has not been traditionally protected under the First Amendment, and that depictions of animal cruelty should be added to that list. "Depictions of illegal acts of animal cruelty . . . lack expressive value, and they are integrally linked to harms to animals, humans, and society," the government's brief to the Court stated. "Accordingly, they may be regulated as unprotected speech."

Roberts' opinion rejected this argument, saying that the Court did not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."

"The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits," Roberts stated. "Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."

Roberts wrote that § 48 was overly expansive, calling it a "criminal prohibition of alarming breadth," which could theoretically be interpreted to criminalize depictions of legally wounded or killed animals.

"A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful," Roberts wrote. "In the District of Columbia, for example, all hunting is unlawful . . . [and] because the statute allows each jurisdiction to export its laws to the rest of the country,

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§ 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital."

Roberts wrote that the broad wording of the statute left too much discretionary power in the hands of government prosecutors. "[T]he First Amendment protects against the Government," Roberts wrote. "We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

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– Chief Justice John Roberts U.S. Supreme Court

The Court specifically declined to address whether a more narrowly tailored statute prohibiting depictions of animal cruelty would have been found constitutional.

"However 'growing' and 'lucrative' the markets for crush videos and dogfighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48," Roberts concluded. "We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment."

Justice Samuel Alito wrote the sole dissenting opinion in the case, arguing that § 48 was "a valuable statute . . . that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty." Alito argued that the majority's opinion would have "the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production."

"It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited," Alito wrote. "But before the enactment of § 48, the underlying conduct depicted in crush videos was nearly impossible to prosecute.. . . Thus, law enforcement authorities often were not able to identify the parties responsible for the torture."

"Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct," Alito continued. "The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos.. . . Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue."

Alito argued that the majority should have applied the reasoning of *New York v. Ferber*, 458 U.S. 747 (1982), in which the Supreme Court upheld a New York law prohibiting child pornography because it determined (1) that the production of child pornography, and not its content, was the target of the statute, (2) that the distribution of child pornography was "intrinsically related to the sexual abuse of children," and (3) that the speech value of child pornography was "exceedingly modest."

"All three of these characteristics are shared by § 48, as applied to crush videos," Alito wrote. "It must be acknowledged that § 48 differs from a child pornography law in an important respect: preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos.. . . But while protecting children is unquestionably *more* important than protecting animals, the Government also has a compelling interest in preventing the torture depicted in crush videos."

The Humane Society of the United States said in a statement that it would press Congress to adopt a narrower ban on the sale of videos showing "malicious acts of cruelty," the Associated Press (AP) reported on April 20. According to the AP, Humane Society President Wayne Pacelle said hundreds of crush videos appeared on the Internet after the 3rd Circuit ruled in Stevens' favor in 2008. "This Court ruling is going to accelerate that trend," Pacelle said. "That's why it's critical that the Congress take action."

An April 21 *Los Angeles Times* story reported that Rep. Elton Gallegly (R-Calif.) introduced a new, "narrowly tailored" bill in the House of Representatives aimed at animal cruelty videos the day after the Court's ruling. "Violence is not a 1st Amendment issue; it is a law enforcement issue," Gallegly said, according to the *Times* story. "You are not allowed to cry 'fire' in a theater; you are not allowed to possess or distribute child pornography. You shouldn't be able to create and distribute videos that glorify the senseless killing of defenseless animals."

Gallegly's bill, H.R. 5092, was referred to the House Committee on the Judiciary after it was introduced on April 21.

Free-speech advocates, meanwhile, praised the court's decision in *Stevens*. "Speech is protected whether it's popular or unpopular, harmful or unharmful," said David Horowitz, executive director of the Media Coalition, in the April 20 AP story.

Several media groups, including National Public Radio (NPR), the Reporters Committee for Freedom of the Press, *The New York Times*, the Radio and Television News Directors Association, the Society of Professional Journalists, the American Society of Newspaper Editors, MediaNews Group and the National Press Photographers Association submitted a joint *amicus* brief in the case, encouraging the Court to overturn the law.

"NPR's interest is not in preventing the legitimate prosecution of such crime," said Joyce Slocum, NPR's general counsel, in an April 22 NPR story, "but in the effect of the statute on NPR's ability to report on such issues." In the NPR story, Slocum said that NPR had reported on dog fighting, puppy mills, and other animal cruelty incidents, and occasionally ran photos depicting the alleged mistreatment on its website.

"While the federal statute contained some exceptions, including journalistic use, those exceptions were not adequate," Slocum said. "In NPR's view, the statute could allow the federal government and courts presiding over cases brought under the law, to substitute their own news judgment in place of the judgment of an NPR editor."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Supreme Court News

Supreme Court Blocks Attempt to Broadcast California Trial

The Supreme Court of the United States issued an opinion on Jan. 13, 2010, that blocked the broadcast of a high-profile federal court trial on the constitutionality of California's recently enacted ban on same-sex marriages.

In *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010), the Court issued a 5-4 *per curiam* opinion ruling that a California district court had not properly amended its rules to allow for broadcast of the trial, and that because the dispute over the California ballot measure involves "issues subject to intense debate in our society," it was "not a good [case] for a pilot program," since it was unclear what the effects of cameras on such a high-profile case would be.

The trial in the case involved a lawsuit filed in the U.S. District Court for the Northern District of California challenging the validity of Proposition 8 (Prop 8), a California ballot measure passed in the November 2008 election that amended the California Constitution to only recognize marriages between a man and a woman.

The decision to broadcast the trial came after the Judicial Council of the 9th Circuit U.S. Court of Appeals announced on Dec. 17, 2009 that it had approved a pilot program "to experiment with broadcasting court proceedings on a trial basis." Previous 9th Circuit rules had banned any photographic, radio, or television coverage of district court proceedings. A December 17 press release from the 9th Circuit stated that cases would be selected for the program by the chief judge of the district court in consultation with the chief circuit judge.

On Dec. 21, 2010, a coalition of media companies requested permission from the Northern California district court to televise the then-upcoming Prop 8 trial. Two days after this request, the court posted a proposed amendment to Civil Local Rule 77–3 on its website. Rule 77-3 had previously banned the recording or broadcast of court proceedings in Northern California's federal courts, but the new rule created an exception to allow "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." Comments on the proposed revision were to be submitted by Jan. 8, 2010.

On Jan. 4, 2010, the District Court revised its website to state that the new Rule was "effective December 22, 2009 . . . pursuant to the 'immediate need' provision" of 28 U.S.C. § 2071(e), which states that if a court "determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment."

On Jan. 6, 2010, the district court held a hearing regarding the recording and broadcasting of the Prop 8 trial, and filed an order the next day requesting that 9th Circuit Chief Judge Alex Kozinski permit the trial to be broadcast live via streaming audio and video to federal courthouses around the country, which he did. Prop 8's proponents filed an application for a stay of the order with the Supreme Court on Jan. 9, 2010, arguing that the amendment to the local rules was made without sufficient opportunity for notice and comment, and that the public broadcast would violate their right to a fair trial.

"The question whether courtroom proceedings should be broadcast has prompted considerable national debate," the Supreme Court majority stated in *Hollingsworth*. "Reasonable minds differ on the proper resolution of that debate and on the restrictions, circumstances, and procedures under which such broadcasts should occur. We do not here express any views on the propriety of broadcasting court proceedings generally."

Instead, the Court stated, its review was solely to determine whether the district court's amendment of its local rules to broadcast this trial to other federal courthouses complied with federal law. "We conclude that it likely did not and that applicants have demonstrated that irreparable harm would likely result from the District Court's actions," the opinion stated. The Court granted the defendant's requested stay, prohibiting the broadcasting of the trial.

"Federal law . . . requires a district court to follow certain procedures to adopt or amend a local rule," the majority stated, citing authorities such as 28 U.S.C. § 2071 and Fed. R. Civ. P. 83(a). The Court then stated that the district court's amended version of Rule 77–3 was invalid because the court "failed to give appropriate public notice and an opportunity for comment," as required by 28 U.S.C. § 2071(b). The Court pointed out that federal administrative agencies provide a comment period of thirty days or more when making rule changes, and that the district court's disclosure period fell "far short of the appropriate public notice and an opportunity for comment."

The Court also stated that participation in the 9th Circuit's pilot program "does not qualify as an immediate need that justifies dispensing with the notice and comment procedures required by federal law," since "no party alleged that it would be imminently harmed if the trial were not broadcast."

The Court also agreed with the Prop 8 proponents' assertion that "irreparable harm will likely result" if the district court would have broadcast the trial. "The trial will involve various witnesses, including members of same-sex couples; academics, who apparently will discuss gender issues and gender equality, as well as family structures; and those who participated in the campaign leading to the adoption of Proposition 8," the majority opinion stated. "This Court has recognized that witness testimony may be chilled if broadcast.. . . Some of applicants' witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment.. . . There are qualitative differences

Proposition 8, *continued on page 4*

> "While applicants have demonstrated the threat of harm they face if the trial is broadcast, respondents have not alleged any harm if the trial is not broadcast."
>
> – U.S. Supreme Court *Per curiam* opinion

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between making public appearances regarding an issue and having one's testimony broadcast throughout the country."

"It is difficult to demonstrate or analyze whether a witness would have testified differently if his or her testimony had not been broadcast," the opinion continued. "While applicants have demonstrated the threat of harm they face if the trial is broadcast, respondents have not alleged any harm if the trial is not broadcast."

The Court also stated that broadcasting high-profile trials was particularly threatening to the rights of the parties involved, and even if it determined that the district court's rules had been appropriately revised, "questions would still remain about the District Court's decision to allow broadcasting of this particular trial." The Court noted that, even in districts where cameras are routinely allowed, "courts in those districts have allowed the broadcast of their proceedings on the basis that those cases were not high profile . . . or did not involve witnesses."

Justice Stephen Breyer wrote a dissenting opinion in the case, which was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Sonia Sotomayor.

"The Court today issues an order that will prevent the transmission of proceedings in a nonjury civil case of great public interest," Breyer wrote.

In his dissent, Breyer argued that the district court had provided adequate notice of the rule change, that the rule change involved "local rules and local judicial administration," and that by issuing a stay the Court "micromanages district court administrative procedures in the most detailed way."

"I recognize that the Court may see this matter not as one of promulgating and applying a local rule but, rather, as presenting the larger question of the place of cameras in the courtroom," Breyer wrote. "But the wisdom of a camera policy is primarily a matter for the proper administrative bodies to determine."

Breyer also argued that there was no evidence that "harm could arise in this nonjury civil case from the simple fact of transmission itself."

"Neither the applicants nor anyone else has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on the judicial process," Breyer wrote, citing the Supreme Court case *Chandler v. Florida*, 449 U.S. 560 (1981), which allowed state courts to permit photographs and broadcasting of criminal trials.

Breyer also criticized the majority's arguments about the potential effect on witnesses in the trial. "[T]he witnesses, although capable of doing so, have not asked this Court to set aside the District Court's order," Breyer wrote. "And that is not surprising. All of the witnesses supporting the applicants are already publicly identified with their cause. They are all experts or advocates who have either already appeared on television or Internet broadcasts, already toured the State advocating a "yes" vote on Proposition 8, or already engaged in extensive public commentary far more likely to make them well known than a closed-circuit broadcast to another federal courthouse."

Breyer closed by arguing that "the public's interest in observing trial proceedings to learn about this case and about how courts work" was an important consideration not included in the majority's opinion. "With these considerations in the balance, the scales tip heavily against, not in favor, of issuing the stay."

Judge Vaughn Walker, who is presiding over the trial, had also been attempting to have the trial broadcast live on the Internet, but a Jan. 15, 2010 Associated Press (AP) story reported that he abandoned this effort after the release of the Supreme Court's decision. Walker said he did not want the issue of cameras to distract from the trial itself, the AP reported.

In a Feb. 2, 2010 story, the *San Francisco Chronicle* reported that two Los Angeles filmmakers were attempting to re-enact the trial for broadcast on YouTube with the help of transcripts, bloggers, and a volunteer corps of professional actors. "We want all Americans to have a chance to judge for themselves, based on the evidence that was presented," filmmaker John Ireland said, according to the *Chronicle*.

His filmmaking colleague, John Ainsworth, said the project was motivated in part by the Supreme Court's decision to prevent the trial's broadcast. "It frustrated me," Ainsworth said. "Who were they to say that I can't watch this, especially when it's in a public courtroom?"

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Supreme Court News

Supreme Court Strikes Down Campaign Finance Regulation for Corporations

The Supreme Court of the United States struck down portions of a federal campaign finance law in an opinion published Jan. 21, 2010, ruling that the law impermissibly discriminated against the First Amendment rights of corporations to expressly support political candidates for political office.

"By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests," Justice Anthony Kennedy wrote for the majority in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). "Factions will necessarily form in our Republic, but . . . factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false."

The majority's opinion in *Citizens United* ruled unconstitutional portions of the Bipartisan Campaign Reform Act (BCRA) of 2002, 2 U. S. C. § 441b, that prohibited corporations and unions from using their general treasury funds to make independent expenditures for an "electioneering communication" or for speech that expressly advocated the election or defeat of a candidate.

The BCRA defines an electioneering communication as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" that is made within 30 days of a primary election and that is "publicly distributed." The law required that corporations and unions establish separate political action committees (PACs) for advocacy or electioneering communications purposes.

In January 2008, Citizens United, a nonprofit corporation funded by individual and corporate donations, released a documentary titled "Hillary: The Movie." The film was a critical portrayal of then-Sen. Hillary Rodham Clinton, who at that time was a candidate seeking endorsement by the Democratic Party for a presidential run. According to the opinion, "Hillary" was released in theaters and on DVD, and Citizens United planned to make the documentary available for free on cable television through video-on-demand.

Concerned about possible civil and criminal penalties for violating the BCRA, Citizens United sought declaratory and injunctive relief in the U.S. District Court for the District of Columbia to prevent the Federal Election Commission (FEC) from enforcing the law, arguing, among other claims, that § 441b was unconstitutional.

In its ruling, the majority overruled a 1990 Supreme Court case, *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that allowed political speech to be banned based on the speaker's corporate identity.

"*Austin* was a significant departure from ancient First Amendment principles," Kennedy wrote in the majority opinion, citing a concurrence from Justice Antonin Scalia in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). "The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."

"The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them," Kennedy wrote about the decision to reverse the 1990 case. "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment."

The Court ruled that, although § 441b would have applied to "Hillary" because the movie was both electioneering and direct advocacy, the law was unconstitutional.

"The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations – including nonprofit advocacy corporations – either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications," Kennedy wrote. "Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a website telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship."

The Court held that the § 441b provision permitting the creation of PACs was not a sufficient protection of speech. "Even if a PAC could somehow allow a corporation to speak – and it does not – the option to form PACs does not alleviate the First Amendment problems with § 441b.. . . PACs have to comply with [extensive] regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs."

"By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice," Kennedy wrote. "The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each."

In its opinion, the Court noted that it had extended First Amendment protection to corporations in at least 23 previous cases. "This protection has been extended by explicit holdings to the context

Campaign Finance, *continued on page 6*

"By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."

– Justice Anthony Kennedy
U.S. Supreme Court

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of political speech. Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." Kennedy wrote. "Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"

The majority did uphold portions of the law requiring a disclaimer that the sponsoring corporation is responsible for the content of the advertisement, including the name and address of the person or group that funded the advertisement.

"Disclaimer and disclosure requirements may burden the ability to speak, but they do not prevent anyone from speaking," Kennedy wrote. "The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech."

Chief Justice John Roberts filed a concurring opinion, specifically addressing the Court's decision to overrule *Austin*, an opinion that allowed the Court to prohibit "expenditures out of concern for 'the corrosive and distorting effects of immense aggregations of wealth' in the marketplace of ideas."

"A speaker's ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be," Roberts wrote.

In another concurring opinion, Justice Scalia wrote to defend First Amendment protections for corporations from a language-based interpretation of the Constitution. "The [First] Amendment is written in terms of 'speech,' not speakers," Scalia wrote. "Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals – and the dissent offers no evidence about the original meaning of the text to support any such exclusion."

Justice Clarence Thomas also wrote a concurring opinion, although he dissented with the majority's decision to uphold the requirement to disclose a political sponsor's identity in electioneering materials. According to Thomas, who was the only member of the Court who dissented on the issue of disclosure, the dangers of retaliation or intimidation caused by disclosure of campaign contributions have an impermissible chilling effect on political speech.

"Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights," Thomas wrote. "I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in 'core political speech.'"

In an extensive dissent, Justice John Paul Stevens, who was joined by three other justices, wrote that the majority's opinion was "profoundly misguided."

"The real issue in this case concerns how, not if, the appellant may finance its electioneering . . . all that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period," Stevens wrote. "The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its 'identity' as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law."

Stevens continually criticized the majority's assertion that the free speech rights of corporations are coextensive with those of individuals. "Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races," Stevens wrote. "The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it.. . . They reflect the economically motivated decisions of investors and customers.. . . It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."

Stevens also took issue with the majority's characterization of *Austin*, which he stated showed too little respect for the principle of *stare decisis,* or following the Court's precedent. "The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin*," Stevens wrote. "In the end, the Court's rejection of *Austin* . . . comes down to nothing more than its disagreement with their results.. . . The only relevant thing that has changed since *Austin* . . . is the composition of this Court."

"At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt," Stevens concluded. "It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."

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Campaign Finance, *continued from page 6*

The opinion, which was released nearly five months after the Court held oral arguments on the case, prompted extensive commentary in both the media and political arena.

In a January 21 post on The Volokh Conspiracy blog, UCLA law professor Eugene Volokh wrote that the decision would be likely to reduce the influence of the mainstream news media's editorial voice, but would increase the amount of income media organizations will earn from political spending. He also said *Citizens United* helps guarantee the media's free speech rights.

"Most mainstream media is organized as corporations, and as the Court pointed out[,] the argument for lesser protection for corporate speech would equally apply to speech by media corporations," Volokh wrote. "So far, Congress has exempted the media from bans on corporate advocacy for or against candidates; but now it's clear that the media corporations (alongside other corporations) are constitutionally entitled to so editorialize."

In a January 22 story on the Huffington Post's website, Harvard Law Professor Lawrence Lessig wrote that the decision would increase the public's cynicism about the political process. "The vast majority of Americans already believe that money buys results in Congress," Lessig wrote. "This Court's decision will only make that worse."

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>
> – Lawrence Lessig
> Professor,
> Harvard Law School

Some predicted that the decision would not significantly affect campaigns. "I don't see my clients jumping into the fray here," said Ken Gross, the head of the political law practice at the Washington D.C. law office of Skadden, Arps, Slate, Meagher & Flom, in a January 21 post on *The Wall Street Journal*'s Law Blog. "My clients have shareholders, and shareholders don't want their investments put into partisan politics. The last thing a company wants to have to do is explain at an annual shareholders' meeting why it spent hundreds of thousands on some political race."

President Barack Obama issued a statement on January 21 saying that the opinion gave a "green light to a new stampede of special interest money" into American politics. "It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans," the statement said. "I am instructing my Administration to get to work immediately with Congress on this issue. We are going to talk with bipartisan Congressional leaders to develop a forceful response to this decision. The public interest requires nothing less."

Obama also addressed the *Citizens United* opinion in his weekly radio and Internet address on January 23, and in his State of the Union address on January 27, in which he said "the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections."

"I don't think American elections should be bankrolled by America's most powerful interests or, worse, by foreign entities," Obama said in the address. "They should be decided by the American people. And I urge Democrats and Republicans to pass a bill that helps correct some of these problems."

Democratic lawmakers and Obama's cabinet members, surrounding the six of nine justices who turned out for the event, stood and applauded, *The Washington Post* reported in a January 28 story. According to *The Post*, the remarks prompted Justice Samuel Alito, who sided with the majority in *Citizens United*, to say what appeared to be the words "Not true, not true," as he shook his head and furrowed his brow.

An April 23 National Public Radio (NPR) story reported that Sen. Charles Schumer (D-N.Y.) and Rep. Chris Van Hollen (D-Md.) were planning to introduce a bill that would limit corporate spending while attempting to comport with the limits imposed by *Citizens United*. NPR reported that the main focus of the bill would be on limiting the campaigning ability of foreign-owned corporations, enhancing disclosure requirements, and prohibiting coordination between corporate donors and candidate campaigns.

In a January 23 report, the First Amendment Center released a list of states that have begun to re-examine their campaign-finance laws in response to the Supreme Court's decision. According to the report, at least 18 states have begun the process of determining whether their state regulations would survive constitutional analysis under the *Citizens United* standard.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Supreme Court News

Supreme Court Rules Defendant Has Sixth Amendment Right to Open Jury Selection

In a 7-2 decision handed down on Jan. 19, 2010, the U.S. Supreme Court ruled that the jury selection process in most criminal cases must be open to the public under the defendant's Sixth Amendment guarantee of a public trial.

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," the majority wrote in an unsigned *per curiam* opinion in *Presley v. Georgia*, 130 S. Ct. 721 (2010). The decision was a summary disposition, meaning the case was decided without any oral argument or briefing beyond the initial petition and response.

"There can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."

– U.S. Supreme Court *Per curiam* opinion

The appellant in the case, Eric Presley, was convicted of a cocaine trafficking offense in a Georgia state court in 2007. According to the Supreme Court's opinion, a trial court judge noticed a single observer, Presley's uncle, present in the courtroom as it was about to begin questioning prospective jurors for Presley's trial. The judge told the man that he was not allowed to stay in the courtroom and must leave that floor of the courthouse entirely to avoid interacting with jurors.

When Presley's attorney objected to "the exclusion of the public from the courtroom," the judge said that there "just isn't space for them to sit in the audience," and that there was "really no need for the uncle to be present during jury selection."

After Presley's conviction, he filed a motion for a new trial based on the exclusion of the public from the jury selection, and presented evidence showing that 14 prospective jurors could have fit in the jury box and the remaining 28 could have fit entirely on one side of the courtroom, leaving adequate room for members of the public on the other side.

The trial court judge denied Presley's motion, stating that "it's up to the individual judge to decide . . . what's comfortable," and that "It's totally up to my discretion whether or not I want family members in the courtroom to intermingle with the jurors and sit directly behind the jurors where they might overhear some inadvertent comment or conversation."

Presley appealed the decision, arguing that his Sixth and Fourteenth Amendment rights to a public trial were violated when the trial court judge excluded the public from the *voir dire*, or jury selection, portion of his trial. Presley's conviction was affirmed by the Georgia Court of Appeals and the Supreme Court of Georgia, both of which ruled that the trial judge had made sufficient findings to close the courtroom to the public.

In reversing the lower courts, the U.S. Supreme Court held that a defendant's Sixth Amendment right to an open trial and the First Amendment rights of members of the public and the press to access court proceedings, as established in court cases such as *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), were generally coextensive.

"There can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public," the opinion stated.

The Court again cited *Press Enterprise* for the principle that the right to a public trial extended to the *voir dire* process. "In the First Amendment context that question was answered in *Press-Enterprise.* The Court there held that the *voir dire* of prospective jurors must be open to the public under the First Amendment," the opinion stated. "[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has."

Despite the court's finding that a general Sixth Amendment right to a public trial and jury selection exists, the Court held that the right was not absolute. "[T]he right to an open trial may give way in certain cases to other rights or interests, such as . . . the government's interest in inhibiting disclosure of sensitive information," the majority opinion stated, citing *Waller v. Georgia*, 467 U.S. 39 (1984). "Such circumstances will be rare, however, and the balance of interests must be struck with special care . . . the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."

Justice Clarence Thomas wrote a dissenting opinion in the case, which was joined by Justice Antonin Scalia, objecting to the court's decision to issue the opinion without the customary opportunity for the parties to present oral arguments and a full briefing. The dissent did not take a position on whether the Sixth Amendment question was correctly decided.

David E. Hudson, general counsel of the Georgia Press Association, called the ruling "a ringing affirmation" of the public's right to be present for all parts of a criminal trial in a January 20 story in *The Atlanta Journal-Constituiton*. "There should be no doubt now in any trial court in Georgia or in other states that this important right must be protected by the presiding judge," Hudson said.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FOIA and Access

New White House Transparency Policies Draw Mixed Reviews

As he entered into his second full year in office, President Barack Obama continued to introduce new measures he said were intended to increase government transparency. But some critics maintain the administration's changes do not do enough to stem entrenched practices of federal government secrecy.

White House Office Releases Open Government Directive

On Dec. 8, 2009, Peter Orszag, the director of the Office of Management and Budget (OMB), released an Open Government Directive memorandum instructing all cabinet-level departments and agencies to increase transparency by following four general policies: publishing information about their departments online, improving the quality of government information, creating and institutionalizing a "culture of open government," and creating policies that maximize the potential of technology to enhance government transparency.

The directive was issued as a follow-up to the Memorandum on Transparency and Open Government issued by Obama on Jan. 21, 2009, in which the president ordered the director of the OMB to create a directive that "instructs executive departments and agencies to take specific actions" in implementing open-government policies. (For more on Obama's previous open government directives, see "Obama's Policies Promote Openness; Some Secrecy Persists" in the Spring 2009 Silha *Bulletin,* and "Obama Promises More Government Openness; Skeptics Demand Immediate Results" in the Winter 2009 Silha *Bulletin*.)

Orszag's directive instructed each federal agency to choose at least three collections of "high value" undisclosed government data, and make them available online by January 22. The directive said that posting the collections online would increase accountability and improve the public's understanding about the individual agencies' missions. These "high value" collections were published on the data.gov website on Jan. 22, 2010, in compliance with the directive. According to a January 22 report from the Sunlight Foundation, 24 departments and agencies published 300 collections by the due date.

Orszag also ordered each federal agency to create "an Open Government Webpage located at http://www.[agency].gov/open to serve as the gateway for agency activities related to the Open Government Directive" within 60 days. The memo stated that the websites must include a mechanism for the public to provide feedback and input "about which information to prioritize for publication." The directive also required that each agency publish an annual "Freedom of Information Act Report in an open format" on its Open Government page.

The directive included other instructions specifically designed to accommodate the Freedom of Information Act (FOIA), 5 U.S.C. § 552, such as requiring agencies to "proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA," and to take steps to reduce any backlog of FOIA requests by 10 percent annually.

OMB Watch, a nonprofit research and advocacy organization that promotes government accountability, offered tentative praise for the directive in a Dec. 8, 2009 press release, saying that the "proof is in the pudding."

"Implementation over the next few months will reveal how much new transparency we will actually receive from this process,"said Sean Moulton, OMB Watch's director of federal information policy, according to the release. "This first step, the instructions to the agencies, has gone well, now our work must focus on ensuring the next step, implementation by agencies, goes equally well and produces substantive change."

In a Dec. 8, 2009 press release, Rick Blum, the coordinator of the Sunshine in Government Initiative, a coalition of media groups promoting open government, expressed concern that the directive did not provide enough specific instruction to the agencies, or provide a plan to pay for the enhanced transparency measures. "Today the White House released a 'roadmap' for transparency, but how agencies respond is where the rubber hits the road," Blum said, according to the statement.

Danielle Brian, executive director of the Project on Government Oversight, said in a January 28 *Washington Post* story that much of the "high value" information posted by federal agencies on the data.gov website in response to the directive was relatively insignificant, such as the Department of the Interior's publication of population counts for wild horses and burros.

"I'm sure there are curators who want that list, but I want to see information on oil and gas leases," Brian said. "We're interested in the information that will hold the agencies accountable."

Obama Issues Declassification Order

On Dec. 29, 2009, Obama issued an executive order to create "a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism." The order, Exec. Order No. 13526, 75 C.F.R. 707 (2010), created new classification standards and limitations, and also introduced new policies for declassifying documents, including automatic declassification for most records more than 25 years old.

The order also established a National Declassification Center "to streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value."

"No information may remain classified indefinitely," the order stated. "Information marked for an indefinite duration of classification under predecessor orders . . . shall be declassified in accordance with . . . this order."

Obama Transparency, *continued on page 10*

> "Today the White House released a 'roadmap' for transparency, but how agencies respond is where the rubber hits the road."
>
> – Rick Blum
> Coordinator, Sunshine in Government Initiative

Obama Transparency, *continued from page 9*

In a Jan. 4, 2010 post on the Secrecy News blog, Steven Aftergood wrote that the Obama White House sought out and incorporated a "surprising" amount of public input in formulating the order, and that the order came unusually early in Obama's presidency. "Beyond the unparalleled degree of public participation in its development, the new Executive Order is the only such Order to be issued in the first year of a Presidential Administration," Aftergood wrote. "The last two Presidents issued their classification Orders in their third year in office."

Aftergood also noted that not all the changes enacted by the order were in the direction of increased openness. "Section 4.3 authorizes the Attorney General, as well as the Secretary of Homeland Security, to establish highly secured Special Access Programs, an authority reserved in the previous Executive Order to the Secretaries of Defense, State, Energy and then-Director of Central Intelligence," Aftergood wrote. "Sections 1.8c and 3.5g exclude material submitted for prepublication review from classification challenges and mandatory classification review."

Reports Show Transparency Problems Persist Under Obama Administration

Despite the Obama administration's purported attempts to increase transparency in government, a Jan. 27, 2010 *Washington Post* report indicated that little has changed since the presidency of George W. Bush in terms of FOIA lawsuits. *The Post* story stated that court dockets showed a slight increase in the number of FOIA lawsuits filed since Obama was sworn into office – from 278 in 2007 and 298 in 2008 to 319 in 2009.

Similarly, a March 15 Associated Press (AP) story reported that an audit of federal agencies by the National Security Archive "found a decidedly mixed record" of implementing the Obama administration's proposed agency changes. The AP reported that while 13 of the 90 agencies audited could document concrete changes to their FOIA practices, and another 14 had enhanced their training about Obama's "presumption of disclosure" instructions, 35 agencies said they had no record of putting the new Obama FOIA policies in place.

A March 16 AP story reported that federal agencies had actually increased their use of legal exemptions to keep records secret during Obama's first year in office. After reviewing FOIA reports from 17 major agencies, the AP found that the use of nearly every one of the FOIA's nine exemptions to withhold information from the public increased in fiscal year 2009.

According to the AP report, major agencies cited FOIA exemptions to refuse information at least 466,872 times in budget year 2009, compared with 312,683 times the previous year. The budget year runs through the end of October.

Norman Eisen, White House special counsel for ethics and government reform, responded to the report by saying that the Obama administration had spent the year building "the infrastructure to create a lasting change," according to the March 15 AP story. "It takes time to get an entire government to decide how we are going to change the culture," Eisen said.

Meredith Fuchs, general counsel to the National Security Archive, called the Obama Administration's record on transparency a "mixed bag," saying that the administration inherited many of its problems from past presidencies, and that some agency decisions to withhold records may be reflexive. "It's hard to shift the battleship," Fuchs said in the January 27 *Post* story.

Several other activities of the Obama administration in the early months of 2010 drew fire from open government advocates. In a February 8 column, *Washington Post* media columnist Howard Kurtz wrote that Obama has increasingly avoided directly addressing the White House press corps, instead choosing to promote his message through one-on-one television interviews and town hall-style meetings.

"It's a source of great frustration here," Chip Reid, CBS's White House correspondent, said in Kurtz's story. "It's important for us to hold the president's feet to the fire."

On February 19, the AP reported that when Obama met with the Dalai Lama, he closed the meeting to reporters and photographers.

Although the AP story noted that past presidents have also kept their encounters with the Dalai Lama generally private, Kelly McBride, the leader of the Poynter Institute's ethics group, said it was hard for the Obama administration to square its pledges of openness with the effort to control coverage of the Dalai Lama's visit. "That's not very transparent," McBride said, adding that the administration appeared to be trying to control coverage without completely stifling it. "Trying to control what people make of the images is a difficult task, and probably one of the easiest ways to do that is to limit the number of images."

The White House distributed photos of Obama with the Dalai Lama, but many news organizations, including the AP, refused to use the photograph. "Government-controlled coverage is not acceptable in societies that promote freedom," Kathleen Carroll, executive editor of the AP, said in the February 19 story. "And that is why we do not distribute government handouts of events that we believe should be open to the press and therefore the public at large."

The administration also faced criticism for continuing a fight to deny a journalist's request for the names of 9,200 individuals denied clemency by President George W. Bush.

"Pardon and commutation applicants have a substantial privacy interest in nondisclosure of the fact that they have unsuccessfully sought clemency," the Justice Department wrote in a brief submitted on March 26, 2010, opposing the FOIA request by former *Washington Post* reporter George Lardner Jr. "The substantial privacy interest of the clemency applicants outweighs the negligible public interest in disclosure of their names."

In July 2009, a Washington D.C. federal district court judge ruled in favor of Lardner in *Lardner v. Dep't of Justice*, 638 F. Supp. 2d 14 (D. D.C. 2009) and ordered that the list of rejected applicants be made public. The Justice Department appealed the ruling.

– Ruth DeFoster
Silha Research Assistant

FOIA and Access

Ohio Supreme Court Strikes Down Trial Judge's Gag Order

The Ohio Supreme Court struck down a gag order on April 13, 2010, that had been imposed by an Ohio state trial court judge. In *State ex rel. Toledo Blade Co. v. Henry County Court of Common Pleas*, No. 2010-01, 2010 Ohio LEXIS 865 (Ohio April 13, 2010), the court ruled that the judge's attempt to keep news media from reporting on a criminal trial was "patently unconstitutional," and struck down the gag order by applying U.S. Supreme Court precedent and rejecting the trial court's argument that advances in media technology had rendered the precedent obsolete.

The gag order arose after Ohio officials charged Jayme Schwenkmeyer and her boyfriend, David Knepley, with involuntary manslaughter and child endangerment following the death of Schwenkmeyer's 13-month-old daughter from a drug overdose. Schwenkmeyer and Knepley were indicted jointly, but Judge Keith Muehlfeld granted a motion from the two defendants that they be tried separately.

Muehlfeld scheduled Knepley's jury trial to begin on July 20, 2009, and Schwenkmeyer's to begin on July 27, 2009. On July 20, 2009, Muehlfeld granted a motion from Schwenkmeyer to prohibit the media from reporting about the trial proceedings in Knepley's case until the jury was impaneled for her trial, although Muehlfeld's order permitted members of the media to have access to Knepley's trial. Muehlfeld's order stated that he considered the order necessary to prevent tainting the jury pool in the second case.

The trials were later rescheduled and the order of defendants was reversed, with Schwenkmeyer's trial to begin on Dec. 7, 2009, and Knepley's to start on Feb. 8, 2010. On December 2, Knepley moved for an order to prevent the media from reporting on Schwenkmeyer's case. Muehlfeld granted that motion as well.

"[M]embers of the print and broadcast media shall be permitted access to the trial proceedings in . . . *State v. Schwenkmeyer* . . . HOWEVER any and all print or broadcast media shall be PROHIBITED from the published or broadcast reporting of such trial proceedings until a jury is impaneled for the trial in *State v. Knepley*," Muehlfeld's Dec. 4, 2009 order stated, according to the Supreme Court's opinion.

After a mistrial in Schwenkmeyer's first trial, Muehlfeld rescheduled it and amended his December 4 gag order to "permit the print or broadcast media to report that a defense motion for mistrial was granted by the Court in the *State v. Schwenkmeyer* trial on Dec. 10, 2009," but reiterated that the gag order remained in effect for Schwenkmeyer's rescheduled trial.

According to the Supreme Court's opinion, *The Toledo Blade* learned about the order in January 2010, and sent a letter to Muehlfeld requesting that he reconsider his gag order.

On January 26, Muehlfeld held a hearing on *The Blade*'s request for reconsideration, at which Knepley's counsel asserted that the gag order issued by the court upon his motion "was absolutely necessary for [his] client to receive a fair trial in his case," arguing that the trial took place in a small town, and if the media were allowed to report on Schwenkmeyer's trial before a jury was impaneled for his trial, "it would taint the jury pool that's already small."

Muehlfeld ratified his December 4 order, stating that the press and public's First Amendment rights are "derivative in nature" and "abstract," whereas the defendants' fair-trial rights are "very real interests" that "have a direct impact."

On Jan. 27, 2010, *The Blade* filed a motion with the Ohio Supreme Court to prevent the enforcement of Muehlfeld's order, and the court issued a temporary stay on the challenged portions of Muehlfeld's order the same day.

"The phrase 'prior restraint' is a term of art referring to judicial orders or administrative rules that operate to forbid expression before it takes place," the court said in its unanimous, unsigned, April 13 opinion. "The court's gag order here is a prior restraint because it attempts to forbid the media from reporting about the first trial until the jury is impaneled for the second trial, and it was issued before either trial had commenced."

"Although prior restraints are not unconstitutional per se, there is a heavy presumption against their constitutional validity," the court continued. "This is because prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.. . . Prior restraints are simply repugnant to the basic values of an open society in that they tend to *encourage* indiscriminate censorship in a way that subsequent punishments do not."

The court cited the First Amendment to the U.S. Constitution and §§ 11 and 16 of Article I in the Ohio Constitution as creating a "qualified right of public access to court proceedings." The court also said that the Sixth Amendment to the U.S. Constitution and § 10 of Article I of the Ohio Constitution guaranteed a criminal defendant's right to a fair trial. "Pervasive, unfair, and prejudicial media coverage of a criminal trial can sometimes deprive a criminal defendant of this constitutional right," the court stated.

"In the seminal case interpreting the interplay between these two important constitutional rights, the United States Supreme Court struck down gag orders attempting to prevent further publicity about a defendant accused of murdering six members of a family in a small Nebraska town," the court said, referring to *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976). In *Nebraska Press*, the U.S. Supreme Court held that justification for a prior restraint required a court to adequately consider "a) the nature and extent of pretrial news coverage;

Ohio Gag Order, *continued on page 13*

"[I]f courts base their constitutional interpretations on the rapidly changing concept of technology, our constitutional rights would be in the hands of unpredictable technological trends instead of in the hands of sound judicial reasoning."

– Ohio State Supreme Court *Per curiam* opinion

FOIA and Access

Federal Judge Requires FAA to Provide Flight Information

A federal district court judge issued an opinion on Feb. 26, 2010, agreeing with the Federal Aviation Administration (FAA) in a reverse Freedom of Information Act (FOIA) lawsuit and ordering a list of private planes whose flights had been blocked from public view to be released.

In *Nat'l Bus. Aviation Ass'n v. FAA*, No. 09-1089, 2010 U.S. Dist. LEXIS 17223 (D.C. Cir. Feb. 26, 2010), Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia affirmed the FAA's decision to release a list of previously unavailable flight information to ProPublica, a nonprofit public interest news organization. Collyer ruled that the blocked list did not fall under exemption 4 of the FOIA, 5 U.S.C. § 552, which prohibits the disclosure of trade secrets and commercial or financial information.

"We are delighted that the court upheld the FAA's determination and look forward to the prompt release of these records, which are clearly a subject of public interest."

– Richard Tofel
General Manager,
ProPublica

ProPublica was seeking information contained in the Blocked Aircraft Registration Request (BARR) program, which the National Business Aviation Association (NBAA) helped create in 1997. Under the program, a company can request the NBAA to place its aircraft registration numbers on a block list. The NBAA submits the block list to the FAA each month and the FAA then blocks those aircraft from its live data feed, which is publicly available online. The FAA does not require an explanation for adding flights to its blocked list.

ProPublica's interest in the flight records was triggered when General Motors added its planes to the block list after suffering a wave of negative publicity after it was widely reported that the chief executive officers of General Motors, Ford, and Chrysler flew on corporate jets to Washington, D.C. in November 2008 to ask Congress for a publicly funded bailout for the auto industry, a Feb. 26, 2010 ProPublica press release stated. News reporters and members of the public had tracked the auto executives' flights on various websites that provide real-time flight information.

On Dec. 10, 2008, ProPublica filed a FOIA request asking the FAA for a list of all block requests since Jan. 1, 2008, to find out which other companies had tried to keep their flight information private. The NBAA objected to the release of the list, citing exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from release.

The FAA determined that the list was not protected from disclosure because it did not contain "commercial or financial information within the meaning of FOIA." The NBAA then sued the FAA and ProPublica in D.C. federal district court to prevent the release of the blocked list.

In her opinion, Collyer rejected the NBAA's argument that the aircraft registration numbers on the block list constituted "commercial information" because "the information at issue pertains to airplanes used by companies, in commerce, and is thus part of a commercial enterprise" as "overly expansive." The NBAA had speculated that if the block list was released, competitors would be able to discover sensitive information, such as knowledge of negotiations, probable business transactions, or the future travel plans of senior company leadership.

Collyer pointed out that the block list only contains aircraft registration numbers which, by themselves, would not provide ProPublica or any other requester with any real-time or near real-time data about flights because a FOIA request takes days or weeks to process. She also noted that releasing the block list would not disclose the identity of any passengers, the business purpose of a flight, or why the owner sought to block release of the flight information.

The registration numbers can be used to provide the owner's name and the make and model of an aircraft if entered into a publicly available database on the FAA's website, but a FOIA request must be filed to learn historical information about a particular flight, such as its origin, destination, and estimated arrival and departure times, the opinion stated.

"The [NBAA's] speculation that the registration numbers might be used to obtain historical location information and that location information might be used for insight into the nature of a company's business dealings does not convert the *aircraft registration numbers themselves* into commercial information," Collyer wrote.

Collyer also rejected the NBAA's attempt to prevent the release of the block list as a means to protect the personal privacy and security of passengers aboard the aircraft. Collyer stated that Exemption 4 protects "confidential *commercial* information" and that personal privacy interests may be used to prevent disclosure under exemption 6 of FOIA. "Exemption 6, however, does not extend to protect the privacy interests of businesses or corporations," Collyer wrote.

"Further," Collyer continued, "because the Block List contains only registration numbers and release of the information only permits investigation of historical and not real-time location data, it is highly unlikely that the disclosure of the List would impact the security of aircraft or aircraft passengers."

By declining to recognize a personal privacy exemption for corporations, Collyer created a potential conflict with a recent 3rd Circuit U.S. Court of Appeals ruling that recognized a personal privacy exemption for corporations under the FOIA. In *AT&T Inc. v. FCC*, 582 F.3d 490 (3rd Cir. 2009), the 3rd Circuit ruled that corporate records can be protected from disclosure under exemption 7(C), which protects disclosure of "information compiled for law enforcement purposes" that could constitute "an unwarranted invasion of personal privacy." (See "3rd Circuit Rules Personal Privacy Interest Applies to Corporations," in the Fall 2009 issue of the Silha *Bulletin*.)

Richard Tofel, general manager of ProPublica, applauded Collyer's decision in a February 26 press

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FAA, *continued from page 12*

release. "We are delighted that the court upheld the FAA's determination and look forward to the prompt release of these records, which are clearly a subject of public interest," Tofel said.

Bob Lamond, NBAA director of air traffic services and infrastructure, criticized the ruling in a February 26 NBAA press release. "NBAA has long believed that security and other imperatives make it absolutely essential to protect our Members' aircraft and flight information from being made widely available, which is why we created the BARR program," Lamond said. "Unfortunately, and in spite of our work to uphold the BARR program through every legal avenue available, the court has ruled the above information cannot remain permanently sealed."

The NBAA did not appeal the ruling, and an April 8, 2010 *USA Today* story reported that ProPublica had successfully obtained the current list of 1,100 aircraft whose flights had been blocked. According to the *USA Today* story, planes on the list "ranged from those owned by Fortune 500 companies such as bailout recipient American International Group, to college athletic programs, such as the University of Alabama, which say they request flight privacy to hide coach searches and recruiting trips." The story also reported that planes registered to federal agencies, churches and newspaper owners were included on the blocked list.

– Cary Snyder
Silha Research Assistant

Ohio Gag Order, *continued from page 11*

b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and c) how effectively a restraining order would operate to prevent the threatened danger."

The court then applied the *Nebraska Press* standards to Muehlfeld's gag order and found it unconstitutional, rejecting the argument that technological advances had undercut the reasoning of the 1976 case.

"Notwithstanding respondents' suggestion that *Nebraska Press* may no longer be viable because of revolutionary changes in the delivery of information to the public, e.g., the emergence of the Internet, they cite no case that has retreated from the test set forth in that case to evaluate gag orders against the media. Nor have they submitted any evidentiary support for these claims," the opinion said. "Although it has been fairly noted that '*Nebraska Press* was decided in 1965 [sic] without the Internet or other forms of mass communication now readily available to the public,' . . . if courts base their constitutional interpretations on the rapidly changing concept of technology, our constitutional rights would be in the hands of unpredictable technological trends instead of in the hands of sound judicial reasoning."

"We will decline to draw, and then redraw, constitutional lines based on the particular media or technology used," the court stated, citing the recent U.S. Supreme Court case *Citizens United v. F.E.C.,* 130 S. Ct. 876 (2010).

In applying the *Nebraska Press* test, the Ohio Supreme Court first found that Muehlfeld had not found sufficient evidence to issue the order. "In the absence of any properly introduced evidence, there is no reason for a trial court to [conclude] that there will be prejudicial publicity and to presume that such publicity will create a threat to the administration of justice," the court's opinion said.

The court also criticized Muehlfeld's statements asserting that a criminal defendant's constitutional right to a fair trial should be accorded priority over the media's constitutional rights of free speech and press. The court cited former Supreme Court Justice Hugo Black in *Bridges v. California*, 314 U.S. 252 (1941), stating that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

"The judge's refusal to accord equal importance and priority to the media's First Amendment rights was thus plainly erroneous," the Ohio Supreme Court concluded.

The court also stated that the limited duration of the gag order did not affect its constitutionality, that Muehlfeld had overstated the prejudicial effect of pretrial publicity, and that Muehlfeld did not adequately address the possibility of using alternatives to the gag order.

"For all of these reasons, Judge Muehlfeld's gag order is patently unconstitutional," the court concluded.

The Blade praised the decision in an April 15 editorial. "This decision affirms the media's right to do their jobs without undue restrictions and, more important, the public's right to receive timely information about public events," the editorial stated.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FOIA and Access

Federal Judge in Florida Rules Mug Shots Exempt From FOIA

A Federal District Court judge in Florida denied a freelance journalist's request for the mug shots of a man who had pleaded guilty to securities fraud after the judge determined that the guilty man's privacy interests outweighed the public interest in the photos' release in a Dec. 14, 2009 decision.

Judge Paul Huck of the U.S. District Court for the Southern District of Florida said the United States Marshals Service was justified in denying the Freedom of Information Act (FOIA) request from freelance journalist Theodore Karantsalis seeking the mug shots of Luis Giro in *Karantsalis v. U.S. Dep't. of Justice*, 38 Media L. Rep. 1240 (S.D. Fla. 2009).

"Whatever additional embarrassment Mr. Giro may sustain by the release of his mug shots, it surely pales in comparison to what he has already experienced."

– David Borucke
Tampa Bay media law attorney

According to the opinion, Karantsalis had requested "copies of the mug shot photos of Luis Giro" pursuant to the FOIA, 5 U.S.C. § 552. Giro, the former president of Giro Investments Group, Inc., pleaded guilty to securities fraud in 2009 after being arrested by Venezuelan police. According to a June 23 FBI press release, Giro had been indicted in 2003 but was a fugitive until his arrest in May 2009.

Federal marshals had taken booking photographs of Giro after taking him into custody. They denied Karantsalis's request for the photographs, citing FOIA's Exemption 7(C), which exempts "records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to constitute an unwarranted invasion of personal privacy." Karantsalis then filed suit in U.S. District Court for the Southern District of Florida, and the Department of Justice (DOJ) moved for summary judgment.

Huck relied on an 11th Circuit case, *Ray v. U.S. Dep't of Justice,* 908 F.2d 1549 (11th Cir.1990), in ruling that the photos could be withheld because he determined that the mug shots of Giro fell under a valid exemption to the FOIA.

Huck's opinion stated that the Marshals Service has a policy not to release booking photographs of prisoners to the news media "unless doing so serves a law enforcement purpose," and that "the *only* law enforcement purpose for releasing a booking photograph is to address an issue involving a fugitive, which Giro – currently in federal prison – is not."

The opinion relied on the precedent of the U.S. Supreme Court case *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press,* 489 U.S. 749 (1989), to determine whether releasing Giro's mug shots would represent an "an unwarranted invasion of personal privacy."

"The Court agrees . . . that a booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs," Huck wrote in the opinion. "A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties."

Huck later wrote that Giro, despite having pleaded guilty and appearing in open court, had "a continuing personal privacy interest in preventing public dissemination of his booking photographs" and that there was no public interest in disclosing Giro's mug shots.

"[T]he general curiosity of the public in Giro's facial expression during his booking photographs is not a cognizable interest that would 'contribute significantly to public understanding of the operations or activities of the government,'" Huck wrote, citing the policy behind the FOIA cited by the Supreme Court in *Reporters Committee.* "[T]he public obtains no discernible interest from viewing the booking photographs, except perhaps the negligible value of satisfying voyeuristic curiosities."

The opinion recognized that its decision varied from the precedent of the 6th Circuit U.S. Court of Appeals, which held in *Detroit Free Press v. Dep't of Justice,* 73 F.3d 93 (6th Cir. 1996), that some booking photographs must be disclosed even without a law enforcement purpose.

Karantsalis filed an appeal with the 11th Circuit U.S. Court of Appeals on March 1, 2010. In his appeal, Karantsalis argued that under 11th Circuit precedent, exemptions to the FOIA are to be construed narrowly, and that federal courts had a long history of refusing to find a privacy interest in booking photos.

"Giro was a six-year fugitive who pled guilty, and was awaiting sentencing at the time of Karantsalis' request," the appeal said. "He simply had no reasonable expectation of privacy in his mug shot."

Tampa Bay media law attorney David Borucke questioned the court's decision to extend privacy protection to Giro in a Jan. 20, 2010 summary of the case on the website for the law firm Holland & Knight.

"The privacy interest described in *Karantsalis* seems disconnected from the facts: Giro's criminal activities, his flight from law enforcement, the worldwide circulation of his driver's license photograph tied to an indictment, more than five years as a fugitive, his admission of guilt, a looming prison sentence, and a DOJ press release describing all of these events," Borucke wrote. "Whatever additional embarrassment Mr. Giro may sustain by the release of his mug shots, it surely pales in comparison to what he has already experienced."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FOIA and Access

State Courts Side with Public in Open Meetings, Records Disputes

State Supreme Courts across the country sided with news organizations, a labor union and a private citizen in recent decisions that clarified state open records and meetings laws, and mandated disclosure of salary figures and a court settlement.

New Jersey Supreme Court Orders Release of Sexual Harassment Settlement

The New Jersey Supreme Court ruled on Jan. 25, 2010, that a sexual harassment settlement involving a Monmouth County employee must be made public.

The *Asbury Park Press* filed a lawsuit when the county refused to disclose the terms of a 2007 settlement with Carol Melnick, who sued the Monmouth County Board of Chosen Freeholders in 2005, alleging sex discrimination, sexual harassment, retaliation, and a hostile work environment. The settlement between Melnick and the county included a confidentiality agreement.

In *Asbury Park Press v. County of Monmouth*, 986 A.2d 678 (N.J. 2010), the unsigned *per curiam* opinion ruled that withholding the outcome of a lawsuit against the county runs counter to the purpose of the state's open records act, N.J. Stat. Ann. § 47:1A-1, in maintaining transparency in government.

In unanimously affirming an appeals court decision, the judges noted that Melnick chose to file a public complaint against the county, and if the case had not settled, the lawsuit would have proceeded to a public trial where the outcome would have been revealed in open court.

"A governmental entity cannot enter into a voluntary agreement at the end of a public lawsuit to keep a settlement confidential, and then claim a 'reasonable expectation of privacy' in the amount of that settlement," the opinion concluded.

Melnick settled with the county for $470,000, the Associated Press (AP) reported on January 27.

Washington County Fined More Than $371,340 for Delayed Response to Public Records Request

On March 25, 2010, the Washington Supreme Court ordered King County to pay a $371,340 penalty to a citizen as part of a decade-long public records lawsuit over the county's failure to release information related to the proposed public financing of a football stadium in downtown Seattle.

The 5-4 ruling in *Yousoufian v. King County Executive*, 168 Wash.2d 335 (Wash. 2010), more than doubled the fine a trial court imposed on King County, but constituted less than half the amount the county would have had to pay under a previously vacated Washington Supreme Court ruling.

On May 30, 1997, Armen Yousoufian submitted a public records act request to the county seeking economic studies related to a proposed $300 million stadium for the Seattle Seahawks of the National Football League. Yousoufian received a partial response and repeated his request several times. He filed his lawsuit in March 2000.

In his majority opinion, Justice Gerry L. Alexander determined that the trial court abused its discretion when it fined the county $15 per day for its lack of response, resulting in a penalty of $123,780. Alexander noted that the state's public records act, Wash. Rev. Code § 42.56.080, does not include specific criteria for how to calculate a penalty, but it does require that a daily penalty between $5 and $100 must be imposed. According to the opinion, the $15 per day penalty was too small.

Alexander identified 16 different factors courts can consider in determining the proper fine for violating the public records law. Some of these factors include the "good faith" of the agency's response, the training level of the workers fulfilling the request, and the agency's ability to track and retrieve public records. The majority concluded that a $45 per day penalty totaling $371,340 was more "proportionate to the county's misconduct." Yousoufian was also awarded reasonable attorney fees and costs related to the lawsuit.

In a dissenting opinion, Justice Susan Owens called the fine a "naked exercise of discretion" and criticized the majority for imposing a penalty under the public records act that is three times higher than one ever awarded in the state.

In 2009, Washington's high court ruled that King County should pay closer to $800,000. That opinion, *Yousoufian v. King County Executive*, 200 P.3d 232 (Wash. 2009), written by Justice Richard B. Sanders, was withdrawn amid concerns that Sanders had a conflict of interest because of his own pending public records lawsuit against the state. Sanders did not participate in the second Yousoufian ruling.

Wyoming Supreme Court Sides with Newspaper in Open Meeting Dispute

The Wyoming Supreme Court ruled on Jan. 8, 2010, that the Cheyenne Building Code Board of Appeals violated the state's public meetings act when it held a secret meeting in 2008 to discuss demolition permits for six houses in a historic district.

Cheyenne Newspapers Inc., owner of the *Wyoming Tribune Eagle*, filed a lawsuit against the board in Laramie County District Court asking that the board be prohibited from making a decision about the permits before deliberating in a public meeting. The district court eventually sided with the board, but not until after the board had voted in public to deny the demolition permits.

In *Cheyenne Newspapers, Inc. v. Bldg. Code Bd. of Appeals of Cheyenne*, 222 P.3d 158 (Wyo. 2010), the Wyoming Supreme Court reversed, determining that the board was an "agency" under the state's public meeting act, Wyo. Stat. Ann. §§ 16-4-402, 403, and that its closed discussion constituted a meeting involving "public business."

The board, created by a city ordinance, argued that it was exempt from the act because it was not a

Meeting Access, *continued on page 16*

"A governmental entity cannot enter into a voluntary agreement at the end of a public lawsuit to keep a settlement confidential, and then claim a 'reasonable expectation of privacy' in the amount of that settlement."

– New Jersey Supreme Court *Per curiam* opinion

Meeting Access, *continued from page 15*

governing body and its deliberations were "quasi-judicial."

Despite finding that the board met illegally, the court permitted the decision to deny the demolition permits to remain because the actual vote took place during an open meeting.

"[T]he Board ultimately took action and adopted its findings and conclusions in a public meeting and no provision of the Act renders void agency action taken in public that may have been discussed and/or acted upon in an illegal private meeting," Justice Marilyn Kite wrote in a concurring opinion.

Bruce Moats, an attorney who represented the newspaper, said the decision accomplished the main goal of determining that "quasi-judicial deliberations by a government entity must adhere to the public meetings act," the *Tribune Eagle* reported on January 9.

Kate Fox, an attorney who represented the board, said board members were happy their decision on the permits was upheld, the newspaper reported.

Massachusetts High Court Addresses Conflict in Open Meetings, Records Laws

The Massachusetts Supreme Judicial Court ruled on Dec. 31, 2009, that a school board violated the state's open meeting law when it met in a closed session to discuss the performance evaluation of a superintendent and also when members commented on the evaluation in e-mails exchanged prior to the meeting.

The case began in 2005 when a reporter for the *Wayland (Mass.) Town Crier* filed a complaint against the Wayland school committee after its members discussed the performance evaluation of Superintendent Gary Burton over e-mail and in two closed executive sessions. In *Dist. Attorney for the N. Dist. v. Sch. Comm. of Wayland*, 918 N.E.2d 796 (Mass. 2009), Justice Francis Spina clarified a conflict between the state's open meeting law, Mass. Gen. Laws ch. 39, §§ 23A-24, and its public records law, Mass. Gen. Laws ch. 66 § 10. The open meeting law does not exempt discussion of the professional competence of an employee, but the public records law protects work evaluations from public disclosure.

"In light of the requirements of both the open meeting law and the public records law, the correct procedure in this case would have been for the school committee to meet in open session to discuss the professional competence of the superintendent," Spina wrote in advising the committee on how to comply with both laws. "When the school committee reached the state of deliberations where the preparation and drafting of the written performance evaluation was imminent, it should have voted to adjourn to an executive session."

Spina also held that the e-mail exchange constituted an attempt to avoid having a public discussion about Burton's competence, and ordered the committee to release the e-mails to the public.

Glenn Koocher, the executive director of the Massachusetts Association for School Committees, said that since final written evaluations do not need to be released to the public, committee members may not reveal their most critical comments in an open meeting.

"This could be less of a win for people who cover this process if school committees save their controversial comments for the writing process," Koocher said in a Jan. 10, 2010 report in the *Town Crier*.

New Hampshire Supreme Court Orders Group to Release Salary Records

The New Hampshire Supreme Court ruled on Jan. 29, 2010, that an umbrella organization that represents municipalities and schools must abide by the state's Right-to-Know Law and release individual salary records to a firefighters' union.

The Professional Firefighters of New Hampshire sought the records to determine if the Local Government Center (LGC), an organization which runs health insurance pools for public employees, was channeling money collected for health insurance to other purposes. The LGC also lobbies the New Hampshire Legislature on behalf of municipalities on issues, such as retirement, that the union said could favor government employers over employees, such as firefighters, the AP reported on February 1.

The LGC argued that some of the salary information was not covered by New Hampshire's Right-to-Know Law, N.H. Rev. Stat. Ann § 91-A. The LGC previously released a document to the union containing the gross salaries of 112 workers without identifying the workers or their job titles.

Chief Justice John Broderick, Jr., in the opinion for the unanimous court, said that access to salaries for specific job titles provides insight into how taxpayer money is spent and is essential to the transparency of government.

"Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism," Broderick wrote in *Prof'l Firefighters of New Hampshire v. Local Gov't Ctr., Inc.*, 159 N.H. 699 (N.H. 2010). "Such scrutiny is necessary for the public to assess whether LGC, which has a conceded status as a governmental entity subject to the Right-to-Know Law, is being properly and efficiently managed and for educating the member municipalities regarding whether continued membership would be a wise expenditure of taxpayer money."

After the ruling, union president David Lang said that because the court determined that the LGC must comply with the Right-to-Know Law, the union will seek more documents from the center, including minutes of its meetings, according to the February 1 AP story.

"That is huge for the public," Lang said. "It's a very big win for the taxpayers."

– Cary Snyder
Silha Research Assistant

FOIA and Access

KSTP Gains Access to Absentee Ballots

In a ruling issued Jan. 5, 2010, a Minnesota state district court judge granted a Twin Cities ABC affiliate the right to see and copy rejected and unopened absentee ballots from the 2008 election, calling the ballots "public data" for the purposes of Minnesota open records law. As the *Bulletin* went to press, the decision was pending further review by the Minnesota Court of Appeals.

In a June 22, 2009 letter to four different county election officials across the state of Minnesota, KSTP, a Twin Cities television station owned by the Hubbard Broadcasting Company, requested "access to all rejected and therefore uncounted absentee ballots that were received in connection with the November 2008 Minnesota general election," under the Minnesota Data Practices Act (DPA), Minn. Stat. § 13.01 *et seq*. The letter also stated that the station would respect "the sanctity of the private ballot, and the importance of voter confidentiality in the electoral process."

A June 22, 2009 story on the KSTP website said that the station was seeking the rejected ballots so that it could "try to determine how different counties decide to reject absentee ballots."

Ramsey County, which includes the city of St. Paul, refused the request, citing a provision in the DPA, Minn. Stat. § 13.37, that "sealed absentee ballots prior to opening by an election judge" are considered nonpublic data.

In his opinion, *KSTP-TV v. Ramsey County*, No. 62-CV-09-9240, (Minn. Dist. Ct. Dec. 31, 2009), Ramsey County District Court Judge Dale B. Lindman wrote that, rather than seeking the rejected absentee ballots themselves, the station was actually looking for any information that would explain why the ballots were rejected.

"Acceptance or rejection of the unopened ballots was presumably based solely on the sufficiency of the information contained on the face of the unopened envelope," Lindman wrote.

However, Lindman went on to say that, regardless of the requests, all rejected and unopened absentee ballots from Minnesota's 2008 general election are "public data that may be viewed and copied by the Plaintiffs subject to the voter's right of privacy."

In his ruling, Lindman noted that the statute does not specify how these ballots should be treated after an election is complete, and that the DPA requires "a presumption that government data are public and are accessible by the public for both inspection and copying unless there is a federal law, a state statute, or a temporary classification of data that provides that certain data are not public."

"[T]his court finds as a matter of law that the unopened and rejected absentee ballots in question in this case are public data which may be reviewed and copied," Lindman concluded.

Ramsey County was instructed to turn over its ballots, but also to take "all steps necessary, including redaction, to assure that the privacy of the voter and the sanctity of the ballot is maintained."

Mark Anfinson, an attorney for KSTP, told the Silha Center that Ramsey County had appealed the ruling and the parties were in the process of submitting written briefs to the Minnesota Court of Appeals. Anfinson noted that a positive decision from the court of appeals would be valuable to the station because Lindman's verdict is not binding precedent outside of Ramsey County, and a judgment from the court of appeals would apply to district courts throughout the state, paving the way for the release of the state's remaining ballots.

A Jan. 6, 2010 Associated Press (AP) story noted that rejected absentee ballots had been bitterly contested by opponents Al Franken and Norm Coleman during the protracted Senate election and recount process. After the recount, Franken was declared the winner by 312 votes. During the course of the recount, Franken's lawyers argued that the ballots should be re-examined, and Coleman's lawyers argued that standards were inconsistently applied, with some counties rejecting far more ballots than others.

The purpose of examining the ballots is to detect potential problems in Minnesota's election process, enabling policymakers to consider changes to the law, Anfinson said in the January 6 AP story. "There's no doubt that under any scheme of absentee ballot regulation, some of those would be rejected," Anfinson said. "There's considerable effort that's going to have to be invested in understanding why certain ballots weren't accepted and others were."

Marc Elias, one of Franken's lawyers, called the exercise "meaningless," according to the AP story. "These ballots were reviewed and reviewed and reviewed and determined not lawfully cast," Elias said. "The state of Minnesota has already determined the outcome of this election."

– Ruth DeFoster
Silha Research Assistant

> "This court finds as a matter of law that the unopened and rejected absentee ballots in question in this case are public data which may be reviewed and copied."
>
> – Dale B. Lindman
> Ramsey County
> District Court

FOIA and Access

State Courts Adopt Varying Degrees of Access to Jury Selection

Recent rulings by state courts in Kansas, Nevada, and Massachusetts recognized the rights of the accused as well as the rights of the public by allowing varying degrees of access to trial court jury proceedings.

Massachusetts High Court Affirms Sixth Amendment Right to Open Jury Selection

The Supreme Judicial Court of Massachusetts issued an opinion on Feb. 17, 2010 that vacated the conviction of a man who claimed his constitutional right to a public trial was violated when the court determined that members of the public and the press were excluded from jury selection proceedings before his trial.

"The public trial right applies to jury selection proceedings, which are a crucial part of any criminal case," wrote Justice Margot Botsford in *Commonwealth v. Cohen*, 921 N.E.2d 906 (Mass. 2010). "Throughout a trial, an open court room [sic] enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."

"The public trial right applies to jury selection proceedings, which are a crucial part of any criminal case."

– Margot Botsford
Supreme Judicial
Court of Massachusetts

The opinion vacated the conviction of David Cohen, a former Stoughton, Mass. police officer and lawyer who was charged with extortion, filing a false police report, and two counts of witness tampering. During the multi-day jury selection process, the trial court judge placed a sign on the door of the courtroom that read "Jury Selection in Progress. Do not enter."

During an evidentiary hearing on the motion, several of Cohen's friends and supporters testified that the "Do Not Enter" sign kept them out of the jury selection, and at least two reporters testified that court officers had told them that they would not be permitted in the courtroom during jury selection.

Cohen filed a motion for a new trial after his conviction, arguing that the closure of the jury empanelment process had violated his Sixth Amendment right to a public trial. The trial judge, Barbara Dortch-Okara, denied Cohen's motion, noting that the defendant's family and some other members of the public were present during portions of the jury selection process.

Dortch-Okara also said that the excluded reporters were not vocal enough in asserting their rights. "[M]embers of the press characteristically are vigilant in asserting their rights," Dortch-Okara wrote in the denial of Cohen's motion, according to the Supreme Judicial Court's opinion. "From their conduct, the court concludes that the empanelment was not sufficiently important to them to seek entry."

Cohen appealed, and the Supreme Judicial Court reversed. "The sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known," Botsford wrote, citing both state and federal court precedents.

Although Botsford cautioned that "the public trial right is not absolute," she concluded that Dortch-Okara had not made a sufficient finding that closing the court, even partially, was necessary.

"Here, the 'Do Not Enter' sign had a preemptive and preventive effect," Botsford wrote. "The defendant has thus established that the jury selection procedures used in this case violated his Sixth Amendment right to a public trial . . . and that accordingly, he is entitled to a new trial."

According to an April 27, 2010 story in *The Patriot Ledger* of Quincy, Mass., prosecutors said they were prepared to retry Cohen and were waiting for a court date.

In a Jan. 8, 2010 *Boston Globe* story, Wendy Sibbison, Cohen's appellate lawyer, said the court was "reaffirming a bedrock legal principle" in its ruling. "The whole idea is that people watching keeps everybody else in the courtroom keenly alive to their responsibilities,'' Sibbison said. "The fairness of a jury is utterly reliant on whether those prospective jurors tell the truth or not when they are asked questions.. . . This is an enormously important decision.''

Media Gain Partial Access to Jury Selection in Kansas Abortion Doctor's Murder Trial

A Kansas trial court judge closed the jury selection portion of the murder trial of a man accused of killing late-term abortion provider George Tiller, but later allowed partial access after being ordered to reconsider by the Kansas Supreme Court.

According to a Jan. 14, 2010 Associated Press (AP) story, Judge Warren Wilbert originally closed the entire jury selection process in the murder trial of Scott Roeder, who was charged in the shooting death of Tiller in a Wichita church in May 2009. Attorneys for both the prosecution and defense agreed to keep the selection closed, but four different media outlets, including *The Wichita Eagle*, the *Kansas City Star*, the AP, and a Kansas television station, appealed Wilbert's decision to the Kansas Supreme Court.

According to a January 14 *Eagle* story, Wilbert wrote an order on January 11 stating that he was concerned about jurors honestly answering questions about their religious beliefs and opinions about abortion if the entire selection process remained open.

On Jan. 12, 2010, the Kansas Supreme Court ordered Wilbert to reconsider his decision to close jury selection in *Wichita Eagle v. Wilbert*, No. 103,666 (Kan. Jan. 12, 2010). "Consideration of these requests necessarily must include evaluation and balancing of the defendant's right to a public trial, the public's and media's rights to access the judicial proceedings, and the potential that this particular criminal case may involve questioning of potential jurors that implicates their right to privacy," the order said.

After the order, Wilbert announced that media outlets could sit in the courtroom once the jury pool was narrowed to 42 potential jurors, the AP reported. A Jan. 14, 2010 story in *The Wichita Eagle* said that Wilbert also agreed to release a jury questionnaire

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used in narrowing down the original pool of 140 potential jurors. The press groups did not appeal Wilbert's revised order.

Warren Hern, a friend of Tiller's, complained about the closed proceedings in a January 21 AP story. "This is the kind of thing that invokes the specter of Star Chamber proceedings," said Hern, referring to an English court in the 1600s that met in secret and became a symbol of the misuse of power by the monarchy. "Secret proceedings are the antithesis of a democratic society."

Lyndon Vix, an attorney for the AP, also criticized Wilbert's decision in a Jan. 15, 2010 report from the Reporters Committee for Freedom of the Press. "The judge ruled in a paternal way," Vix said. "Instead of waiting for potential jurors to request a closed *voir dire* the judge presumed that that would be the best thing."

Nevada High Court Rules Questionnaires from Simpson Trial Are Public

The Supreme Court of Nevada issued an opinion on Dec. 24, 2009, ruling that jury questionnaires used in the 2008 armed robbery and kidnapping trial of former football player O.J. Simpson should have been made public.

"[J]uror questionnaires used in jury selection are, like the jury-selection process itself, presumptively subject to public disclosure," wrote James Hardesty, the Chief Justice of the Nevada Supreme Court, in *Stephens Media, LLC v. Dist. Ct.*, 221 P.3d 1240 (Nev. 2009). "Because we conclude that the district court neither articulated specific findings to show that concerns about juror candor superseded the First Amendment's presumption of open proceedings in jury selection nor considered reasonable alternatives to a complete closure of the questionnaires, we . . . direct the district court to release all blank and completed juror questionnaires to petitioners."

During the course of Simpson's trial, which concluded in 2008, the district court issued a decorum order prohibiting the release of the jury questionnaires from Simpson's criminal trial. The petitioners in the case, which included the *Las Vegas Review-Journal* and the AP, intervened, seeking to access a copy of the blank juror questionnaire before jury questioning began and the completed questionnaires of the jurors and alternates who were ultimately selected for the jury.

The district court denied the press's application, stating that it was concerned about jury taint and "the likelihood that potential jurors would access the questionnaires and tailor their answers to better position themselves onto the jury," according to the Nevada Supreme Court's opinion. The trial court did release a blank questionnaire after the jurors were seated.

"Public access inherently promotes public scrutiny of the judicial process, which enhances both the fairness of criminal proceedings and the public confidence in the criminal justice system," Hardesty wrote in the Nevada Supreme Court's opinion. "We conclude that the First Amendment's qualified right of access extends to juror questionnaires prepared in anticipation of oral voir dire."

The court then adopted the reasoning used by the Supreme Court of the United States in *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), commonly referred to as *Press Enterprise II*, to determine when a district court may limit access to juror questionnaires. Under a *Press Enterprise II* analysis, the court determined, a district court may refuse access to juror questionnaires only after it makes specific findings that the defendant would be deprived of a fair trial by the disclosure of the questionnaires, and considers whether alternatives to suppression of the questionnaires would protect the interests of the accused.

The Nevada Supreme Court then stated that the district court had not passed this test. "In every high-profile criminal case, there is a risk that jurors will prejudge the defendant but will be unwilling to admit their prejudgment," Hardesty wrote. "We determine that the district court's concern that potential jurors would preview the questionnaires and formulate their answers to better position themselves on the jury is based on unsupported conjecture."

The Nevada high court then ordered the district court to release all unredacted completed juror questionnaires to the media.

In a December 24 post on The Huffington Post, Donald Campbell, an attorney who represented the AP and the *Review-Journal* in the case, called the decision "a victory for the First Amendment and a victory for every citizen."

"One of the most critical features of our legal system is public access and open trials," Campbell said. "This decision reinforces just how important that commitment to full access is."

Dennis Drasco, the co-chair of the American Bar Association's Section of Litigation's Special Committee on Jury Innovation, said that publishing the completed questionnaires would have a negative impact on jury participation.

"My view is that privacy should prevail over the media's ability to delve into a juror's back ground [sic] – in any case, let alone a high-profile case," Drasco said in a February 25 article in the *Litigation News*. "I think jurors appreciate that and are more apt to give open answers that way."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

"One of the most critical features of our legal system is public access and open trials.. . . This decision reinforces just how important that commitment to full access is."

– Donald Campbell
Attorney for the Associated Press and *Las Vegas Review Journal*

Subpoenas and Shield Laws

Kansas Enacts Shield Law; Wisconsin Bill Clears Legislature

> "The shield law demonstrates that Kansas upholds that belief and respects a reporter's discretion in disclosing information and sources."
>
> – Mark Parkinson
> Governor of Kansas

Kansas Gov. Mark Parkinson signed a journalist shield bill into law on April 15, 2010, saying that "we must allow journalists to perform their jobs without fear of prosecution and continue bringing the news home to Kansans."

The shield law, Senate Substitute for House Bill 2585, requires a journalist to comply with a subpoena only if a judge rules that the party seeking the previously undisclosed information made a reasonable effort to obtain it some other way. The judge must also find that the information sought is of a "compelling interest" and is "likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists." The statute defines "compelling interest" to include preventing a "miscarriage of justice" or acts that would result in "death or great bodily harm."

The law, which goes into effect July 1, 2010, covers those who collect and publish information for "online journal[s] in the regular business of newsgathering and disseminating news or information to the public" in addition to reporters for traditional media such as newspapers, radio and television stations.

"Our founding fathers were very meticulous in making certain that our country, including members of the press, received the necessary protections for freedom," Parkinson said in an April 15 statement. "The shield law demonstrates that Kansas upholds that belief and respects a reporter's discretion in disclosing information and sources."

Doug Anstaett, executive director of the Kansas Press Association (KPA), a primary advocate of the bill, said the law will encourage reporters and their sources to actively uncover abuse and corruption in government. "While this won't eliminate all fishing expeditions by prosecutors, it will certainly at least cause them to pause when they're tempted to try to force reporters to become an arm of law enforcement, which is not what the framers had in mind when they wrote the First Amendment to the U.S. Constitution," Anstaett said in an April 16 Associated Press (AP) report.

Although efforts to pass a shield law began in 2002, Anstaett cited the recent subpoena of *Dodge City Daily Globe* reporter Claire O'Brien as a primary impetus for the law's passage.

"With the situation that developed in Dodge City, there was a much higher interest and awareness of this issue among the legislators this year," Anstaett said in an April 16 *Emporia (Kan.) Gazette* story. "That made it somewhat easier to bring it forward and get it moving."

O'Brien was fined and held in contempt of court on Feb. 10, 2010, after refusing to comply with a subpoena compelling her to testify about a confidential source and give prosecutors her unpublished notes.

Ford County prosecuting attorney Terry Malone issued subpoenas to the *Globe* and O'Brien seeking details about an Oct. 7, 2009 interview O'Brien conducted with Samuel Bonilla, who was charged with second-degree murder and attempted murder in the shooting death of Steven Holt and the wounding of Tanner Brunson in a September 2009 incident.

The subpoenas were issued after the *Globe* published a story written by O'Brien on Oct. 13, 2009, in which O'Brien quoted an anonymous source as saying that Brunson had a supply of semiautomatic weapons and "a base of support that is well-known for its anti-Hispanic beliefs." In the October 13 story, Bonilla, who is Hispanic, said he acted in self-defense after the two victims, both white, tried to run him down while he was jogging with two children. O'Brien's story also quoted bail bondswoman Rebecca Escalante as saying that she would have posted Bonilla's bond if several people had not warned her that Bonilla's life would be in danger if he was released from jail.

The newspaper moved to quash the subpoenas, but Dodge City District Court Judge Daniel Love refused the request and ordered O'Brien to testify about her newsgathering at an inquisition, Kansas' equivalent of a grand jury. In his Dec. 9, 2009, ruling, Love wrote that courts must balance the government's need for information against the reporter's interest in protecting sources. "In this case, when applying the balancing test, it is clear to the court that the need for this information outweighs the news reporter's privilege of confidentiality," Love wrote, according to a Dec. 10, 2009 report by the AP and the First Amendment Center.

William Hurst, an attorney who represented *Globe* owner GateHouse Media Kansas Holdings II, said that Love's ruling "collapsed" the balancing test by relying on "a minimum relevancy standard" for news media subpoenas in state criminal cases, a Dec. 21, 2009 AP report said.

O'Brien said she reassured her confidential source throughout the legal battle that she would not disclose his identity. "I think the reporter's only currency is her word – and I really did give it," O'Brien said in the December 21 AP report. "Every time I try to work myself through giving the information, I just can't imagine myself being able to compromise my professional reputation to that extent.. . . Who would trust me again?"

According to Malone, investigators were conducting two separate ongoing inquisitions, one involving the Bonilla shootings, and the other involving the alleged threats against Bonilla to which the October 13 *Globe* story alluded.

"In that story I read as county prosecutor for the first time that people have information that Mr. Bonilla himself may be in danger from other people that have anti-Hispanic beliefs, and so the Globe reporter has information about that which she is unwilling to give us that I find to be rather inexplicable," Malone said in the December 21 AP story. "I would think the normal person if they heard somebody may be in harm's way that they would want to give that information to police."

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Shield Laws, *continued from page 20*

On Jan. 4, 2010, Love rejected a request from attorney Michael Giardine, who represented O'Brien and the newspaper, to postpone his order requiring O'Brien to testify. "Granting a stay order would leave the investigation where it is now – stymied," Love wrote, according to a Jan. 6, 2010 AP report. "And it would leave Sam Bonilla's life in danger. Granting the stay order would also place a higher value on the reporter's unfounded legal argument than it would on the safety of Sam Bonilla."

On Jan. 19, 2010, the Kansas Supreme Court granted O'Brien a temporary stay so that she would not have to testify at the inquisition scheduled for the next day. The Kansas Supreme Court lifted the temporary stay of the subpoena on February 2 in a two-sentence order issued by Chief Justice Robert E. Davis that required O'Brien to testify, the AP reported on Feb. 3, 2010.

After the ruling, Malone disputed claims by O'Brien and the KPA that enforcing the subpoena would hinder the efforts of reporters to gather news. "I don't know what's chilling about that," Malone said, according to the February 3 AP story. "We just want the whole story, not just the part the reporter chose to put in there."

Love found O'Brien in contempt of court on Feb. 10, 2010, when she failed to attend a scheduled closed hearing and answer questions about her confidential source as required by the subpoena, *The Topeka Capital-Journal* reported in a Feb. 10, 2010 story. Love fined O'Brien $1,000 a day until she appeared in court.

The confidential source – who said he never told O'Brien his real name – revealed his identity to prosecutors the day after O'Brien did not show up in court. O'Brien then apologized to Love, and the judge rescinded the contempt citation and fine after O'Brien testified in a closed inquisition on Feb. 12, 2010, the AP reported on Feb. 15, 2010.

"He was moved by his own moral convictions," O'Brien said of the source revealing his identity to authorities in the February 15 AP story. "The only thing that could have evoked those was me demonstrating my moral convictions to that extent . . . when he saw I was willing to pay the whole price."

A dispute between O'Brien and the *Globe* led to O'Brien's dismissal, according to a March 8 AP story.

Wisconsin Governor Plans to Sign Journalist Shield Bill into Law

Wisconsin Gov. Jim Doyle said he planned to sign into law a journalist shield bill passed by the state legislature, the *Wisconsin State Journal* reported on April 20, 2010, the same day the Senate approved the measure by a voice vote. The Wisconsin Assembly previously approved the bill on Sept. 22, 2009.

The shield bill prohibits courts from compelling journalists to reveal confidential sources or unpublished material, except in limited circumstances. A subpoena may only be issued to a journalist if the information sought is "highly relevant" to a criminal investigation or civil claim and "not obtainable from any alternative source." In these instances, the journalist is entitled to dispute the merit of the subpoena before having to reveal the requested information.

Sen. Pat Kreitlow (D-Chippewa Falls), a former television and radio reporter, co-sponsored Assembly Bill 333, which was written in consultation with the Wisconsin Newspaper Association, the Wisconsin Broadcasters Association, and the Wisconsin Freedom of Information Council. "This bill is not about protecting the journalists so much as protecting the whistleblowers and their ability to come forward without the fear of intimidation or retribution from their employers," Kreitlow said in a statement, the *Milwaukee Journal Sentinel* reported on April 20.

The protections are limited to those who work for a "business or organization that, by means of print, broadcast, photographic, mechanical, electronic, or other medium, disseminates news or information to the public, including a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company."

– Cary Snyder
Silha Research Assistant

> "This bill is not about protecting the journalists so much as protecting the whistleblowers and their ability to come forward without the fear of intimidation or retribution from their employers."
>
> – Pat Kreitlow
> Wisconsin State Senator

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Subpoenas and Shield Laws

Police Raid Blogger's Home, College Paper's Newsroom

In two unrelated incidents in April 2010, California police searched the home of a technology blogger who had written about the prototype of a new phone from Apple, and Virginia officials raided the newsroom of *The Breeze*, the student newspaper at James Madison University, while investigating recent student riots.

> "The tactics used were a clear attempt to intimidate journalists into giving up their rights. The threat to coerce the students and shut down the newsroom is completely out of bounds."
>
> – Frank LoMonte
> Executive Director,
> Student Press Law Center

California Police Confiscate Computers at Blogger's House

California's Rapid Enforcement Allied Computer Team (REACT) entered the home of Jason Chen, editor of the technology blog Gizmodo, on April 23, 2010, seizing four computers and two servers in their investigation into the loss of an Apple iPhone prototype.

According to Chen's account of the events, which were posted on Gizmodo on April 26, he arrived at his home at around 9:45 p.m. on April 23 to find several police officers searching his house and removing several computers. They showed Chen a warrant, and provided him with a cataloged list of items removed from his house.

According to an April 26 story in *The New York Times*, the search was part of an investigation into the sale of an unreleased version of Apple's iPhone. Gizmodo, one of several blogs owned and operated by Gawker Media, published a number of stories the week of April 19 featuring information about the phone after buying it for $5,000 from a college student who said he had found the device at a California bar.

"You are looking at Apple's next iPhone. It was found lost in a bar in Redwood City, camouflaged to look like an iPhone 3GS," a Gizmodo post on April 19 stated. The post was accompanied by pictures, video, and a list of new and modified features on the phone. "We got it. We disassembled it. It's the real thing, and here are all the details."

According to the April 26 *Times* story, San Mateo County authorities are considering criminal charges related to the sale of the phone, which Gizmodo returned to Apple after publishing its report.

In response to the seizure of Chen's items, Gawker Media legal director and Chief Operating Officer Gaby Darbyshire wrote a letter to San Mateo authorities arguing that the seizure was illegal and that the items seized should be returned to Chen immediately. "Jason is a journalist who works full time for our company. Abundant examples of his work are available on the web," Darbyshire wrote. "He works from home, which is his de facto newsroom, and all equipment used by him there is used for the purposes of his employment with us."

Darbyshire wrote that the seizure was a violation of Cal. Penal. Code § 1524(g) and Cal. Evid. Code § 1070, which prohibits the issuance of warrants for material covered by California's journalist shield law. She cited *O'Grady v. Superior Court*, 34 Media L. Rep. 2089 (Cal. App. 2006), as extending the shield law to online journalists.

Stephen Wagstaffe, the San Mateo County chief deputy district attorney, said Chen's computers had not been searched yet and that his office was still considering the legal issues raised by Gawker, according to the April 26 *Times* story.

In an April 27 story in *The Business Journal,* Wagstaffe said that outside counsel for Apple had called his office to report the alleged theft of the phone and said they wanted it investigated. His office then referred Apple to REACT, a multi-jurisdictional, high-tech crime task force that operates under the Santa Clara County District Attorney's office. Apple is on the steering committee of REACT along with 24 other Silicon Valley companies, *The Business Journal* reported.

Some commentators said that California's shield law should protect Chen. "Of all places, California is probably the most clear that what Gizmodo does and what Jason Chen does is journalism," said Sam Bayard, a fellow at Harvard's Berkman Center for Internet & Society in the April 26 *Times* story. He said the case could hinge on whether there is an exception in the law involving a journalist committing a crime, "in this case receipt of stolen property," but that "this seems unlikely based on the plain language of the statute."

An April 27 post on the website for the Electronic Frontier Foundation (EFF) stated that the search was a potential violation of the Privacy Protection Act (PPA), 42 USC § 2000aa *et seq*., which prohibits searches for "documentary material" and "work product material," defined as material which is or has been used "in anticipation of communicating such materials to the public." Although the EFF noted that the PPA includes an exception for searches targeting criminal suspects, which it said Chen may or may not be, it noted that this exception does not apply "if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein."

Virginia Police Raid Student Newsroom in Riot Probe

Police executed a search warrant on James Madison University's student paper, *The Breeze*, on April 16, 2010, as part of investigation into student riots that had taken place a week earlier.

According to an April 16 story in *The Breeze*, Rockingham County Commonwealth's Attorney Marsha Garst and several police officers confiscated 926 photos from the paper, 682 of which were images of riots that took place at an annual James Madison event called Springfest.

Katie Thisdell, *The Breeze*'s editor-in-chief, said in the April 16 story that the commonwealth attorney's office had contacted her the day before the raid asking for pictures.

"Our policy is the only images that were available were the ones on our website and the ones already published," Thisdell said of her conversation with

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Police Raids, *continued from page 22*

commonwealth officials. "He verified the information, and that was the end of that conversation."

The next morning, Garst arrived at the office with a search warrant and "at least six or seven police officers." *The Breeze* reported that the officials had a search warrant for all electronic materials related to the riots, for the purpose of identifying and prosecuting violent rioters. The warrant gave police permission to search all *Breeze* offices and to copy photos and other materials.

Thisdell said she refused, citing the federal Privacy Protection Act (PPA), 42 USC § 2000aa *et seq*., but that Garst told her that if she persisted the police would seize all the computers and electronic equipment in the office. Thisdell relented, allowing the police to copy photos and other Springfest-related materials onto DVDs. "Basically, I didn't have any other choice," Thisdell said in an April 22 *Washington Post* story. "We can't put out a newspaper without our equipment."

According to *The Breeze*, the affidavit that gave the reasoning behind the warrant is sealed, and could remain sealed for up to a year.

In the April 16 *Breeze* story, Frank LoMonte, the executive director of the Student Press Law Center, said the action by the commonwealth attorney's office was "blatantly illegal" and a violation of the PPA.

"The tactics used [April 16] were a clear attempt to intimidate journalists into giving up their rights," LoMonte said. "The threat to coerce the students and shut down the newsroom is completely out of bounds."

The PPA states that, with certain exceptions, "it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials . . . possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."

The statute defines "documentary materials" as "written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense."

An April 19 *Breeze* story reported that Garst had reached a agreement with the paper's attorney, and the images seized during the raid would be sealed until a further settlement between the parties could be reached.

– Jacob Parsley
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Digital Media

Federal Judge Orders Website to Delay Posting of Stock Recommendations

A federal district court judge ruled on March 18, 2010, that financial news website Theflyonthewall.com (Fly) had misappropriated the financial recommendations of three prominent Wall Street firms and instituted strict time guidelines for the site's future publication of stock recommendations.

Fly is a New Jersey-based Internet subscription news service that aggregates and publishes stock recommendations along with other items of interest to investors. The investment firms in the case, Barclays, Merrill Lynch, and Morgan Stanley, accused Fly of misappropriation by using information from the firms' reports to publish recommendations on stock upgrades and downgrades, in many cases before the firm's paying clients received the investment advice. The firms also accused Fly of copyright infringement for the "verbatim copying of key excerpts" of several 2005 investment recommendation reports.

"It is not a defense to misappropriation that a Recommendation is already in the public domain by the time Fly reports it."

– Denise L. Cote
U.S. District Court for the Southern District of New York

In *Barclays Capital, Inc. v. Theflyonthewall.com*, No. 06 Civ. 4908, 2010 U.S. Dist. LEXIS 25728 (S.D.N.Y. March 18, 2010), the three firms argued that their equity recommendations were "hot news" and that Fly's consistent and timely redistribution of the content constituted a violation of the New York common law of unfair competition. Each of the firms invests hundreds of millions of dollars annually to compile their equity research, and the judge agreed with the firms that Fly's conduct was a disincentive for the firms to expend resources to produce the reports.

"Fly's core business is its free-riding off the sustained, costly efforts by the Firms and other investment institutions to generate equity research that is highly valued by investors," wrote Judge Denise L. Cote of the U.S. District Court for the Southern District of New York in the opinion, which was issued after a four-day bench trial.

Cote's final ruling instituted specific time requirements for Fly's future publication of the firms' recommendations. For recommendations issued when the stock market is closed, Cote forbade publication by Fly before 10 a.m. the following day. For recommendations issued while the market is open, Cote wrote that Fly cannot publish the reports for two hours after their release.

"This time frame preserves incentives for the Firms to create and disseminate research reports to their investor clients, while still recognizing the inevitable, fast-moving, and widespread informal communication of Recommendations on Wall Street," Cote wrote.

The time restrictions will not apply if Fly reports the firms' recommendations "in the context of independent analytical reporting on a significant market movement that has already occurred that same day," Cote wrote.

According to its website, Fly produces more than 800 stories per day on stock recommendations, rumors, and other financial events. Trial testimony indicated that, as of August 2008, more than 3,000 subscribers paid up to $50 per month to access Fly, Bloomberg News reported on March 18.

Until 2005, Fly relied on employees at the various firms to e-mail unauthorized research reports directly to Fly after they were published. Fly's employees would then scan and type selected recommendations as headlines into its newsfeed, sometimes adding passages lifted directly from the report.

Fly did not dispute the firms' claim that it was guilty of copyright infringement for publishing verbatim portions of 17 research reports in 2005. Cote ordered Fly to pay $12,750 in damages to the firms for the copyright violations.

Ron Etergino, president and majority owner of Fly, testified at trial that as a result of the copyright lawsuit, Fly changed its process for gathering the firms' recommendations, and no longer looks at the reports directly. Instead, Etergino testified that Fly relies on other sources, such as news services, chat rooms, and exchanging instant messages and e-mails with industry contacts to learn the information contained in the reports.

Fly argued that if it could show that the firms' recommendations are already "public," or available from sources other than the firms, then it should be free to republish them, since other Internet companies, as well as major news organizations, constantly report the firms' recommendations.

Cote disagreed. "The fact that others also engage in unlawful behavior does not excuse a party's own illegal conduct," she wrote. "Similarly, even if true, it is not a defense to misappropriation that a Recommendation is already in the public domain by the time Fly reports it."

Glenn Ostrager, an attorney representing Fly, said he planned to appeal the decision to the 2nd Circuit U.S. Court of Appeals, according to the March 18 Bloomberg report. "We fully expect that the financial press will vigorously support Theflyonthewall.com with amici briefs to the circuit court on the grounds that the recommendations are news which the financial press regularly reports," Ostrager said.

Sam Bayard, Assistant Director of the Citizen Media Law Project at Harvard's Berkman Center for Internet and Society, pointed out in a March 23 post on the project's blog that Cote's lengthy opinion lacked any discussion of how hot-news misappropriation intersects with the First Amendment. Bayard noted that Fly currently appears to rely on publicly available information and employ "good-old fashioned journalism" [sic] in reporting stock recommendations. He questioned whether newspapers and other media would try to use the case to prevent news aggregators and social media from reproducing the content of their original news reporting.

Website restrained, *continued on page 28*

Media Ethics

New York Times Co. Pays Settlement to Singaporean Leaders

The New York Times Co. apologized and agreed to pay $114,000 to Singaporean leaders as part of an out-of-court settlement after the *International Herald Tribune* ran a story on Feb. 15, 2010 that included Singapore's Prime Minister Lee Hsien Loong and his two predecessors in a list of Asian "political dynasties."

Both the author of the February 15 article, Philip Bowring, and the New York Times Co., which publishes the *International Herald Tribune*, agreed to pay $60,000 in Singaporean currency to Lee, as well as $50,000 to his father, former Prime Minister Lee Kuan Yew, and $50,000 to former Prime Minister Goh Chok Tong for the article, titled "All in the Family," a March 25 Associated Press (AP) story reported.

The apology, which ran March 24, said that Bowring, a regular contributor to the *Herald Tribune*'s op-ed section, had made an agreement in 1994 with Singapore's leaders not to say or imply that Prime Minister Lee had attained his position through nepotism. "Mr. Bowring nonetheless included these two men in a list of Asian political dynasties, which may have been understood by readers to infer that the younger Mr. Lee did not achieve his position through merit," the apology said. "We wish to state clearly that this inference was not intended. We apologize to Prime Minister Lee Hsien Loong, Minister Mentor Lee Kuan Yew and former Prime Minister Goh Chok Tong for any distress or embarrassment caused by any breach of the undertaking and the article."

A March 24 *New York Times* story reported that Singaporean leaders have a history of threatening legal action against news organizations for language that would not be considered libelous in the United States. A March 24 Reuters report stated that in the past, Singapore's leaders have won damages or out-of-court settlements from foreign media entities, including the *International Herald Tribune*, *The Wall Street Journal*, Bloomberg News, and *The Economist*.

The March 24 *Times* story reported that the current case stemmed from a similar incident in 1994 in which Bowring wrote an article that referred to the "dynastic politics" of Singapore when Goh Chok Tong was prime minister and Lee was his deputy. In the 1994 case, the *Herald Tribune* paid $678,000 and published an apology after the three leaders threatened to take legal action against the publication. Bowring and the *Herald Tribune* also agreed not to make any more references to Singaporean nepotism, an agreement that the March 24 apology acknowledged breaching.

According to a March 26 post on the website for the Committee to Protect Journalists, Davinder Singh, the lawyer representing the Singaporean leaders, described the February 15 story as "libelous" and a breach of an earlier "undertaking with the leaders of the government of Singapore." Singh said that because *The Times* apologized and agreed to pay damages and costs, no suit was filed.

Stuart Karle, a former general counsel of *The Wall Street Journal*, said in the March 24 *Times* story that "[n]obody in most of the world would bat an eye" about this kind of story. But in Singapore, Karle said, there is often "the presumption that there's a hidden message" about nepotism or corruption in news coverage, and if it leads to libel charges, news organizations face "a near-certainty of losing."

In a March 29 post on *Business Insider*'s The Wire blog, *Business Insider* Editor-in-Chief Henry Blodget criticized the Times Co.'s decision to pay the Singaporean leaders. "The NYT has been bludgeoned into submission," Blodget wrote, asserting that the Times Co. only paid the fine to preserve their access to Singapore's leaders. "We don't mean to be overly critical here, but we get tired of holier-than-thou mainstream media bellyaching about how only mainstream media can be trusted – when so much of the mainstream media game is granting control over coverage in exchange for access."

In an April 3 column, *New York Times* public editor Clark Hoyt emphasized that the 1994 agreement between Bowring and the Singaporean government applied only to the *International Herald Tribune*. Hoyt's column quoted *New York Times* Executive Editor Bill Keller as saying that "[n]obody in this company has ever told me what our reporters can write – or not write – about Singapore." Keller said *The Times* newsroom has no agreements with any government about what can be reported.

Andrew Rosenthal, the editor of *The Times* editorial page, told Hoyt the settlement did not affect his section of the paper either. "If we have something that needs to be said on the editorial or Op-Ed pages, on any subject, we will say it, clearly and honestly," Rosenthal said.

According to Hoyt's column, the *Herald Tribune*'s only options in Singapore were to reach some kind of agreement with the government or leave. "For The Herald Tribune, the economic stakes are large: more than 10 percent of its Asian circulation is in Singapore," Hoyt wrote. "It prints papers there that are distributed throughout the region. It sells advertising to companies throughout Asia that want to reach readers in Singapore."

Hoyt also acknowledged that deference to Singapore's government was unlikely to change the government's rigid standard for libel. Hoyt's column quoted Roby Alampay, the executive director of the Southeast Asian Press Alliance, as saying that the "continuing line of major media organizations too quick to offer contrition and money is a sad sight and a persisting insult on legitimate journalism, fair commentary, free speech and the rights that Singaporeans deserve."

– Ruth DeFoster
Silha Research Assistant

"[The] continuing line of major media organizations too quick to offer contrition and money is a sad sight and a persisting insult on legitimate journalism, fair commentary, free speech and the rights that Singaporeans deserve."

– Roby Alampay
Executive Director,
Southeast Asian Press Alliance

Media Ethics

Two Journalists Resign amid Plagiarism Allegations

In February 2010, two high-profile plagiarism scandals involving a reporter for *The New York Times* and the chief investigative reporter for news website The Daily Beast resulted in the resignations of both journalists. Both men allegedly used language from other online news sources without acknowledgement or attribution, highlighting one of the potential pitfalls of web-based journalism.

"At a time when cut-and-paste technology enables plagiarism, when news and information on the web are treated as commodities, these are conversations worth having throughout the Times building."

– Clark Hoyt
Public Editor,
The New York Times

Business Reporter Resigns from* The New York Times *amid Plagiarism Accusations

Zachery Kouwe, a reporter for *The New York Times,* resigned on Feb. 16, 2010, amid allegations that he reused language from other news sources without attribution in a number of business articles in *The Times* and in posts on *The Times*' DealBook blog.

An Editor's Note published with the corrections in the February 14 edition of *The Times* stated that Kouwe "appears to have improperly appropriated wording and passages published by other news organizations." The note said that Kouwe "reused language from The Wall Street Journal, Reuters and other sources without attribution or acknowledgment."

"Copying language directly from other news organizations without providing attribution – even if the facts are independently verified – is a serious violation of Times policy and basic journalistic standards," the note said. "It should not have occurred."

In a February 16 story, *The New York Times* reported that the controversy came to light when Robert Thomson, the managing editor of *The Wall Street Journal,* sent a letter to editors of *The Times* saying that portions of a story Kouwe wrote February 5 were identical or nearly identical to a *Journal* article published online hours before. *The Times* editors investigated and found other examples of plagiarism by Kouwe, but the story did not specify how many.

Kouwe was initially suspended by *The Times*, and resigned on February 16. "The Times has dealt with this, as we said we would in our Editors' Note, consistent with our standards to protect the integrity of our journalism," Diane McNulty, a spokeswoman for the company, said in the February 16 *Times* story. "Beyond that, we don't comment on personnel issues."

The day he resigned, Kouwe gave an interview to *The New York Observer,* in which he said that he never knowingly plagiarized. "Basically, there was a minor news story and I thought we needed to have a presence for it on the [DealBook] blog," Kouwe said. "In the essence of speed, I'll look at various wire services and throw it into our back-end publishing system, which is WordPress, and then I'll go and report it out and make sure all the facts are correct . . . I'll go back and rewrite everything," Kouwe said. "I was stupid and careless . . . and thought it was my own stuff, or it somehow slipped in there. I think that's what probably happened."

Kouwe started writing for *The Times* in 2008, according to the February 16 *Observer* story. Before working for *The Times,* Kouwe was a reporter for *The New York Post* and Dow Jones Newswires. He was one of several employees to start at *The Times* in a wave of hiring in an effort to staff blogs like DealBook, *The Observer* reported.

In a March 6 column, *Times* public editor Clark Hoyt wrote that although most of what Kouwe lifted was "pretty banal stuff, like background material," the practices were still considered unacceptable.

Hoyt also wrote that previous incidents involving Kouwe indicated that there was a problem. Dealbreaker, a rival business-news blog, and *The Wall Street Journal* had both complained previously about Kouwe lifting material from their websites without attribution, but at the time Andrew Ross Sorkin, the editor of DealBook, updated Kouwe's posts to give credit to the original reporting and considered the overlaps to be honest oversights on Kouwe's part.

"I think everybody looks back and says, yeah, there were warning signs," *Times* business editor Larry Ingrassia said in Hoyt's column. Ingrassia also said he would instruct his staff to tell him about every complaint about proper credit not being given.

Hoyt suggested that because of the fast-breaking and competitive nature of DealBook, added oversight might help avoid future problems.

"Many at The Times with whom I spoke seem to regard Kouwe's plagiarism as an isolated case involving a problematic reporter," Hoyt wrote. "But Ingrassia said he is initiating conversations to see if there are things that should be done differently in DealBook and the rest of his department. At a time when cut-and-paste technology enables plagiarism, when news and information on the Web are treated as commodities, these are conversations worth having throughout the Times building."

Daily Beast Investigative Reporter Resigns after Repeated Plagiarism Allegations

The chief investigative reporter of The Daily Beast news site, Gerald Posner, resigned on Feb. 10, 2010 after a scandal emerged involving plagiarized material from *The Miami Herald.*

On February 5, Slate media critic Jack Shafer wrote about plagiarism evident in a Feb. 2, 2010 post on The Daily Beast that included five sentences copied almost verbatim from a story posted a few hours earlier on *The Miami Herald*'s website.

In Shafer's February 5 story, Posner said he agreed that copying the sentences constituted plagiarism. "There is no excuse," Posner said. "I take full responsibility." Posner also said that the plagiarism was unintentional and he could not understand how it had happened, because he was "absolutely sure" he hadn't seen *The Herald* story that preceded his own post.

"I must have had the *Miami Herald* there and copied," Posner said, claiming that the differences

Plagiarism, *continued on page 28*

Media Ethics

News Networks Criticized for Practicing 'Checkbook Journalism'

Several major news organizations drew criticism in recent months for paying sources or providing gifts in exchange for exclusive licensing or interview rights.

ABC News Pays $200,000 for Baby Pictures of Murdered Toddler

An attorney for Casey Anthony, a Florida woman accused of murdering her 2-year-old daughter, revealed in court that ABC News had paid Anthony's family $200,000 in 2008 for what ABC called "an extensive library of photos and home video" of Anthony's daughter.

Jose Baez, Anthony's lead attorney, revealed the $200,000 payment in court on March 19, 2010. According to a March 19 story on National Public Radio (NPR), the pictures and footage were used in Sept. 5, 2008 broadcasts on the ABC programs "Good Morning America" and "20/20."

ABC released a statement on March 19 saying that "we licensed exclusive rights to an extensive library of photos and home videos for use by our broadcast platforms, affiliates and international partners. No use of the material was tied to any interview."

The Society of Professional Journalists (SPJ) condemned the payment to Anthony in a March 23 press release castigating major broadcast networks for the practice of what it called "checkbook journalism." The release said the ABC payments violated the SPJ Code of Ethics, which states that journalists should "avoid conflicts of interest, real and perceived," "be wary of sources offering information for favors and money," and "avoid bidding for news."

"Paying someone while covering them breaches basic journalism ethics," SPJ Ethics Committee Chairman Andy Schotz said, according to the press release. "ABC's failure to disclose this business relationship as part of its coverage the last two years made the breach worse."

In a March 19 post on the Poynter Institute's website, Poynter's ethics group leader Kelly McBride said she thought the payment sounded like a "pretty lucrative photo licensing deal."

"I don't know how much [is typical] when they really have to license photos, but $200,000 is pretty expensive," McBride said. "I question all of these over-the-top licensing arrangements because you are essentially paying for a source to talk to you and you are going around the rules that say you are not allowed to do that."

In the March 19 NPR report, former ABC News anchor Aaron Brown, who is currently a journalism professor at Arizona State University, called the ABC payments "the worst example of what has become a common practice."

"Even if you are OK with skirting the ethical edges some of the time by buying pictures from principals, this seems way over that line," Brown said.

NBC Provides Chartered Jet for Father in Brazilian Custody Battle

NBC News provided a chartered jet for a father and his son to fly from Brazil to America on Dec. 24, 2009, after a highly publicized international custody battle. According to a December 24 Reuters report, an NBC reporter interviewed the father during the flight and was the only member of the media on the plane.

After landing in the United States, David Goldman, a New Jersey father who won custody of his son after a five-year court battle with the boy's Brazilian stepfather, provided another exclusive interview to NBC News, parts of which aired on the Christmas Eve broadcast of the "NBC Nightly News," as well as the next day's broadcast of "The Today Show."

On Dec. 28, 2009, the SPJ Ethics Committee issued a statement saying that NBC News "breached widely accepted ethical journalism guidelines" by providing the jet for Goldman. The SPJ release emphasized that the duty of the news media is to report news, not help create it. "By making itself part of a breaking news story on which it was reporting – apparently to cash in on the exclusivity assured by its expensive gesture – NBC jeopardized its journalistic independence and credibility in its initial and subsequent reports," the SPJ release said. "In effect, the network branded the story as its own, creating a corporate and promotional interest in the way the story unfolds. NBC's ability to report the story fairly has been compromised by its financial involvement."

The SPJ release proposed increased openness as a solution. "NBC must now, belatedly, explain why it entangled its news reporting and corporate interests in this story, as well as the terms of any deal it made with the Goldman family," Ethics Committee chair Schotz said, according to the release. "NBC also is ethically bound to adequately disclose its active role in the story in each of its future reports on the Goldmans."

In a Dec. 29, 2009 post on the gossip and media news blog Gawker, staff writer John Cook wrote that the practice of indirectly paying for interviews has become common among news organizations.

"In the Goldman case, the subterfuge is actually in the meaning of the word 'pay,'" Cook wrote. "NBC News does not 'pay' for interviews like a trashy tabloid, it just provides goods and services like private jet travel at no cost to people of public interest who are willing to exclusively talk to NBC News employees."

CNN Pays $10,000 for Photos of Thwarted Airplane Bomber

CNN paid $10,000 for the rights to a cell phone picture taken by Jasper Schuringa, a Dutch citizen who helped overpower an alleged terrorist on a

'Checkbook Journalism,' *continued on page 28*

> "In the Goldman case, the subterfuge is actually in the meaning of the word 'pay.'"
>
> – John Cook
> Gawker

'Checkbook Journalism,' *continued from page 27*

flight from Amsterdam to Detroit on Dec. 25, 2009. Schuringa's first interview after the incident was also on CNN.

According to a Dec. 26 post on the blog Mediaite, CNN said it paid a "licensing fee" for the exclusive cell phone image. "While network shows like ABC's 20/20 or NBC's Dateline often license photos and video for interviews, it's rare to see CNN get into the mix," the Mediaite post said. "Obviously they wanted to land the 'get' – but at what cost, literal and figurative?"

The March 23 SPJ press release denouncing "checkbook journalism" also mentioned CNN's payment for use of the photos. "News organizations that claim they're getting free interviews or access after giving sources thousands of dollars in cash or gifts are being disingenuous," Ethics Committee Chair Schotz said, according to the release. "It's time to end this unethical shell game."

– Ruth DeFoster
Silha Research Assistant

"News organizations that claim they're getting free interviews or access after giving sources thousands of dollars in cash or gifts are being disingenuous.. . . It's time to end this unethical shell game."

– Andy Schotz
Chairman,
SPJ Ethics
Committee

Plagiarism, *continued from page 26*

between his copy and *The Herald*'s were evidence of him "doing the rewrite" of what he thought was his copy.

Three days later, Shafer wrote another story about the case that alleged several more instances of Posner plagiarizing from various sources. In the February 8 Slate story, The Daily Beast's executive editor, Edward Felsenthal, said that he took the new information "very seriously," and intended to suspend Posner for a full review of his work. In a statement quoted in Shafer's story, Posner reiterated that he took full responsibility for the contested stories, emphasizing that he had only plagiarized what he called the most "mundane information."

"I now realize that a method of compiling information that I have used successfully since 1984 on book research, obviously does not work in a failsafe manner at the warp speed of the net," Posner said. "I ask all of you to accept my apology for these instances, a tiny percentage of the hundreds of thousands of words I've written over decades. I accept, however, the full responsibility."

Shafer criticized Posner's apology in a February 11 Slate story. "[Y]ou don't have to rob from Proust to qualify as a low-down plagiarist," Shafer wrote. "Even mundane information takes time and energy to collect and type up – sometimes more time and energy than it takes to toss off an original sonnet."

Posner announced his official resignation from The Daily Beast on a February 10 post on his personal blog. "I shall not be doing journalism on the internet until I am satisfied that I can do so without violating my own standards and the basic rules of journalism," Posner wrote.

On April 1, the Miami *New Times* blog published a new report that claimed to have found several new cases of plagiarism by Posner on both The Daily Beast and in his new book, *Miami Babylon*, a nonfiction history of crime in Miami Beach. In a March 17 Associated Press story, Posner acknowledged that he had used a "flawed research methodology" when writing the book, and admitted that he may have used text from another book, Frank Owen's *Clubland*, without attribution.

"Taken as a whole," the *New Times* post said, "the new evidence presented here is the most damning yet that Posner isn't a victim of 'warp speed' Internet, 'trailing endnotes,' or a conspiracy. He's just a serial plagiarist, plain and simple."

In the February 11 Slate story, Shafer referenced an essay by Edward Wasserman, a professor of journalism ethics at Washington and Lee University and a former Silha Center Ethics Forum speaker. "Most everybody concedes that plagiarism harms plagiarized writers by denying them due credit for original work," Shafer wrote. "But Wasserman delineates the harm done to *readers*. By concealing the true source of information, plagiarists deny 'the public insight into how key facts come to light' and undermines [sic] the efforts of other journalists and readers to assess the truth value of the (embezzled) journalistic accounts. In Wasserman's view, plagiarism violates the very 'truth-seeking and truth-telling' mission of journalism."

– Ruth DeFoster
Silha Research Assistant

Website restrained, *continued from page 24*

Bayard argued in the blog post that under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the First Amendment protects Fly's right to publish the recommendations as long as Fly lawfully obtained the information. "There is nothing inherently unlawful about Fly reading about a stock recommendation on a newsfeed provided by another news service or participating in a public chat room where Wall Street 'rumors' are discussed," Bayard wrote. "The court says that Fly has engaged in 'illegal conduct' by publishing the information it did, but this label begs the question – that is, whether the state may constitutionally penalize publication of truthful information relating to a matter of public concern that was not obtained in violation of any other applicable laws."

Bayard acknowledged that the Barclays Capital case might be distinguishable from other instances of news aggregation because investment information is inherently time-sensitive, and that it could be difficult for newspapers to show that news aggregation on blogs and social media hurts their financial bottom line.

Charles Davis, executive director of the National Freedom of Information Coalition at the University of Missouri in Columbia, agreed in the March 18 Bloomberg report that Barclays Capital could have broad significance for the news industry. "If that's theft of intellectual property, there's a lot of theft of intellectual property across the journalism landscape," Davis said. "If information is on the street, it's on the street."

– Cary Snyder
Silha Research Assistant

Media Ethics

Washington Post Deletes, Modifies Blog Post Critical of Paper

The Washington Post deleted a reporter's Jan. 27, 2010 blog post on the newspaper's website that was critical of the relationship between *The Post*'s editorial board and a prominent local school official, and reposted a redacted version of the same story a few hours later without notifying readers that the post had been altered. The episode highlighted an ongoing debate over the extent to which news organizations should notify readers of changes to online content.

In a January 27 post on the paper's D.C. Schools Insider blog, *Washington Post* education reporter Bill Turque wrote that he had been scooped the previous day by *Post* editorial writer Jo-Ann Armao regarding specific information about teacher layoffs. Turque wrote that he had been seeking additional information from Washington D.C. Public Schools (DCPS) Chancellor Michelle Rhee regarding comments she had made in a *Fast Company* interview in which she said that DCPS had conducted layoffs of "teachers who had hit children, who had had sex with children, who had missed 78 days of school."

According to a January 29 story in the *Columbia Journalism Review* (*CJR*), the *Fast Company* story did not clarify how many of the 266 teachers who were laid off had such serious infractions on their records. But Turque continued to press the DCPS for specific numbers that could shed some light on Rhee's comments. Instead of providing the information to Turque, Rhee passed the information on to Armao, who the *CJR* story described as "an editorial board member who regularly, and relatively sympathetically, writes on Rhee's efforts to remake the city's troubled school system."

In his blog post, Turque wrote that Rhee's office had selectively chosen to provide information to Armao rather than to him, although he had been working on the same story, because the paper's editorial board – of which Armao is a member – had historically written favorably about Rhee. Armao's editorials, Turque wrote, were "a guaranteed soft landing spot for uncomfortable or inconvenient disclosures – kind of a print version of the Larry King Show."

"The chancellor is clearly more comfortable speaking with Jo-Ann, which is wholly unsurprising. I'm a beat reporter charged with covering, as fully and fairly as I can, an often turbulent story about the chancellor's attempts to fix the District's public schools," Turque wrote in his original January 27 post. "Jo-Ann, on the other hand, sits on an editorial board whose support for the chancellor has been steadfast, protective and, at times, adoring."

The blog entry was removed from *The Post*'s website the same day, but later reposted with several portions altered by Managing Editor Liz Spayd, according to a January 28 blog post by *The Post*'s ombudsman, Andrew Alexander. The "Larry King" characterization made by Turque was gone in the new blog post, and the description of the editorial board's support for Rhee was changed from "steadfast, protective and, at times, adoring" to simply "steadfast."

According to Alexander's post, Spayd "felt that Turque's characterizations were unfair." Turque said that Spayd called the original January 27 post "completely inappropriate" and said that Turque "had no place as a beat reporter taking on the editorial board."

In the January 29 *CJR* story, staff writer Clint Hendler wrote that "Turque's post appealed to me as a rare look at a newsroom's internecine battles. But it also was a pithy explanation of the games sources play, of the different jobs of the beat reporter and the editorialist, and a reassertion of the oft-doubted wall between the two. It was a refreshing and honest item – the kind of behind-the-scenes story that I know many readers would like to see more of."

Hendler also criticized *The Post* for not explaining their revisions. "If the papers' editors think his post crossed the line, they should say why – not only publicly, but on their own site," Hendler wrote.

In a January 27 post on the website for the Washington *City Paper*'s website, then-editor Erik Wemple reproduced Turque's original post in its entirety, and criticized *The Post* for having removed and revised the content without notifying readers. In a follow-up post on January 28, Wemple emphasized again that the paper should have notified readers about the change. "[T]he entire episode speaks to the newspaper's inability to graduate from Web 101," Wemple wrote. "The subtext here is that, 'Hey, it's just a blog post – it's not the paper. You can take it down, pass it around, whatever.'"

In a February 7 story, Alexander responded to the criticism by calling for greater online transparency, writing that the Turque episode highlighted the need for a standardized set of policies for revising content online. Although *The Post* does have policies for revising online content, the guidelines remain "tucked away on an internal *Post* Web site" and have not been widely consulted, despite the integration of the print and online editions of the newspaper, Alexander wrote.

"With the (online) corrections policy, it's clear that a lot of people either don't know one exists or are confused because they couldn't find it," Raju Narisetti, the managing editor who oversees *The Post*'s website said in Alexander's February 7 story.

According to Alexander, *The Post*'s existing policies are being examined, and a "draft of updated guidelines is in the final review stage."

Kelly McBride, of the Poynter Institute, said the key to avoiding similar problems in the future is transparency on the part of newspapers, according to the February 7 story.

"People start to not trust you and it damages your credibility," McBride said. "It really does undermine credibility to a substantial degree when you just take stuff down [or] when you correct an error of fact without noting that you corrected it."

– Ruth DeFoster
Silha Research Assistant

> "The entire episode speaks to the newspaper's inability to graduate from Web 101."
>
> – Erik Wemple
> Former editor,
> *City Paper*

Libel

10th Circuit Upholds Dismissal of Libel Suit Against Grisham, Other Authors

On Feb. 1, 2010, the 10th Circuit U.S. Court of Appeals upheld the dismissal of a libel suit against best-selling author John Grisham and several other authors who wrote about two men wrongfully convicted of murder and rape in Oklahoma.

In *Peterson v. Grisham*, 594 F.3d 723 (10th Cir. 2010), the appeals court found the authors' statements were protected by a state statute that prohibits libel claims against public officials unless the speaker falsely accuses the official of committing a crime.

"Merely because defendants published their books in close temporal proximity to one another does not demonstrate there was an illegal agreement to engage in 'a massive joint defamatory attack.'"

– Carlos F. Lucero
U.S. District Court for the Eastern District of Oklahoma

The libel case stemmed from published works chronicling the ordeal of Ronald Williamson and Dennis Fritz, who were convicted in 1988 for a 1982 rape and murder in the rural town of Ada, Okla. Williamson and Fritz each spent 11 years in prison before they were exonerated when court-ordered DNA testing in 1999 revealed that hair and semen samples taken from the crime scene did not belong to them.

The exonerations served as the basis for two different books, a chapter in a third, and an afterword in a fourth. In each of these books, the writers strongly criticized the work of three men involved in the investigation and prosecution of the crime: former Pontotoc County District Attorney William Peterson; former Shawnee police officer Gary Rogers; and former state criminologist Melvin Hett, who testified at trial that the hair samples found at the crime scene belonged to Williamson and Fritz.

Grisham, best known for his fictional legal thrillers, used Williamson's experience to craft *The Innocent Man*, his first non-fiction work. In the book, Grisham criticized what he described as a broken criminal justice system that condones "bad police work, junk science, faulty eyewitness identifications, bad defense lawyers, lazy prosecutors, [and] arrogant prosecutors."

Fritz similarly criticized the public officials who helped secure his conviction in *Journey Toward Justice*, his personal account of the ordeal. Barry Scheck, Fritz's former attorney and a prominent anti-death penalty advocate, wrote the foreword to *Journey Toward Justice*, and also devoted a chapter of his 2003 book, *Actual Innocence*, to the wrongful convictions. Robert Mayer referred to the Williamson-Fritz case in the afterword of a new edition of his 1987 book *The Dreams of Ada*, which centered on a different murder investigation in the town of Ada.

After the publication of the books, Peterson, Rogers, and Hett filed suit against the authors and their publishing companies in U.S. District Court for the Eastern District of Oklahoma, alleging defamation, false light invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. The plaintiffs claimed the authors and publishing companies engaged in "a massive joint defamatory attack" against them in an effort to abolish the death penalty.

The district court dismissed the lawsuit under Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief could be granted. "The wrongful convictions of Ron Williamson and Dennis Fritz must be discussed openly and with great vigor," district court Judge Ronald A. White wrote in dismissing the suit.

In affirming the dismissal of the libel claim, the unanimous three-judge appellate panel relied on Okla. Stat. tit. 12, § 1441, which exempts from libel claims "[a]ny and all criticisms upon the official acts of any and all public officers" unless a defendant made a false allegation that the public official engaged in criminal behavior.

"[P]laintiffs point to no statement in which defendants directly accuse any plaintiff of a crime," Judge Carlos F. Lucero wrote for the panel. "Any connection between defendants' statements and an accusation of criminal activity is far too tenuous for us to declare them as unprivileged."

The judges noted in a footnote that, although Oklahoma law controlled dismissing the libel claim, the First Amendment also protected at least some of the authors' statements. "[A]t a minimum, allowing the plaintiffs to recover would offend the spirit of the First Amendment," Lucero wrote. "Defendants wrote about a miscarriage of justice and attempted to encourage political and social change. To the extent their perceptions of the affair were erroneous, we depend on the marketplace of ideas – not the whim of the bench – to correct insidious opinion."

Robert Nelon, an Oklahoma City attorney who represented Random House, Grisham, Mayer, and Scheck, said the decision was an important victory for authors in a February 4 report from the First Amendment Center.

"Thankfully, the 10th Circuit recognized – as the district court did below – that public discourse about the criminal justice system is crucial to understanding the system and how miscarriages of justice can occur," Nelon said. "People who step out and research, study, comment and write about alleged miscarriages of justice should receive a high degree of protection, as we in society need more of that type of speech, not less."

Gary L. Richardson, the Tulsa-based attorney for the plaintiffs, suggested the wrongful conviction of Williamson and Fritz led the court to make a misguided decision, according to the First Amendment Center report.

"We are just still in disbelief that the court could conclude that there wasn't anything in the complaint that would give rise to a legal cause of action," Richardson said. "I get the sense that the reality of what happened to these two men has been very impacting on the court's ruling in the sense that the court focused on the fact that justice wasn't done to these two men instead of whether there is a legal cause of action."

Grisham, *continued on page 34*

International

Google Suspends Operations in China, Citing Censorship

The Internet search giant Google announced on March 22, 2010, that it would no longer comply with Chinese government censorship and was suspending its online operations in mainland China. Since the announcement, Google has redirected users attempting to access its mainland China site, Google.cn, to Google.com.hk, a search engine based in Hong Kong, where it offers uncensored Internet searching.

"We want as many people in the world as possible to have access to our services, including users in mainland China, yet the Chinese government has been crystal clear throughout our discussions that self-censorship is a non-negotiable legal requirement," Google's chief legal officer David Drummond wrote in a March 22, 2010 post on Google's official blog. "We believe this new approach of providing uncensored search in simplified Chinese from Google.com.hk is a sensible solution to the challenges we've faced . . .. We very much hope that the Chinese government respects our decision, though we are well aware that it could at any time block access to our services."

Google first discussed the possibility of leaving China in January 2010 after the company investigated a series of cyber attacks originating from China against Google and more than 20 other U.S. companies in mid-December 2009. In a January 12 blog post, Drummond wrote that Google "uncovered evidence to suggest that the Gmail accounts of dozens of human rights activists connected with China were being routinely accessed by third parties."

In a March 22 *New York Times* interview, Google co-founder Sergey Brin said those episodes were "deeply troubling," and implied Chinese government involvement, although *The Times* said he "stopped short of saying the Chinese government was directly involved in those activities."

"We launched Google.cn in January 2006 in the belief that the benefits of increased access to information for people in China and a more open Internet outweighed our discomfort in agreeing to censor some results," Drummond wrote in the January 12 post. "These attacks and the surveillance they have uncovered – combined with the attempts over the past year to further limit free speech on the web – have led us to conclude that we should review the feasibility of our business operations in China. We have decided we are no longer willing to continue censoring our results on Google.cn, and so over the next few weeks we will be discussing with the Chinese government the basis on which we could operate an unfiltered search engine within the law, if at all."

After negotiations with the Chinese government over whether Google could operate an unfiltered search engine legally in China, Google decided to close its Google.cn site and begin redirecting users. Drummond described the decision as a "sensible solution" in the March 22 blog post, and Google set up a website at http://www.google.com/prc/report.html, to monitor the ability of mainland China users to access Google's various services at the Hong Kong site.

According to Google, Chinese officials have continued to block certain Google services such as Blogger, Picasa, and YouTube, but Google's web search has generally remained available to mainland China users.

In a March 23 *Washington Post* story, an unnamed Chinese government official responded to Google's decision by asserting that the Chinese government had been patient with Google, but that the company had still "violated its written promise" to censor search results.

Google's decision to stop censoring search results drew praise from free speech and human rights advocates shortly after the company first announced it would stop filtering searches. In a Jan. 13, 2010 story in *The New York Times,* Rebecca MacKinnon, a Chinese Internet expert and fellow at the Open Society Institute, said that to remain in China meant Google would be risking the security of its users, many of whom are Chinese dissidents who used Gmail because of its encryption and overseas servers. "Unless they turn themselves into a Chinese company, Google could not win," MacKinnon said. "The company has clearly put its foot down and said enough is enough."

A Jan. 12, 2010 statement from Human Rights Watch said Google's decision highlights the importance of privacy and freedom of expression on the Internet. "A transnational attack on privacy is chilling, and Google's response sets a great example," Arvind Ganesan, Human Rights Watch's director said, according to the statement. "At the same time, this incident underscores the need for governments and companies to develop policies that safeguard rights."

When it began operations in China in 2006, Google agreed to filter certain searches at the Chinese government's request, according to a January 14 *Washington Post* story. When considering whether to expand Google's business interests to China, Google executives said that even a censored version of Google's site would provide Chinese citizens with greater access to information and lead to greater free expression.

According to the January 14 *Post* story, Google increasingly found itself at odds with Chinese authorities over the course of Google's four-year operation in China. During its time in China, Google occupied approximately 36 percent of the Chinese market, and was continually overshadowed by Baidu, the leading Chinese search engine, which occupied 58 percent of the market, a March 21 *BusinessWeek* story reported. Google's departure is expected to benefit Chinese-language Internet search engines like Baidu, which voluntarily filter results deemed inappropriate by Chinese authorities.

Google China, *continued on page 36*

> "We want as many people in the world as possible to have access to our services, including users in mainland China, yet the Chinese government has been crystal clear throughout our discussions that self-censorship is a non-negotiable legal requirement."
>
> – David Drummond
> Chief Legal Officer,
> Google

International

Afghan Government Issues 'Guidelines' Forbidding Filming of Taliban Attacks, Citing Journalists' Safety

On March 1, 2010, Afghanistan's National Directorate of Security (NDS) announced a ban on news coverage showing footage of live attacks by Taliban insurgents. Afghan officials claimed that the images embolden Islamist militants, a March 1 Reuters report stated.

According to the Reuters report, Afghan officials said journalists will only be allowed to film the aftermath of attacks, and only then after receiving permission by the NDS. Journalists filming while attacks are under way will be held and their gear seized. "Live coverage does not benefit the government, but benefits the enemies of Afghanistan," NDS spokesman Saeed Ansari said, according to Reuters.

Afghan President Hamid Karzai's office defended the new policy as benefitting both journalists and the Afghan people. "While there is an operation going on, the journalists' lives are always in danger; it doesn't mean we are censoring the media," said Waheed Omar, a spokesman for Karzai, in a March 2 *New York Times* story. "We will find a way to protect journalists' lives and to prevent enemies from using those live broadcasts for their benefit."

The announcement followed widespread "minute-by-minute" news coverage of two deadly suicide attacks in Afghanistan on February 26, the March 2 *Times* story reported. According to *The Times*, the coverage "provided ammunition" to Karzai's opponents who have criticized the ineffectiveness of the Afghan government.

"The government should not hide their inabilities by barring media from covering incidents," said Laila Noori, who monitors media issues for the Afghanistan Rights Monitor, according to the March 1 Reuters story. "People want to know all the facts on the ground whenever security incidents take place."

Afghanistan's Interior Ministry denied that the new measures amounted to censorship. "The letter from the police chief does not say that we ban media coverage," said Zemary Bashary, the ministry's spokesman. "When there is a suicide attack, the journalists will not be allowed to get into the scene of the attack for their own safety."

"Secondly," Bashary said, "live coverage of the attacks is prohibited because of recent attacks in Kabul, which showed that the insurgents were using the live broadcasts to their own benefit."

The prohibition on coverage was criticized by several media groups, including some who called the measure illegal. "Any limitation on freedom of speech and freedom for journalists contravenes the Afghan Constitution and the media law," said Mohammad Abdullah, a legal adviser to an independent Afghan television channel, in the March 2 *Times* story. "No one can stop the broadcast of television, and no one can make an obstacle for giving information to the people of Afghanistan . . . it not only contradicts Afghan laws, it contradicts the international principles of freedom of speech."

In a March 2 Reuters story, Omar said the new guidelines had not been finalized yet, but preliminary reports had been misunderstood. "I think I can ensure you [sic] that it's not the way it's been interpreted. This is not an attempt to restrict the work of the media," Omar said. "I would not call it restrictions. There is nothing even discussed or conveyed to the media called restrictions on the media."

Robert Mahoney, the deputy director for the Committee to Protect Journalists, criticized the uncertainty created by the new measure in a March 2 statement. "It is for news organizations to determine whether it is safe for their staff to report," Mahoney said. "The Afghan authorities should allow reporters to work freely and clarify whether it is considering restrictions on broadcast coverage."

According to the website for Radio Free Europe/Radio Liberty (RFE/RL), the Taliban itself criticized the ban. The site included a statement in a March 3 story in which the Taliban called the new measure "a flagrant violation of the recognized principle of freedom of speech."

"The monopolization of activities of independent mass media outlets by the Kabul Puppet Administration is a clear-cut violation of norms and regulation of neutrality, independence, and liberty of speech and has no justification in the light of national and international laws," the statement said, according the RFE/RL story.

Farida Nekzad, editor of the Kabul, Afghanistan-based Wakht News Agency, said she was concerned the media situation could worsen, according to the RFE/RL story. "These kinds of signals raise concerns," she told RFE/RL. "I think these are the restrictions that begin with requests and suggestions but eventually might have very serious consequences for the journalists. I don't see a good year ahead for the journalists."

In a March 5 interview on National Public Radio's "On the Media," Saad Mohseni, the director of the Afghan-based Moby Media Group, said the ban could backfire on the Afghan government.

"In a city the size of Kabul, you can't avoid hearing the explosions and the gunfire. The public doesn't want to watch this because they're bored. They want to watch what's going on because they need to know. They have kids at school. They have partners at work. People get very, very stressed not knowing," Mohseni said. "The government could use this medium to reassure the public. It can cordon off the area to ensure that the media doesn't get too close, but it cannot ban the media. You cannot kill the messenger."

– Sara Cannon
Silha Center Staff

"It is for news organizations to determine whether it is safe for their staff to report.. . . The Afghan authorities should allow reporters to work freely and clarify whether it is considering restrictions on broadcast coverage."

– Robert Mahoney
Deputy Director,
Committee to Protect Journalists

International

Canadian Supreme Court Creates New "Responsible Communication" Defense

On Dec. 22, 2009, the Canadian Supreme Court vacated libel verdicts against two Canadian newspapers in separate rulings, and created a new defense for members of the public or media who engage in "responsible communication."

The Court's rulings granted new trials in the libel suits against the two outlets which had both been found liable in jury trials. In *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 (Can.), the *Toronto Star* had been ordered to pay more than $1 million in punitive damages for writing about controversial plans for a golf course. In *Quan v. Cusson*, [2009] 3 S.C.R. 712 (Can.), the *Ottawa Citizen* was ordered to pay $135,000 for a story it published scrutinizing the activities of a former police officer.

In *Grant*, Peter Grant and his company, Grant Forest Products Inc., sued *The Toronto Star* for a story the newspaper published in 2001 concerning a proposed private golf course development on Grant's lakefront estate. The story reprinted the views of several local residents who were critical of the development's environmental impact and suspicious that Grant was "exercising political influence behind the scenes to secure government approval for the new golf course." The story quoted residents as saying that the project was a "done deal" because of Grant's political connections.

The reporter, Bill Schiller, attempted to verify the allegations in the article, including asking Grant for comment, but Grant did not respond. A jury subsequently found *The Star* liable for damages totaling $ 1.475 million.

In 2008, the Ontario Court of Appeal ordered a new trial, stating the trial judge "should have found as a matter of law that the subject of the article was in the public interest and gone on to assess responsibility on that basis." Grant appealed to the Canadian Supreme Court.

In her opinion for the unanimous court, Beverly McLachlin, Chief Justice of the Canadian Supreme Court, wrote that under Canadian common law, the only existing defenses to a defamatory statement of fact are that the statement was "substantially true," or that the statement was made in a privileged context.

In creating a new defense against defamation for members of the news media reporting on matters of fact, McLachlin wrote it was necessary to protect the freedom of expression. "[T]he current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law – in effect a regime of strict liability – is not justifiable," McLachlin wrote. "The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales – democratic discourse and truth-finding – and therefore require some protection within the law of defamation."

McLachlin also noted in her opinion that a survey of other common law democracies, including the United States, favors "replacing the current Canadian law governing redress for defamatory statements of fact on matters of public interest, with a rule that gives greater scope to freedom of expression."

McLachlin cited *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that a public figure cannot recover in defamation unless he or she proves the allegedly defamatory statement was made with "actual malice," meaning knowledge of falsity or reckless indifference to truth. "*Sullivan* and its progeny have made it extremely difficult for anyone in the public eye to sue successfully for defamation," McLachlin wrote. "In the contest between free expression and reputation protection, free expression decisively won the day."

McLachlin also cited decisions from Australia, New Zealand, and South Africa before concluding that "a number of countries with common law traditions comparable to those of Canada have moved in recent years to modify the law of defamation to provide greater protection for communications on matters of public interest."

McLachlin then set forth the two elements of the new defense, which she called the defense of "responsible communication on matters of public interest," emphasizing that the defense would not just be available to traditional journalists, but also to bloggers and "others engaged in public communication on matters of public interest."

"First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances," McLachlin wrote. Under the Court's new test, the judge determines if the matter is of public interest, while the jury finds whether the publication was adequately "responsible."

McLachlin affirmed the order for a new trial, with the instruction that, if the trial court determines that the statements at issue in *The Toronto Star* story about Grant were facts, then they must apply the new test to determine if the defense of "responsible communication on matters of public interest" applies.

Quan v. Cusson involved Danno Cusson, a constable with the Ontario Provincial Police (OPP) who traveled to New York City to assist with the search and rescue effort at Ground Zero in the aftermath of the attacks of Sept. 11, 2001. The *Ottawa Citizen* published three stories alleging that Cusson had misrepresented himself to the

Canadian Libel, *continued on page 34*

> "The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales – democratic discourse and truth-finding – and therefore require some protection within the law of defamation."
>
> – Chief Justice Beverly McLachlin Supreme Court of Canada

Canadian Libel, *continued from page 33*

authorities in New York by telling them he was a trained K-9 handler with the Royal Canadian Mounted Police (RCMP), and possibly interfered with the rescue operation.

At trial, the jury found that many, but not all, of the factual imputations in the stories had been proven true, and awarded Cusson $125,000 in damages, although the jury also found no malice on the part of the *Citizen* and declined to award any special, aggravated, or punitive damages.

In November 2007, the Ontario Court of Appeal used the case to establish a responsible journalism defense under Ontario law, but denied the *Citizen* the use of the defense because it had failed to assert it at trial.

"As explained in *Grant*, the time has come to recognize a new defence [sic] - the defence of responsible communication on matters of public interest," wrote McLachlin, who authored the opinion in *Quon*. "[I]n my view, the *Citizen* defendants should have an opportunity to avail themselves of the new defence. I would allow the appeal and order a new trial."

"In this case, the public interest test is clearly met. The Canadian public has a vital interest in knowing about the professional misdeeds of those who are entrusted by the state with protecting public safety," McLachlin wrote. "While the subject of the *Ottawa Citizen* articles was not political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service. When Cst. Cusson represented himself to the New York authorities and the media as an OPP or RCMP officer, he sacrificed any claim to be engaged in a purely private matter. News of his heroism was already a matter of public record; there is no reason that legitimate questions about the validity of this impression should not have been publicized too."

"The court has revamped and modernized libel laws that, for too long, have placed the reputations of individuals ahead of our democratic system's need for hard-hitting journalism on important public issues."

– Dean Jobb
Professor, University of King's College

Paul Schabas, an attorney who represented *The Star* in the case against Grant, commented on the landmark nature of the case in a December 22 *Canadian Press* report. "It's probably the most important decision the Supreme Court's ever decided on the law of libel," Schabas said. "It modernizes our laws to better reflect freedom of speech and that's in the public interest . . .. It means that the media and anybody else who's acting responsibly can put something out for public debate and not be chilled because they can't ultimately prove that it's true in a court of law years later."

Dean Jobb, a journalism professor at University of King's College in Halifax, said the rulings were a long-needed revamp of Canada's libel law in a Dec. 22, 2009 story in *The Globe and Mail*. "The court has revamped and modernized libel laws that, for too long, have placed the reputations of individuals ahead of our democratic system's need for hard-hitting journalism on important public issues," Jobb said. "The rulings are significant and long-overdue.. . . The new defence gives journalists a bit more breathing space when they investigate wrongdoing and corruption or report on politics and important public issues. Libel laws have demanded near-perfection from journalists, when nobody expects doctors, lawyers or even judges to be perfect."

Mary Agnes Welch, the president of the Canadian Association of Journalists and a reporter at the *Winnipeg Free Press* in Manitoba, said the decisions would provide added clarity for journalists reporting on controversial topics. "This gives journalists a step-by-step test they should follow," she said in a Dec. 22, 2009 story in the *International Herald Tribune*. "It's something to hang your hat on."

In a Dec. 22, 2009 interview on "CTV News with Lloyd Robertson," CTV News reporter Robert Fife emphasized the limitations on the new libel rules. "The Supreme Court laid down some strong rules for reporters to follow," Fife said. "It says we have to be fair and accurate in our reporting, we have to check our facts, and we have to make sure our sources are reliable. In other words, we can't go around reporting rumor or unfounded allegations or we'll end up in court."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

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Although the Oklahoma statute speaks only in terms of libel claims, the appeals court also affirmed the dismissal of the intentional infliction of emotional distress and false light invasion of privacy claims by concluding that Oklahoma courts had previously used the statute to exempt such additional claims when the same underlying facts are involved.

The appeals court also dismissed the civil conspiracy claim, noting that the authors and publishers did not undertake "a massive defamatory attack." Lucero wrote, "Merely because defendants published their books in close temporal proximity to one another does not demonstrate there was an illegal agreement to engage in 'a massive joint defamatory attack.'"

– Cary Snyder
Silha Research Assistant

Student Media

3rd Circuit Issues Conflicting Rulings on Student Internet Speech

On Feb. 4, 2010, the 3rd Circuit U.S. Court of Appeals issued two opinions that reached separate conclusions regarding whether schools can discipline students for material posted on social networking websites. The resulting uncertainty prompted the 3rd Circuit to vacate both opinions and schedule a rehearing of the two cases before the full circuit court.

Both cases involved students in Pennsylvania who used off-campus home computers to create parodies of their school principals on MySpace.com. School officials in both instances punished the students by suspending them from school.

In *Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3rd Cir. 2010), a unanimous three-judge panel ruled that a student could not be punished for his off-campus speech. However, in *J.S. v. Blue Mountain School Dist.*, 593 F.3d 286 (3rd Cir. 2010), a separate panel in a 2 to 1 decision favored the school district's right to punish students for certain off-campus speech.

"The law was unclear and now it's in a state of chaos," said attorney Witold Walczak of the American Civil Liberties Union, according to a February 5 Associated Press (AP) report. Walczak and the ACLU helped represent the students in both cases.

In *Blue Mountain*, administrators suspended two eighth graders – identified in the opinion as J.S. and K.L. – at Blue Mountain Middle School in Orwigsburg, Pa., for 10 days after the students used home computers in March 2007 to create a MySpace page that described their principal, James McGonigle, as a sex addict and pedophile. The profile did not identify McGonigle by name, but included his photograph from the school district's website and listed his interests as "being a tight ass," "f***ing in my office," and "hitting on students and their parents." According to the 3rd Circuit, Blue Mountain school computers block access to MySpace, so students could have only viewed the profile from off-campus locations.

Terry and Steven Snyder, J.S.'s parents, filed suit in U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983, which allows citizens to sue government officials for civil rights violations, arguing that the suspension violated their daughter's First Amendment free speech rights. The Blue Mountain School District argued that the profile disrupted school because two teachers had to quiet their classes as students discussed the profile, and a guidance counselor had to proctor a test so that an administrator could attend meetings between McGonigle and J.S. In addition, the school said that students decorated the lockers of J.S. and K.L. to welcome them back to school following their suspensions, prompting students to congregate in the hallway.

The district court acknowledged that J.S. had created the profile at home, and determined that the profile itself did not substantially and materially disrupt school. However, the district court ruled that "because the lewd and vulgar off-campus speech had an effect on-campus," the school district did not violate J.S.'s First Amendment rights by disciplining her. The Snyders then filed an appeal.

In affirming the district court, the 3rd Circuit opinion in *Blue Mountain* relied on *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), in which the U.S. Supreme Court established that student expression may not be suppressed unless school officials conclude that the conduct "would materially and substantially disrupt the work and discipline of the school."

The majority in *Blue Mountain* said that, although the profile did not substantially disrupt school activity, the suspensions could be upheld because "the profile presented a reasonable possibility of a future disruption" if McGonigle did not punish its creators.

"Electronic communication allows students to cause a substantial disruption to a school's learning environment even without being physically present," Judge Michael Fisher wrote in a footnote. "We decline to say that simply because the disruption to the learning environment originates from a computer located off campus, the school should be left powerless to discipline the student."

In a dissenting opinion, Judge Michael A. Chagares wrote that the majority had significantly broadened the authority of school administrators to regulate student speech. "Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored and that caused no substantial disruption at school," Chagares wrote.

In *Layshock*, Hickory High School senior Justin Layshock used his grandmother's home computer in December 2005 to create a fake MySpace profile of his school's principal, Eric Trosch. As with the profile at issue in *Blue Mountain*, Layshock also included a photograph of the principal from the school district's website in his mocking profile. The profile said Trosch was a "big steroid freak" and a "big whore" who smoked a "big blunt."

To punish Layshock, the Hermitage School District in Hermitage, Pa., suspended him for 10 days and prohibited him from participating in all extracurricular activities, including the graduation ceremony, for the rest of the school year. Layshock, who was previously enrolled in advanced placement classes, was also placed in an alternative education program typically reserved for students with behavioral and attendance problems. Layshock's parents filed a § 1983 claim in U.S. District Court for the Western District of Pennsylvania, alleging the violation of Layshock's First Amendment rights.

The school district did not dispute the district court's finding that Layshock's conduct failed to satisfy the *Tinker* standard by creating "a substantial disruption of the school environment." Instead, the school district argued that Layshock's use of the principal's photograph from the school's website

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> "The law was unclear and now it's in a state of chaos."
>
> – Witold Walczak
> Attorney, American Civil Liberties Union

Student Speech, *continued from page 35*

created a "sufficient nexus" between the profile and the school to permit the district to regulate Layshock's off-campus conduct. The district claimed that the profile was vulgar, lewd, and offensive, and therefore not entitled to First Amendment protection when it entered the school community. The school district had not been able to immediately block student access to MySpace on school computers after Layshock created the profile because its technology coordinator was on vacation when the profile was discovered.

The district court entered summary judgment in favor of Layshock, and the school appealed.

The 3rd Circuit panel affirmed that Layshock's suspension had violated his First Amendment rights, stating that Layshock's use of a photograph on the school district website did not constitute "entering the school."

"It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities," Judge Theodore McKee wrote for the panel.

"A student can more easily demean and injure the reputation of a member of the school community with vulgar and lewd language and share such pronouncements with a targeted school audience by way of the Internet than by any other means."

– Anthony G. Sanchez
Attorney, Hermitage School District

On April 9, 3rd Circuit Chief Judge Anthony J. Scirica vacated the conflicting opinions and granted the *en banc* motions filed by attorneys on the losing sides of both cases. The entire panel of 3rd Circuit judges is scheduled to hear oral arguments in both cases on June 3.

Anthony G. Sanchez, an attorney representing the Hermitage School District, argued in his *en banc* petition that the *Layshock* panel did not sufficiently recognize how the Internet has transformed student speech, according to a March 12 report in *The Legal Intelligencer*.

"A student can more easily demean and injure the reputation of a member of the school community with vulgar and lewd language and share such pronouncements with a targeted school audience by way of the Internet than by any other means," Sanchez said.

Sanchez contrasted speech on the Internet, which can have an unlimited lifespan and vast audience, with speech in school hallways, which typically has few listeners and only exists for a limited time.

Kim Watterson, a private attorney representing Layshock and his parents, countered that "the widespread use of the Internet does not diminish constitutional protection for online expression," according to a March 29 report in *The (Sharon, Pa.) Herald*.

"The First Amendment does not permit the government to regulate a particular medium of speech solely because that medium is more effective than others," Watterson said.

ACLU attorneys representing J.S. in Blue Mountain argued in their *en banc* petition that the conflicting rulings cannot coexist because they confuse students, administrators, and lower court judges about the state of Internet student speech law.

Frank LoMonte, the Executive Director of the Student Press Law Center (SPLC), also argued that a uniform standard for off-campus speech will benefit both students and administrators. "The end result of the Layshock and J.S. cases left a lot of people scratching their heads over what type of speech could and could not be punished, so it makes sense for the 3rd Circuit to hear both cases together and set a consistent legal standard," LoMonte said in an April 13 SPLC report.

– Cary Snyder
Silha Research Assistant

Google China, *continued from page 31*

In a March 23 story in *The New York Times*, Yu Yang, chief executive of Analysys International, a Beijing research firm, said that Google's departure will cause stagnation in online Chinese space. "The whole industry will become worse," Yu said. "Without competition with Google, Baidu has no motivation to innovate."

On January 21, U.S. Secretary of State Hillary Rodham Clinton condemned the cyber attacks on Google at a press conference and called for worldwide Internet freedom. "A new information curtain is descending across much of the world," Clinton said. "We stand for a single Internet where all of humanity has equal access to knowledge and ideas."

After Google's March 22 announcement that its mainland China users would be redirected to Hong Kong, the Obama administration announced that, while it was disappointed that Google and China were unable to reach an agreement, it respected Google's decision.

"We have previously raised our concerns about this issue directly with the Chinese government," said Mike Hammer, a spokesman for Obama's National Security Council, in a March 22 statement. "As both President Obama and Secretary Clinton have stressed on several occasions, we are committed to Internet freedom and are opposed to censorship."

Chinese officials have made demands on U.S.-based Internet companies operating in mainland China in the past. In 2005, Yahoo provided information to the Chinese government from the Yahoo.cn account of a journalist which led to his conviction for divulging state secrets. (See "Endangered Journalists: Yahoo Assists China in Arresting Journalist" in the Fall 2005 issue of the Silha *Bulletin*, and "Jailed Chinese Reporter Joins Suit Against Yahoo! Inc." in the Summer 2007 Silha *Bulletin.*)

– Ruth DeFoster
Silha Research Assistant

FCC News

D.C. Circuit Strikes Down Net Neutrality Measure

The D.C Circuit U.S. Court of Appeals ruled on April 6, 2010, that the Federal Communications Commission (FCC) has no authority to regulate an Internet service provider's (ISP) network management practices. Some commentators speculated that the decision could represent a serious setback for advocates of "net neutrality," the doctrine that requires Internet service providers to treat all content equally.

In *Comcast Corp. v. F.C.C.*, 49 Comm. Reg. 1226 (D.C. Cir. 2010), Judge David Tatel ruled that the FCC had no express statutory authority over ISP data management, and the FCC's reliance on a portion of the Communications Act, 47 U.S.C. § 154(i), which authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions," was not valid.

The case arose after several subscribers to Comcast's high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications in 2007. According to the court's opinion, peer-to-peer programs allow users to share large files directly with one another without going through a central server, and consume significant amounts of bandwidth.

Two non-profit advocacy organizations and a coalition of public interest groups and law professors filed a complaint and a petition for a declaratory ruling with the FCC, arguing that Comcast "violated the FCC's Internet Policy Statement." The Internet Policy Statement was issued by the FCC in 2005 and asserts that "consumers are entitled to access the lawful Internet content of their choice . . . [and] to run applications and use services of their choice." Comcast argued in opposition that its interference with peer-to-peer programs was necessary "to manage scarce network capacity."

In response to the complaint, the FCC ruled that Comcast had "significantly impeded consumers' ability to access the content and use the applications of their choice," and its method of bandwidth management "contravene[d] . . . federal policy." Comcast then petitioned for a review of the FCC's order in the D.C. Circuit U.S. Court of Appeals.

The FCC defended its ruling by stating that congressional policy had created "statutorily mandated responsibilities" sufficient to support the exercise of § 154(i) "ancillary authority," but Tatel wrote that the argument was contradicted by previous federal decisions, and said that such reasoning would "virtually free the Commission from its congressional tether."

"Were we to accept that theory of ancillary authority . . . we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission, relying on the broad policies . . . would be unable to impose upon Internet service providers," Tatel wrote.

The FCC also argued that portions of other federal statues, such as 47 U.S.C. § 1302(a), which provides that "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment," grant the FCC the authority to regulate bandwidth.

Tatel also rejected these arguments, stating that, where the FCC "has no express regulatory authority," he was unwilling to accept the commission's "expansive theory of ancillary authority."

"It is true that Congress gave the Commission broad and adaptable jurisdiction so that it can keep pace with rapidly evolving communications technologies," Tatel concluded. "Yet notwithstanding the difficult regulatory problem of rapid technological change posed by the communications industry, the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer Commission authority."

According to an April 6, 2010 story in *The New York Times*, Comcast had a "muted reaction" to its victory. "Comcast remains committed to the F.C.C.'s existing open Internet principles, and we will continue to work constructively with this F.C.C. as it determines how best to increase broadband adoption and preserve an open and vibrant Internet," Comcast said in a statement.

In an April 6 post on the CommLawBlog, Mitchell Lazarus, an attorney for the law firm of Fletcher, Heald & Hildreth, wrote that the FCC "still has a few options."

"For example, it can ask the same court for a hearing *en banc* . . . or appeal to the Supreme Court. Or it can ask Congress for a law that gives it the authority it needs. There may be other alternatives as well, involving adjustments to the existing regulations for a better fit with the existing statutes, but their likelihood of success in court remains to be seen," Lazarus wrote. "For the time being, at least, Internet providers are free to favor or block content as they choose."

In an April 6 post on the Electronic Frontier Foundation's website, senior staff attorney Fred von Lohmann wrote the ruling "is not likely to make much difference to Comcast subscribers," since Comcast had agreed to stop regulating bandwidth before the FCC's ruling was issued. "Instead, the court's ruling is important because it represents a blow to FCC Chairman [Julius] Genachowski's proposed net neutrality regulations, which are premised on the same theory of 'ancillary jurisdiction' that the FCC used against Comcast and that the court rejected today," von Lohmann wrote.

In an April 6 post on the TechDirt blog, Mike Masnick praised the decision for limiting the power

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> "[N]otwithstanding the difficult regulatory problem of rapid technological change posed by the communications industry, the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer Commission authority."
>
> – David Tatel
> D.C. Circuit U.S. Court of Appeals

Privacy

California Court Finds Right to Privacy in Death Scene Photos

A state appellate court panel in California issued a decision on Jan. 29, 2010, allowing a lawsuit to proceed against the California Highway Patrol (CHP) and two of its officers for disseminating photos depicting a dead woman's body at the scene of an auto accident, on the grounds that the deceased's family members had a sufficient privacy interest in the photographs.

"As cases from other jurisdictions make plain, family members have a common law privacy right in the death images of a decedent, subject to certain limitations," Associate Justice Eileen Moore wrote for the three-judge panel in *Catsouras v. Dep't. of California Highway Patrol* 104 Cal. Rptr. 3d 352 (Cal. App. 4 Dist. 2010), which reversed a trial court's dismissal of the family's claims.

"We rely upon the CHP to protect and serve the public. It is antithetical to that expectation for the CHP to inflict harm upon us by making the ravaged remains of our loved ones the subjects of Internet sensationalism."

– Eileen Moore
4th District California
State Court of Appeals

The lawsuit stemmed from a fatal car crash involving 18-year-old Nicole Catsouras, who was decapitated in an auto accident on Oct. 31, 2006. According to the opinion, CHP officers arrived at the scene, cordoned off the area where the accident occurred, and took multiple photographs of the decapitated corpse. Two CHP officers, Aaron Reich and Thomas O'Donnell, later e-mailed "graphic and horrific photographs" of the crash scene to some of their friends and family.

The photos soon became readily available online, with more than 2,500 websites in the United States and other countries posting the images. "Plaintiffs were subjected to malicious taunting by persons making use of the graphic and horrific photographs," Moore's opinion stated. "For example, Christos Catsouras, decedent's father, received e-mails containing the photographs, including one titled 'Woo Hoo Daddy' that said, 'Hey Daddy I'm still alive.'"

"With her demise, the torment of her family members began," the opinion continued. "They endured not only her death, and the hideous manner of it, but also the unthinkable exploitation of the photographs of her decapitated remains. Those photographs were strewn about the Internet and spit back at the family members, accompanied by hateful messages."

The Catsouras family's complaint alleged that O'Donnell and Reich had e-mailed the photos of Catsouras to their friends and family members on Halloween "for pure shock value," and sought damages for invasion of privacy and intentional infliction of emotional distress, among other claims.

"California law clearly provides that surviving family members have no right of privacy in the context of written media discussing, or pictorial media portraying, the life of a decedent. Any cause of action for invasion of privacy in that context belongs to the decedent and expires along with him or her," Moore wrote in the opinion. "The publication of death images is another matter."

The court relied on cases previous California cases such as *Shulman v. Group W Productions, Inc.* 955 P.2d 469 (Cal. 1998), for the necessary elements of an invasion of privacy suit based on the public disclosure of private facts, which requires that a plaintiff prove the following: 1) public disclosure 2) of a private fact 3) which would be offensive and objectionable to the reasonable person and 4) which is not of legitimate public concern. The court then cited cases from other jurisdictions, including the U.S. Supreme Court case *Nat'l Archives and Records v. Favish* 541 U.S. 157 (2004) as providing "persuasive authority" for extending privacy rights in death photos to family members seeking to prevent their release.

In *Nat'l Archives*, the Supreme Court extended the "personal privacy" exemption under the Freedom of Information Act, 5 U.S.C. § 552, to include surviving family members seeking to block the release of death scene photos of Vincent Foster, a deputy counsel for President Clinton. (For more on *Nat'l Archives*, See "Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos," in the Spring 2004 issue of the Silha *Bulletin*, and "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 of the Silha *Bulletin*.)

"In short, the court in *National Archives* recognized that family members have a privacy right in the death images of a decedent," Moore wrote. "We recognize that there are instances in which matters pertaining to the dead or dying may involve issues of public interest.. . . In the matter before us, however, there is no indication that any issue of public interest or freedom of the press was involved."

Later in the opinion, Moore wrote that both the CHP and the individual officers could also potentially be held liable for the emotional distress suffered by the Catsouras family members in having the death scene photographs published on the Internet and made widely available. "It unquestionably was foreseeable that the parents and siblings of a decapitated teenager would suffer emotional harm upon seeing the photographs of her mutilated remains strewn across the Internet," Moore wrote. "While the CHP contends it was not foreseeable that the gruesome photographs allegedly disseminated for shock value on Halloween would be forwarded to thousands of Internet users, in these days of Internet sensationalism, we must disagree.. . . It is perfectly foreseeable that those e-mails would be forwarded to others, for exactly the same purpose."

Moore's opinion stated that, by allowing the lawsuit to continue to the trial stage, it would discourage any similar action by law enforcement figures in the future. "We rely upon the CHP to protect and serve the public. It is antithetical to that expectation for the CHP to inflict harm upon us by making the ravaged remains of our loved ones the subjects of Internet sensationalism," Moore wrote. "It is important to prevent future harm to other families by encouraging the CHP to establish and enforce policies to preclude its officers from engaging in such acts ever again."

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Privacy

Italian Judge Convicts Google Executives of Violating Country's Privacy Law

An Italian judge convicted three Google executives of violating Italy's privacy law on Feb. 24, 2010, after a 2006 user-generated Internet video of teenagers bullying a disabled boy was posted on a Google-maintained website. The three executives each received a six-month suspended sentence.

According to a February 24 *New York Times* story, Italian prosecutors charged Peter Fleischer, Google's chief privacy counsel, David Drummond, Google's senior vice president and chief legal officer, and George Reyes, the company's former chief financial officer, with criminal defamation and violation of the boy's privacy. A fourth defendant, Google senior marketing manager Arvind Desikan, was charged only with defamation and was acquitted. The defamation charges against all the defendants were dismissed.

According to *The Times* story, the charges originated with a complaint to police from Vivi Down, an advocacy group representing individuals with Down syndrome. Vivi Down sought to have the video, which showed a disabled Turin teenager being pushed, taunted, pummeled with objects, and insulted by classmates, removed from Google Video, a website that allowed Internet users to upload videos in order to host and display them on Google's servers.

The clip was available on Google Video for about two months after it was first posted, *The Times* reported, and was viewed over 5,500 times, making it to the top of Google Italy's "most entertaining" video list, although Google said it pulled down the video within two hours of receiving a formal complaint from Italian police.

According to *The Times*, prosecutors successfully argued that because Google had used the video to generate advertising revenue, it should be considered a content provider, not a service provider, and therefore was in violation of Italian privacy law, which prohibits the use of someone's personal data with the intent of making a profit.

Judge Oscar Magi, who issued the conviction, wrote a 111-page ruling stating his reasoning which was published on April 12, 2010. According to a April 12 *New York Times* summary of the opinion, Magi did not say that Google had to monitor all the content uploaded to its platforms but suggested that the company could be more vigilant and said that Google had an obligation to make European privacy policies clear to third-party users of its platforms. The full opinion, in Italian, is available online at http://speciali.espresso.repubblica.it//pdf/Motivazioni_sentenza_Google.pdf.

In a February 24 post on Google's official blog, Matt Sucherman, Google's vice president and deputy general counsel for Europe, Middle East and Africa, wrote that the judge's decision "attacks the very principles of freedom on which the Internet is built."

"Common sense dictates that only the person who films and uploads a video to a hosting platform could take the steps necessary to protect the privacy and obtain the consent of the people they are filming," Sucherman wrote. "[W]e and our employees will vigorously appeal this decision."

In a February 25 post on Law.com, Samuel Buffone, a defense attorney for the three Google executives, said the verdict was a huge setback in terms of the precedent it could set in Italy and the rest of Europe, and that monitoring third-party content posted to Google-owned sites is impossible. "You could now have an obligation to monitor every single thing posted on YouTube or Facebook," Buffone said. "This is the sort of thing that could break the Internet."

Buffone added that the Italian charges would not have stood in the United States, where legislation, such as portions of the Communications Decency Act, 47 U.S.C. § 230, specifically protect Internet hosts such as Google from liability for the content users post to their sites. Buffone also said that U.S. authorities had refused Italian officials' requests to charge the Google executives in the United States.

Alfredo Robledo, one of the Italian prosecutors, said in a February 24 Associated Press (AP) story that the ruling reflected European views that personal privacy is a "fundamental right," and that the interests of an individual should come before those of a business.

"This is the big principal [sic] affirmed by this verdict," Robledo said. "It is fundamental, because a person's identity is a primary good. If we give that up, anything can happen." Robledo said that a company like Google could find ways to easily monitor its content, and that it was inappropriate for Google to profit from advertising revenue generated from content that violated privacy laws.

Some American legal experts disagreed, arguing that the case raised troubling questions for all American companies that do online business overseas. In a February 25 story in the *San Francisco Chronicle,* Danny O'Brien, an international outreach coordinator of the Electronic Frontier Foundation, said that the verdict "absolutely is a threat."

"If intermediaries like Google or the person who hosts your Web site can be thrown in jail in any country for the acts of other people and suddenly have a legal obligation to prescreen everything anyone says on their Web site before putting it online, the tools for free speech that everyone uses on the Net would grind to a halt," O'Brien said.

Drummond, one of the convicted Google executives, said in the February 24 AP story that he was "outraged" by the ruling. "This verdict sets a dangerous precedent," Drummond said, and it "imperils the powerful tool that an open and free Internet has become for social advocacy and change."

Google Italy, *continued on page 40*

> "You could now have an obligation to monitor every single thing posted on YouTube or Facebook. This is the sort of thing that could break the Internet."
>
> – Samuel Buffone
> Defense Attorney,
> Google

Google Italy, *continued from page 39*

In a February 26 *New York Times* story, Nicole Wong, an attorney for Google, said that foreign opinions, such as Magi's, could impact users outside of Italy. Wong said Google's policies on invasion of privacy were best applied uniformly around the world, and that trying to meet all the differing local standards "will make you tear your hair out and be paralyzed."

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, emphasized the difference in European and American perspectives on privacy in the February 26 *Times* story. "Americans to this day don't fully appreciate how Europeans regard privacy," Kirtley said. "The reality is that they consider privacy a fundamental human right."

– Ruth DeFoster
Silha Research Assistant

3rd Circuit Allows Trespass Suit against Google to Proceed

In an opinion published on Jan. 28, 2010, a unanimous panel of the 3rd Circuit U.S. Court of Appeals allowed a Pennsylvania couple to proceed with their trespass suit against Google for photos taken for the use of Google's "Street View" program.

Boring v. Google Inc., 38 Media L. Rep. 1306 (3rd Cir. 2010), arose when Aaron and Christine Boring discovered that Google had taken "colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization" for use on Google Map's "Street View" program. The Borings alleged that their road is clearly marked with a "Private Road, No Trespassing" sign and that, in driving up their road to take photographs for and in making those photographs available to the public, Google "disregarded their privacy interest."

Street View is a feature on Google Maps that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street.

The Borings sued Google in the Court of Common Pleas of Allegheny County, Pennsylvania, asserting invasion of privacy, and trespass, among other claims. Google later moved the suit to the U.S. District Court for the Western District of Pennsylvania, and filed a motion to dismiss. The district court granted Google's motion on Feb. 17, 2009. The court dismissed the invasion of privacy claim by stating that "the Borings were unable to show that Google's conduct was highly offensive to a person of ordinary sensibilities." The court dismissed the trespass claim by stating that "the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass."

The Borings appealed, and the 3rd Circuit upheld the dismissal of their invasion of privacy claim, but reversed the dismissal of the trespass claim. "No person of ordinary sensibilities would be shamed, humiliated, or have suffered mentally as a result of a vehicle entering into his or her ungated driveway and photographing the view from there," Judge Kent Jordan wrote for the 3rd Circuit panel in dismissing the invasion of privacy claim, comparing the activity to a person knocking on the front door of a private residence. "Indeed, the privacy allegedly intruded upon was the external view of the Borings' house, garage, and pool – a view that would be seen by any person who entered onto their driveway, including a visitor or a delivery man. Thus, what really seems to be at the heart of the complaint is not Google's fleeting presence in the driveway, but the photographic image captured at that time. The existence of that image, though, does not in itself rise to the level of an intrusion that could reasonably be called highly offensive."

In reversing the district court's dismissal of the Boring's trespass claim and remanding the case for trial, the court stated that the legal standard for trespass is "exceptionally simple," and is defined under Pennsylvania law as an "unprivileged, intentional intrusion upon land in possession of another."

"Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple," Jordan wrote, although he emphasized that the Borings would have to prove that they suffered harm as a result of the trespass to collect more than nominal damages. "[I]t may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day."

Andrew Pederson, a spokesman for Google, responded to the verdict in a Jan. 29, 2010 story in *The Legal Intelligencer*. "I don't think there's any way to construe this as a loss for Google," Pederson said. "We're pleased with the decision, as it upheld the dismissal of all but one of the claims, which the plaintiffs did not win. It has only been remanded to district court."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FCC, *continued from page 37*

of the FCC. "The FCC was clearly going beyond its mandate, as it has no mandate to regulate the internet in this manner," Masnick wrote. "Even if you believe net neutrality is important, allowing the FCC to overstep its defined boundaries is *not* the best way to deal with it. So for those of you upset by this ruling, look at it a little more closely, and be happy that the FCC has been held back from expanding its own mandate."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Privacy

U.S. Supreme Court Refuses to Hear *Hustler*'s Right-of-Publicity Appeal; Georgia Legislature Modifies State Open Records Law

On March 1, 2010, the U.S. Supreme Court declined to hear an appeal from *Hustler* magazine, allowing a right-of-publicity lawsuit filed against the magazine by the mother of a deceased professional wrestler to continue.

The lawsuit hinges on whether the publication of decades-old nude photographs of Nancy Benoit, a former model and professional wrestler, that accompanied an article about Benoit in the March 2008 issue of *Hustler*, was "newsworthy," or for commercial purposes. Benoit and her 7-year-old son were killed by Benoit's husband Chris Benoit, also a former professional wrestler, in a murder-suicide in their Georgia home in June 2007. The killings received widespread media coverage.

Maureen Toffoloni, the mother of Nancy Benoit and the administrator of her estate, filed a lawsuit in 2008 against LFP Publishing Group, *Hustler*'s publisher, seeking damages for violation of Nancy Benoit's right of publicity under Georgia law, which protects an individual's right to control the use of his or her image for commercial purposes. According to Toffoloni's lawsuit, Benoit posed for a nude video for Mark Samansky about 20 years before her death. Benoit asked Samansky to destroy the video, but he never did, and Samansky later extracted still photos from the video and sold them to *Hustler*.

Hustler appealed a 2009 decision of the 11th Circuit U.S. Court of Appeals in which a unanimous three-judge panel held that the publication of the photos 20 years after they were taken did not fall under a "newsworthiness" exception to the right of publicity. The Supreme Court did not explain why it declined to hear the magazine's appeal in *LFP Publ'g Group, LLC*, 572 F.3d 1201 (11th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3500 (U.S. Mar. 1, 2010), meaning the 11th Circuit decision stands, although the Supreme Court did not necessarily adopt the 11th Circuit's reasoning or conclusion.

In the 11th Circuit opinion, Judge Charles R. Wilson wrote on behalf of the panel that he was required to balance Benoit's rights of privacy and publicity with the First Amendment rights of the publisher, "with an eye toward that which is reasonable and that which resonates with our community morals."

LFP had argued that the article on Benoit's life, career, and death, accompanied by nude photographs of her, were of substantial public interest and should fall under the "newsworthiness" exception to the right of publicity.

Wilson noted that the cover of *Hustler* contained the advertisement "Wrestler Chris Benoit's Murdered Wife Nude," and the table of contents did not reference the actual Benoit article, which was itself entitled, "Nancy Benoit Au Naturel: The long-lost images of wrestler Chris Benoit's doomed wife." Wilson found that the photographs, and not the article, constituted the "heart" of the publication.

"The photographs published by [*Hustler*] neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny," Wilson wrote. "[W]ere we to hold otherwise, [*Hustler*] would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as 'newsworthy.' Surely that debases the very concept of a right to privacy."

Wilson also determined that the nude photos of Benoit had economic value and Toffoloni was entitled to decide whether the photos were made public "in order to maximize the economic benefit to be derived from her daughter's posthumous fame."

LFP argued in its petition to the Supreme Court that the First Amendment requires that the "test for determining newsworthiness is to be construed broadly," and that the court should avoid becoming involved in "editorial decisions as to newsworthiness."

The petition also argued that previous Supreme Court cases, such as *Time, Inc. v. Hill*, 385 U.S. 374 (1967), have established that it is inappropriate for courts to decide whether an article is newsworthy.

The Reporters Committee for Freedom of the Press and the Society for Professional Journalists filed an *amicus* brief on behalf of *Hustler* in which the media groups argued that, if allowed to stand, the 11th Circuit decision would create an unclear standard in right-of-publicity matters, which could possibly chill news reporting. "The court has created the prospect of open-ended privacy tort liability for publications and newscasts regarding the deceased, who for more than a century have been consistently held not to have privacy rights," the brief said.

The U.S. District Court for the Northern District of Georgia had previously dismissed the lawsuit against Hustler in 2008 when a judge determined that Benoit's death was a "legitimate matter of public interest and concern" and the magazine's use of the photos was therefore protected by the First Amendment and Georgia law.

> "The photographs published by *Hustler* neither relate to the incident of public concern conceptually nor correspond with the time period during which Benoit was rendered, against her will, the subject of public scrutiny."
>
> – Charles R. Wilson
> 11th Circuit U.S. Court of Appeals

Georgia Lawmakers Add Crime Photo Exemption to Open Records Law

Georgia lawmakers have passed legislation that would exempt certain crime photos from the state's open records law after *Hustler* requested photos of the nude body of a woman killed while hiking.

The Georgia Bureau of Investigation (GBI) declined the magazine's request for the photos of Meredith Emerson, claiming that releasing them "would be an actionable invasion of privacy," the *Atlanta Journal-Constitution* reported on March 8, 2010. The beaten and decapitated body of Emerson, a 24-year-old graduate student, was found in January 2008 in the north Georgia woods.

DeKalb County Superior Court Judge Daniel

Hustler, *continued on page 42*

Hustler, *continued from page 41*

Coursey issued a temporary injunction on March 10 that prohibited the GBI from releasing "any and all photographs, visual images or depictions of Meredith Emerson which show Emerson in an unclothed or dismembered state," CNN.com reported on March 11.

Fred Rosen, a true crime author on assignment for *Hustler*, requested the photos in February 2010 while working on a story about the crime, the *Journal-Constitution* reported.

The magazine's request was criticized by some state lawmakers. "It's sickening," Georgia House Speaker David Ralston (R-Blue Ridge) said in a March 9 Associated Press report. "I think it's disgusting. I think it is vile and I think it is very, very hurtful to this family."

On March 9, State Rep. Jill Chambers (R-Atlanta) introduced House Bill 1322, also known as the Meredith Emerson Memorial Privacy Act. The bill seeks to amend the state's open records law, Ga. Code Ann. § 50-18-72, and prevent the release of photos or videos that are "recordings of the personal suffering of a person in physical pain or distress [where] Public dissemination of such records would cause emotional distress to the person whose suffering was so recorded or to the family of such person." The law also prohibits the release of "photographs, videos, or other depictions compiled by law enforcement of any individual in a state of partial or complete nudity, depicting the dismemberment of a body part, or depicting an injured or deceased individual." The law states exceptions may be made for "bona fide credentialed members of the press."

"We have to walk the line between open record laws and the constitutional provisions that allow women to be able to be photographed nude or in pornography when they knowingly and willingly offer their bodies for dissemination," Chambers said in the CNN.com report. The Georgia House of Representatives unanimously passed the bill on March 16, and the Senate unanimously passed the bill on April 13. It had not been signed into law at the time the *Bulletin* went to press.

Some scholars have expressed concern that the legislation jeopardizes the public's right to access public information.

"Having access to ghoulish crime-scene photos that most anyone would not even for a second – not even for a second – want to see might be very, very important for certain requesters because there might be public interest in the photographs," said Charles Davis, executive director of the National Freedom of Information Center at the University of Missouri, the *Journal-Constitution* reported.

Davis said this public interest includes someone investigating a suspicious death that a coroner ruled resulted from natural causes. "There could be reason to believe it was a murder and those photos could be important," he said.

– Cary Snyder
Silha Research Assistant

Death Scene Photos, *continued from page 38*

In a concurring opinion, Justice Richard Aronson wrote that he "would expressly limit any familial right of privacy in death images to photographs taken during an autopsy or for the coroner at a cordoned-off accident scene, and which serve no newsworthy public interest."

Although Aronson acknowledged that "decedent's decapitation was public knowledge as a result of news reports and, moreover, this fact was newsworthy to illustrate the severity of an automobile accident occurring on a public highway," he concluded that just because "an accident occurs on a public highway, [it] does not make every detail connected to the accident 'public' or of overriding public interest.. . . There appears to be no social value in the defendants' allegedly unprivileged dissemination of the accident-scene photographs and the private facts those photographs revealed."

"While until today no California case had yet recognized a familial right to privacy in autopsy or similar photographs . . . it is no great leap to do so," Aronson concluded.

Although the CHP and the officers appealed the ruling to the Supreme Court of California, their petition was denied on April 14, 2010.

In an April 15 story in *The Orange County Register*, Alexander Wheeler, O'Donnell's attorney, said that, now that the case is headed for a trial, the parties can start "getting past the plaintiffs' outrageous allegations and to the truth."

"Up until now, the courts have been limited to the plaintiffs' sensational story," Wheeler said. According to the April 15 *Register* story, O'Donnell and Reich said they sent the images out to warn family and friends about the dangers of speeding and driving under the influence.

The Catsouras death scene photos remain widely available online. According to an April 19, 2010 *Newsweek* story, there are multiple websites devoted solely to the Catsouras photos. "It's the simple things you never expect," Christos Catsouras said in the *Newsweek* story. "We live in fear of the pictures. And our kids will never Google their name without the risk of seeing them."

Although the lawsuit would determine only whether the CHP and individual officers are civilly liable for releasing the photos, the Catsouras family has said they would like to get the photos off the Internet entirely. "In a perfect world, I would push a button and delete every one of the images," said Lesli Catsouras, Nichole's mother, in the *Newsweek* story. "But it feels good knowing that at least now, at least in California, our case will (help) prevent this from happening to anybody else."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Free Speech

Blogger White Convicted; Two Mistrials for Turner

On Dec. 18, 2009, a federal jury in Roanoke, Va., convicted white supremacist William White on four counts of criminal threats and intimidation. Although one of the counts was later vacated, White was sentenced to 30 months in prison on the remaining three convictions.

White, 32, is the founder of the American National Socialist Workers Party, a Roanoke-based Neo-Nazi group. The criminal counts charged against White stemmed from personal attacks he leveled against several individuals via websites, e-mail, phone calls, and the U.S. mail. Although specific details of White's conduct varied in each instance, he generally would learn of a racial controversy in the news, obtain the contact information of those involved, and send the individuals e-mails, letters, or make phone calls with racially charged commentary.

For example, after Pulitzer Prize-winning columnist Leonard Pitts wrote a column about black-on-white crime, White wrote Pitts an e-mail stating that he looked "forward to the rapidly approaching day when whites once again rise up and slaughter and enslave your ugly race to the last man, woman and child," according to a December 11 report in *The Roanoke Times* describing Pitts' trial testimony. Pitts testified that he considered the e-mail a threat, especially after he learned that White posted his home address and telephone number on a website frequented by white supremacists.

In addition to charges of threatening Pitts, White was also accused of leveling criminal threats against Charles Tyson, the former mayor of South Harrison Township in New Jersey; Jennifer Petsche, a Citibank employee; Kathleen Kerr, the administrator of a diversity awareness program at the University of Delaware; Richard Warman, a human rights lawyer from Ontario, Canada; and several black tenants of a Virginia Beach, Va., apartment complex who had filed a housing discrimination lawsuit against their landlord.

For his communication with the individuals, White was charged with five counts of violating 18 U.S.C. § 875(c), which criminalizes transmitting "in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person." For his communication with the Virginia Beach tenants, White was charged with violating 18 U.S.C. § 1512(b)(1), which criminalizes intimidation to "influence, delay or prevent the testimony of any person in an official proceeding."

In his closing argument, defense attorney David Damico urged the jury to protect White's comments under the First Amendment, reiterating that White never physically approached any of the victims, and that there was no evidence that he did anything violent to anyone, according to a December 19 *Roanoke Times* report that detailed the verdict.

"That's what this case challenges you to do," Damico told the jury. "Be an American, even if it makes your blood boil, and acquit Bill White."

The trial judge, Senior District Judge James C. Turk, of the U.S. District Court for the Western District of Virginia, instructed the jurors that, in order to convict White, they had to find that his communications constituted a "true threat," which is not protected under the First Amendment. According to *The Times*, the jury instructions defined a true threat as a statement "made under such circumstances that an ordinary reasonable person who was familiar with the context of the communication would interpret it as an expression of an intent to injure the recipient or injure another person."

The all-white jury found White not guilty of making threats against Pitts and Tyson, but convicted White of threatening Petsche, Kerr, Warman, and the Virginia Beach tenants.

After the jury verdict, White filed a motion in which he asked Turk to reverse the jury verdict for the four counts for which he was convicted. In *United States v. White*, No. 7:08-CR-00054, 2010 U.S. Dist. LEXIS 9603 (W.D. Va. Feb. 4, 2010), Turk affirmed White's convictions on two of the three counts for violating 18 U.S.C. § 875(c), and also affirmed White's conviction under 18 U.S.C. § 1512(b)(1).

In his opinion, Turk acquitted White of the charges concerning Warman after noting that "much of the evidence and violent language attributed to White was taken from blog postings and articles published on the internet." Turk specifically cited an online post authored by White responding to the firebombing of a Canadian Communist party candidate's house, in which White wrote, "Good. Now someone do it to Richard Warman." In another posting, titled "Kill RW," White called for Warman to be "drug out into the street and shot, after appropriate trial by a revolutionary tribunal."

Turk distinguished these online posts from the phone call White made to Kerr and the e-mail he sent to Petsche. He stated that, as opposed to the messages to Kerr and Petsche, the postings were not communicated directly to Warman. In overturning the verdict, Turk relied on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in which the U.S. Supreme Court held that the First Amendment protects speech advocating violence unless the speech is intended to incite "imminent lawless action and is likely to incite or produce such action."

"Permitting a conviction on such evidence as presented here would eviscerate the protections that the Supreme Court has steadfastly endorsed with respect to the mere advocacy of violence and forever blur, impermissibly, the line between protected and prohibited speech," Turk wrote.

Turk also upheld White's conviction for sending a letter to several residents of a Virginia Beach, Va., apartment complex who filed a housing discrimination lawsuit against their landlord. White addressed the letter to "Whiny Section 8 n----rs," *The Times* reported. "You may get one over on your landlord this time, and you may not," White wrote to the residents. "But know that the white community has noticed you, and we know that you are and

Blogger Convicted, *continued on page 45*

"Permitting a conviction on such evidence as presented here would eviscerate the protections that the Supreme Court has steadfastly endorsed with respect to the mere advocacy of violence and forever blur, impermissibly, the line between protected and prohibited speech."

– James C. Turk
U.S. District Court for the Western District of Virginia

Free Speech

11th Circuit Rejects 9th Circuit's National Internet Obscenity Standard

The 11th Circuit U.S. Court of Appeals released an unpublished opinion on Feb. 2, 2010, that rejected the 9th Circuit's national Internet obscenity standard and instead applied a localized, "contemporary community" standard to affirm the conviction of an online pornography producer.

In *United States v. Little*, 38 Media L. Rep. 1289 (11th Cir. 2010), a unanimous three-judge panel upheld the trial court's use of the pre-Internet "community standard" the Supreme Court of the United States adopted in *Miller v. California*, 413 U.S. 15 (1973), and affirmed the convictions of adult movie producer Paul F. Little, also known as Max Hardcore, and his company, Max World Entertainment Inc. The *Miller* court defined the standard for "obscene" as "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."

A jury in the U.S. District Court for the Middle District of Florida convicted Little and Max World in May 2008 for violating 18 U.S.C. §§ 1465 and 1461, which prohibit the publication of obscene content and using the U.S. mail to deliver such materials, respectively. Little, of Altadena, Calif., posted promotional trailers of sexually explicit videos on the Max Hardcore website, which is hosted on servers in Tampa, Fla.

Agents with the U.S. Postal Inspection Service in Tampa downloaded the videos, then ordered five DVDs and arranged to have them delivered to a local post office box. The government used the online trailers and the mailing of the DVDs as the basis for the charges against Little and Max World. Neither the 11th Circuit nor the lower court opinions described the contents of the DVDs.

Little and Max World were each convicted on 10 counts of violating the federal obscenity statutes. Little was sentenced to 46 months in prison, ordered to pay a $7,500 fine, and to forfeit the obscene films and all gross profits from the distribution of the films. Max World was fined $75,000.

In an earlier decision, *United States v. Kilbride*, 584 F.3d 1240 (9th Cir. 2009), the 9th Circuit U.S. Court of Appeals interpreted the Supreme Court decision in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), as mandating that "a national community standard must be applied in regulating obscene speech on the Internet." In *Ashcroft*, Justices Sandra Day O'Connor and Stephen Breyer argued in separate concurring opinions that a national standard should be adopted in Internet obscenity regulation cases.

"[G]iven Internet speakers' inability to control the geographic location of their audience," O'Connor wrote in *Ashcroft*, "expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask, and would potentially suppress an inordinate amount of expression."

In *Little*, the 11th Circuit declined to follow the 9th Circuit's interpretation by reasoning that the portions of *Ashcroft* that advocated a national Internet obscenity standard constituted dicta, and not a binding ruling of the Supreme Court.

"As a result," the 11th Circuit panel wrote, "the *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere." By applying the community standard, the 11th Circuit held that the district court properly instructed the jury to judge the materials on the basis of how "the average person of the community as a whole – the Middle District of Florida – would view the material."

An attorney for Little told the Silha Center that Little had not reached a final decision on whether to appeal to the Supreme Court of the United States.

In a February 4 post on The Volokh Conspiracy blog, UCLA law professor Eugene Volokh questioned the 11th Circuit's decision not to publish the *Little* opinion because the ruling rejected the 9th Circuit precedent and apparently constituted the first time the 11th Circuit considered the national Internet obscenity standard. Volokh noted that unpublished opinions lack binding precedential value and are typically used when ample precedent on a subject exists in a jurisdiction. "So it's hard for me to see why this opinion, which is certainly quite detailed[,] should be unpublished," Volokh wrote.

In a February 11 post on his Digital Media Lawyer Blog, California attorney David Johnson argued that use of a local community standard is problematic for online publishers, because unlike publishers of print materials, they cannot limit distribution to markets where they would not be violating local obscenity standards.

Johnson also wrote that he thought the Supreme Court may want to reconcile the divergent rulings. "The standard for obscenity in Internet cases is clearly an issue that several U.S. Supreme Court Justices have already indicated interests them. I would not be surprised for the Court to take one of these cases soon in order to resolve this issue," Johnson wrote.

Although the 11th Circuit affirmed the convictions, it vacated both sentences and remanded the case to the district court for re-sentencing. The panel ruled that the district court improperly enhanced the sentences of Little and Max World because the DVDs generated aggregate retail sales of $40,340. Federal sentencing guidelines at U.S.S.G. § 2G3.1(b)(1) permit enhanced sentences when the financial gain from the sale of obscene materials exceeds $30,000. The panel concluded that the local community standard must also be applied to sentencing and that there was no evidence any sales, other than the purchase by the postal service agents, occurred in the Middle of District of Florida.

Obscenity, *continued on page 45*

> "The standard for obscenity in Internet cases is clearly an issue that several U.S. Supreme Court Justices have already indicated interests them. I would not be surprised for the Court to take one of these cases soon in order to resolve this issue."
>
> – David Johnson
> California attorney

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never will be anything other than a dirty parasite – and that our patience with you and the government that coddles you runs thin."

In affirming the jury's verdict, Turk stated that intimidation under the statute was not required to pass the same test as a "true threat," but instead held that any attempt to intimidate with "a specific intent to influence, delay, or prevent the testimony of any person in an official proceeding" was prohibited by the statute.

"Viewing all the evidence in context," Turk wrote, "a jury might well conclude that White's intent, as expressed by his own words, was to scare the African-American tenants to such an extent that they would not 'do anything,' including pursue the . . . complaint that White referenced in the letter."

Turk sentenced White to 30 months in prison on April 14, *The Roanoke Times* reported the same day. At the sentencing, Turk told White that, when he gets out of prison, "You can have any thoughts that you want to have, but you ought to keep them to yourself," *The Times* reported.

The Virginia trial was not the first time White faced criminal charges related to his online writing. On July 21, 2009, Judge Lynn Adelman, of the U.S. District Court for the Northern District of Illinois, dismissed a one-count indictment against White that accused him of violating 18 U.S.C. § 373 by urging harm to the foreman of a federal jury that convicted white supremacist leader Matthew Hale for soliciting the murder of a federal judge in 2004. White published the foreman's previously unpublished name, photograph, home address, and phone number.

In the 2009 opinion, *United States v. White*, 638 F. Supp. 2d 935 (N.D. Ill. 2009), Adelman also cited *Brandenburg* in dismissing the charge, noting that White did not expressly advocate that the foreman be harmed. "Knowledge or belief that one's speech, even speech advocating law breaking, may cause others to act, does not remove the speech from the protection of the First Amendment unless the speech is directed to inciting imminent lawless action and is likely to produce such action," Adelman wrote. (See "Blogger Acquitted of Soliciting Harm to Juror, Remains in Custody," in the Summer 2009 issue of the Silha *Bulletin*.)

Mistrials Declared in Case of Blogger Accused of Threatening Judges

A federal district court judge declared two mistrials in the case against Hal Turner after jurors in Brooklyn, N.Y., twice deadlocked on whether to convict the New Jersey blogger and Internet radio host charged with threatening the lives of three judges on the 7th Circuit U.S. Court of Appeals.

Federal District Court Judge Donald E. Walter declared the first mistrial on Dec. 7, 2009, when the jurors were split 9 to 3 in favor of acquittal, said Richard Gardener, one of the jurors, according to a December 8 *New York Times* story. Gardener said the jury was troubled that prosecutors ended their presentation of evidence after three days in a trial that had been expected to last more than a week.

During the first trial, prosecutors did not call the three 7th Circuit judges who were the target of Turner's alleged threat as witnesses.

The charges against Turner arose from a post on his blog in June 2008 in which he wrote that 7th Circuit judges William Bauer, Frank Easterbrook, and Richard Posner all "deserved to be killed" after they upheld two local handgun bans in Chicago in *Nat'l Rifle Ass'n v. Chicago*, 567 F.3d 856 (7th Cir. 2009). (See "Blogger Charged with Inciting Attacks on Judges, Lawmakers," in the Summer 2009 issue of the Silha *Bulletin*.)

Walter declared a second mistrial on March 10, 2010, when another group of jurors told the court they could not reach a verdict after three days of deliberations, *The Times* reported on March 11.

In the second trial, Bauer, Easterbrook, and Posner were called as witnesses. At one point while cross-examining Easterbrook, *The Times* reported defense attorney Michael Orozco questioned the merits of *Nat'l Rifle Ass'n*, which was granted certiorari and argued before the U.S. Supreme Court on March 2.

"If it's overturned, doesn't that make Hal Turner correct?" Orozco asked.

"This blog post says any judge who decides a case incorrectly is supposed to be assassinated," Easterbrook responded, according to *The Times*. "That is not the way the system works."

During his testimony in the second trial, Turner denied making a threat and said his commentary was political hyperbole that is protected by the First Amendment, *The (Hackensack, N.J.) Record* reported on March 11.

The third trial for Turner is scheduled to begin on August 9 in Brooklyn, N.Y., *The Record* reported.

– Cary Snyder
Silha Research Assistant

Obscenity, *continued from page 44*

"Appellants' sentences are being increased for sales in areas that could have community standards that deem the DVDs not to be obscene," the panel wrote. "Thus, when dealing with the DVDs in areas outside the Middle District of Florida, we must treat them as speech protected by the First Amendment until otherwise determined. Increasing Appellants' sentences for pecuniary gain in areas where the DVDs have not yet been proven to be obscene comes dangerously close to a violation of Appellants' First Amendment rights."

– Cary Snyder
Silha Research Assistant

Silha Center Events

Silha Centers Hosts Variety of Speakers in Spring 2010

The Silha Center hosted a broad spectrum of events in March and April 2010. Topics covered included crime in the virtual world, the effects of corporate public relations, and the health of journalists themselves as well as the journalism industry.

Speakers Discuss Criminalizing Virtual World Conduct in the Real World

At a Silha Center Spring Forum on March 31, 2010, Mary Horvath, an FBI Senior Computer Forensic Examiner, issued a stern warning about the lack of privacy in the digital age. "I pretty much can get access to your entire life, especially when you put your whole life on Facebook or MySpace," Horvath said at the outset of the forum.

> "I pretty much can get access to your entire life, especially when you put your whole life on Facebook or MySpace."
>
> – Mary Horvath
> FBI Senior Computer Forensic Examiner

Horvath was joined by Dick Reeve, General Counsel/Chief Deputy District Attorney for computer crimes in Denver, Colo., and Stephen Cribari, a criminal and constitutional law professor at the University of Minnesota Law School. Attendees filled the Murphy Hall Conference Center at the University of Minnesota School of Journalism and Mass Communication at an event titled "Criminal Conduct in the Virtual World: of Avatars and Evidence."

Horvath and Reeve used their experience as law enforcement officials to frame a discussion on whether acts such as theft, rape and murder that constitute crimes in the real world should also be considered crimes when committed by user-controlled avatars in the virtual world.

An avatar is a three-dimensional digital persona users create in online games such as Second Life, a virtual world run by Linden Lab, which is headquartered in San Francisco and has employees across the globe. Users can create avatars that resemble their real-world selves, or craft alternate identities. Horvath said that some users become so attached to these digital personas that they live vicariously through their avatars.

To illustrate the potential for virtual world conduct constituting a crime, Horvath cited the "rape" of a female avatar. "Where does the real physical human being go for legal relief? Who can she blame and who can she punish for that?" Horvath asked.

"Remember, some of these people, this is their world now. This can be psychologically harming to somebody whose world this became. As it is, they can feel like they've really been raped. I can only imagine."

Users can navigate Second Life for free, but they also have the option to pay real-world money in exchange for various privileges, such as purchasing land or investing in a virtual world stock exchange. This virtual economy accounted for more than $500 million dollars in user-to-user transactions in 2009, according to a March 31, 2010 Linden Lab news release. Businesses also use the virtual world to advertise their products to users.

The expenditure of real-world money complicates the debate over whether to prosecute users for the actions of their avatars. Horvath mentioned the example of one avatar robbing a bank or ATM in the virtual world to steal another avatar's money, which constitutes the real-world investment of a user. "You just robbed what effectively is my U.S. money, even though it's in Linden dollars," Horvath said. "Now who do I call? Who investigates the fact that you just ripped me off?"

Reeve said he believes such a theft should be considered a crime because it has financial consequences in the real world. "As a prosecutor, I look at that and say, that's a very simple question for me. That's a computer, and the virtual world was used to perpetuate a crime," Reeve said.

Cribari explained that prosecuting the "rape" or "murder" of an avatar presents problems in proving criminal intent unless laws are redefined to account for the results of such conduct in the virtual world. "Is it a game, and what are the cultural implications of recognizing that the virtual world isn't a virtual world, but a real world?" Cribari asked. "Do we step over that line or do we say, 'Look, you're paying a price to play a game and if you lose your money, you've lost your money just as if you're playing a game?'"

Reeve pointed out that deciding whether to criminalize the actions of avatars involves making subjective societal judgments that may vary among generations. He presented the hypothetical situation of a man who creates an avatar resembling his ex-girlfriend and then establishers a scenario where the man invites the woman to view herself being serially raped in the virtual world.

"Is that criminal conduct? Is that tortious conduct? Is that intentional affliction of emotional distress in a tort theory? What is that?" Reeve asked. "I don't know."

Law enforcement officials also face some practical limitations in attempting to prosecute virtual world conduct. When users move their avatars to foreign countries, information for that avatar is then stored on a server in that country. Horvath said this reality creates obstacles in both locating an avatar and securing search warrants within foreign countries.

"We're traditionally used to the information being right here on the computer in your house or on the cell phone on your hip. We're not used to your information being on a server in Korea, nor thinking ahead of time about it being over in Korea," Horvath said. Reeve pointed out that it may be difficult to justify using real-world law enforcement resources to investigate virtual world conduct.

Spring Ethics Forum Focuses on the Influence of Corporate Public Relations

"In celebrity culture, we destroy what we worship," said Chris Hedges, the featured speaker at the Silha Center's 2010 Spring Ethics Forum, titled "The Propaganda State: The Inordinate Influence of PR on the Press." Using Michael Jackson as his primary example, Hedges described how Jackson's popularity, driven by corporate public relations personnel, may have resulted in his premature death. "He became a commodity product," Hedges said.

Silha Center Events, *continued on page 47*

The Forum was co-sponsored with the Minnesota Journalism Center, the School of Journalism and Mass Communication, and the College of Liberal Arts at the University of Minnesota, and was held April 15, 2010 at the University of Minnesota's School of Journalism and Mass Communication.

Hedges, a veteran reporter who served for eight years as the Middle East bureau chief of *The New York Times*, where he shared the 2002 Pulitzer Prize for Explanatory Journalism, is a senior fellow at the Nation Institute, the Anschutz Distinguished Fellow at Princeton University, and the author of nine books.

His thesis was that corporations have gained an undue influence on modern society, especially in politics and the media. "Corporate money drives the media commentary," Hedges said, an effect that he warned would inevitably result in "neo-feudalism."

Political power goes to those most effective at marketing their "brands," Hedges said, pointing out that *Advertising Age* magazine named Barack Obama the "marketer of the year" in 2008.

Any achievement in today's media marketplace, Hedges said, requires the influence of corporate public relations staff. Referring to Jackson's success, Hedges argued that "it wouldn't have been possible without the handlers."

At the end of his presentation, Hedges addressed the role of the news media, which he said has suffered under corporate ownership. "Commercialization of the American Press was a Faustian bargain," Hedges said, asserting that news programming has become largely driven by corporate interests. "Large portions of the United States have become invisible."

Hedges also criticized America's celebrity culture as substituting popularity for quality journalism. As an example, he said that he considered "CBS Evening News" host Katie Couric to be a celebrity, not a journalist, and that the trend towards celebrity worship and the corporate news agenda would only worsen in the near future.

"I don't know how we're going to sustain journalism," Hedges said.

Authors Make the Case for a Subsidized Press at Book Signing

The practice and profession of journalism is in peril, argued Robert McChesney and John Nichols in a presentation at the School of Journalism and Mass Communication at the University of Minnesota on March 25, 2010. The only viable solution, the two argued, was public funding for the American news media.

Their presentation, "The Death and Life of American Journalism: The Media Revolution that will Begin the World Again," was co-sponsored by the Minnesota Journalism Center and the University of Minnesota Bookstore.

McChesney and Nichols began with a discussion of the current economic state of news journalism, emphasizing the steady decline in jobs and pay for journalists. The ratio of traditional journalists to public relations professionals in the United States is currently 1-to-4, said Nichols, a figure he claimed was unprecedented in countries comparable to the United States by political and demographic measures. As a result of the worsening economic situation for journalists, the quality and quantity of real journalism is diminishing. This cycle, asserted Nichols, creates a misinformed and unengaged electorate.

According to McChesney, the solution to the problems facing modern American journalism is already in place throughout Europe and Canada. Government-funded public media, subject to public scrutiny and oversight, could fill the gaps in local coverage that have resulted from massive media conglomeration since the Telecommunications Act of 1996 deregulated media ownership. McChesney suggested that market factors could still be applied to maintain quality standards. For example, he suggested that Americans could be given "media vouchers" to give to the news outlets of their choice.

Arkansas Professor Addresses Emotional Demands of Journalism at Silha Center Special Presentation

Journalism is a stressful profession, Professor Don Judges told students, faculty, staff, and members of the general public at an event titled "Journalist Impairment: Identifying and Managing the Emotional Demands of Life in Journalism," held at the School of Journalism and Mass Communication at the University of Minnesota on March 31, 2010. It is only becoming more stressful due to "the changing landscape" of the media, he said.

Judges, a psychology and law professor at the University of Arkansas, explained that journalists face constant pressure that can lead to detrimental psychological effects. Judges cited factors such as looming deadlines, the stress of the economic climate, hazardous reporting environments, and repeated exposure to tragedy and disaster.

According to Judges, these combined pressures can lead to burnout, depression, alcohol and drug abuse, relationship problems, and even Post-Traumatic Stress Disorder. Because of these effects, younger journalists and women are at high risk for leaving the profession, Judges said.

Pessimism is toxic, Judges explained, saying that "if you view life as your enemy, it will hurt you." But optimism, he said, could sustain journalists, and self-awareness is the first step to breaking the cycle of hopelessness that can ambush a stressed person. Motivating yourself and cultivating empathy and social competence can empower people to remain capable as journalists. "The master aptitude," said Judges, is emotional self-regulation, which is essential to success.

All Silha Center activities are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

– Cary Snyder
Silha Research Assistant

– Sara Cannon
Silha Center Staff

"Commercialization of the American Press was a Faustian bargain . . . large portions of the United States have become invisible."

– Chris Hedges
Featured Speaker,
Silha Spring Ethics Forum

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SCHOOL OF JOURNALISM
& MASS COMMUNICATION

A New Approach to the Silha *Bulletin*

Beginning with this combined Winter-Spring 2010 edition, the Silha *Bulletin* will appear three times each year, rather than four.

Two factors influenced this change.

First, converting to three issues a year means that our publication schedule will mirror the academic calendar. In other words, the Silha Center staff will produce a single issue each academic term: Fall, Spring and Summer.

It has always been a challenge to produce two issues (Winter and Spring) in the Spring semester. The new structure will allow us to maintain the high quality of our research, reporting and writing. It will also permit us to experiment with some new ideas, such as thematic approaches that will complement our chronological summaries and analyses.

Second, like most academic and non-profit institutions, we face significant economic constraints. Our operating budget is stretched to capacity. If you have been a regular reader of the Silha *Bulletin*, you know that it has steadily expanded in size and scope during the past ten years. Printing and mailing costs continue to rise, as do personnel costs. Although we remain committed to supporting as many SJMC graduate students and law students as possible, the number of positions the Silha Center can offer has been reduced. This means that fewer research assistants must work even harder to complete our work.

I hope that by reorganizing our production schedule, our student staffers will not only be able to produce the *Bulletin*, but also to undertake additional research opportunities to enhance their scholarly experience at the Silha Center.

If you have visited the Silha Center website in the past few weeks, you may have noticed that it has been re-designed to conform to new College of Liberal Arts policies. The current issues of the *Bulletin*, as well as the publication archives, will remain accessible there. http://www.silha.umn.edu

Rest assured, the Silha Center will continue to sponsor events, such as the annual Silha Lecture in the Fall and the annual Silha Ethics Forum in the Spring. We will also continue to monitor and comment on emerging developments in media ethics and law, and to conduct original research in these areas, consistent with the wishes of our generous donors, the late Otto Silha and his wife, Helen Silha.

I encourage you to contact me if you have comments or suggestions concerning the Silha *Bulletin* or the other work of the Silha Center.

– Jane E. Kirtley
Silha Center Director and Silha Professor