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Latest Israel-Hamas War Raises Concerns About Journalist Safety, Media Bias, Freedom of Speech, and Misinformation

The latest Israel-Hamas war has raised issues related to journalist safety, media bias, free speech, and misinformation. Journalists covering the conflict on the ground have been killed and injured. News outlets around the globe have been accused of biased reporting by various groups on all sides of the conflict. Protests have broken out in the United States, including on college campuses and at high schools, raising questions about students' freedom of speech rights. Misinformation has flooded social media and the internet, making it difficult for outside observers to determine what is true and what is false.

In the early hours of Oct. 7, 2023, Hamas militants launched an attack on southern and central Israel, killing approximately 1,200 people, and taking nearly 240 hostages, according to Israeli officials. In retaliation, Israel commenced an air and ground assault in Gaza. As the *Bulletin* went to press, Israel's assault has killed more than 20,000 people, according to the Gaza Health Ministry, which is operated by Hamas. Most people killed in the conflict have been civilians. Tens of thousands more have been injured and nearly two million people have been displaced in Gaza. These numbers are estimates, as counting the number of people who have died in wartime is a difficult task with many people missing, unaccounted for, or trapped underneath rubble. However, according to a Nov. 5, 2023, *Associated Press* (*AP*) article, "[t]he latest Israel-Hamas war has quickly become the deadliest and most destructive of the five wars fought between the sides since Hamas seized control of the Gaza Strip in 2007 from the Palestinian Authority." The *AP* article is available at: https://apnews.com/article/israel-hamas-war-death-toll-numbers-injured-5c9dc40bec95a8408c83f3c2fb759da0.

President Joe Biden initially expressed doubt about the death toll reports coming out of Gaza and indicated that he thought they were inflated, but *The New York Times* reported on November 25 that "the Biden administration now concedes that the true figures for civilian casualties may be even worse" than the estimates. *The New York Times* article is available online at: https://www.nytimes.com/2023/11/25/world/middleeast/israel-gaza-death-toll.html.

On Nov. 24, 2023, Israel and Hamas began a temporary pause in the conflict to exchange hostages held by Hamas for Palestinians imprisoned by Israel. The pause ended seven days later on Dec. 1, 2023, after more than 100 hostages were freed by Hamas and more than 240 Palestinians were released by Israel, according to *AP*. The *AP* article containing this information is available online at: https://apnews.com/article/israel-hamas-war-live-updates-12-1-2023-0c225e35008879ea7574aabb077596f2.

Journalists Covering War in Gaza Face Difficulties Including Death, Injuries, and Disappearances

On Oct. 7, 2023, four Israeli journalists were killed by Hamas in the attack on Israel. According to *The Times of Israel*, "Ynet photographer Roee Idan was murdered in his hometown of Kfar Aza, Israel Hayom photographer Yaniv Zohar was murdered in Nahal Oz along with his wife and two daughters, and Kan news editor Ayelet Arnin and Maariv reporter Shai Regev were murdered at the Nova music festival near Re'im." Additionally, according to the Committee to Protect Journalists (CPJ), Israeli journalist Oded Lifschitz has been missing since the October 7 attack. His wife was among the hostages released by Hamas on October 24 during a temporary pause in the conflict. Lifschitz, however, was not among those released. Throughout the ensuing months, journalists have been killed and injured or have disappeared while covering the latest Israel-Hamas war. According to CPJ, the latest Israel-Hamas war has been "the deadliest period for journalists" since at least 1992 when CPJ began gathering data.

Journalists reporting from Gaza have faced especially high risks as they try to cover the conflict during Israeli ground assaults, airstrikes, disrupted communications, and power outages. The Israel Defense Forces (IDF) told *Reuters* and *Agence France Press* news agencies that it could not guarantee the safety of their journalists operating in the Gaza Strip, *Reuters* reported on October 27. The *Reuters* report is available online at: https://www.reuters.com/world/middle-east/israeli-military-says-it-cant-guarantee-journalists-safety-gaza-2023-10-27/. As a result, the Israel-Hamas war has led to the deaths, injuries, and disappearances of a number of journalists.

Israel-Hamas, *continued on page 3*

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Inside This Issue

Fall 2023: Volume 29, No. 1

Silha Center Staff

Israel-Hamas, *continued from page 1*

CPJ has been tracking these numbers. As of December 19, CPJ verified 68 journalists killed in the war: 61 Palestinian, four Israeli, and three Lebanese; 13 reported injured, three reported missing, and 20 journalists arrested.

In its report, CPJ lists assaults, arrests, threats, cyberattacks, and censorship that make up a "hostile environment" for members of the media trying to report on the war. The report is available online at: https://cpj.org/2023/12/attacks-arrests-threats-censorship-the-high-risks-of-reporting-the-israel-hamas-war/.

Some of the journalists represent Western media organizations, such as BBC's Muhannad Tutunji, Haitham Abudiab, and their colleagues, who on October 12 were "dragged from the vehicle — marked 'TV' in red tape — searched and pushed against a wall," the BBC reported. Tutunji and Abudiab identified themselves as BBC journalists and showed police their press ID cards. As he tried to film the incident, Tutunji "said his phone was thrown on the ground and he was struck on the neck." The BBC report is available online at: https://www.bbc.com/news/world-middle-east-67102956.

COVER STORY

On October 30, *Rolling Stone* magazine reported that the Israeli government denied press credentials to its journalist, Jesse Rosenfeld, possibly because he reportedly had covered Israeli Prime Minister Benjamin Netanyahu's administration unfavorably. More about the incident is available online at: https://www.rollingstone.com/politics/politics-news/israeli-government-denies-rolling-stone-press-credential-1234866286/?sub_action=logged_in.

On November 5, the CPJ reported that a team of journalists from the German public broadcaster ARD was stopped by Israeli soldiers south of the Palestinian city of Hebron, which is located in the West Bank. ARD correspondent Jan-Christoph Kitzler later posted a photo on the social media platform X (formerly Twitter) that showed one of the soldiers aiming a gun at him. Christian Limpert, the head of the ARD Tel Aviv studio, noted that a few days earlier, an unidentified ARD cameraman and soundman had been detained by soldiers in South Hebron. Limpert characterized such incidents "as an attempt to obstruct ARD and other international media from reporting in the West Bank," CPJ reported. Israeli newspaper *Haaretz* later reported that the IDF apologized for the incident with Kitzler and said that "the soldiers' actions were examined and protocols were reiterated," and that the IDF "will continue to act in order to ensure the freedom of the press in Judea and Samaria [the West Bank] even during the war." The *Haaretz* article is available online at: https://www.haaretz.com/israel-news/2023-11-06/ty-article/german-journalists-detained-by-israeli-soldiers-asked-if-we-were-jewish-at-gunpoint/0000018b-a5ae-d9c0-a5fb-edfee9ed0000.

On November 9, the Israeli government, including Prime Minister Benjamin Netanyahu, accused four freelance photographers working with *Reuters*, the *Associated Press* (*AP*), *The New York Times*, and CNN, of having advance knowledge of the October 7 Hamas attack. The freelancers captured photographs of the attack as it unfolded, some of which were published by the news outlets. On November 10, BBC reported that "[a]ll four outlets have denied the claims, which have since been debunked." The BBC report is available online at: https://www.bbc.com/news/world-middle-east-67375667.

Some Israeli officials posted their accusations on X. Benny Gantz, a member of Israel's war cabinet, wrote, "Journalists found to have known about the massacre, and [who] still chose to stand as idle bystanders while children were slaughtered — are no different than terrorists and should be treated as such." Gantz's post is available online at: https://twitter.com/gantzbe/status/1722535046400061853. Danny Danon, a member of the Israeli parliament affiliated with the ruling Likud party, put it more bluntly, saying the photojournalists were now marked for death: "Israel's internal security agency announced that they will eliminate all participants of the October 7 massacre. The 'photojournalists' who took part in recording the assault will be added to that list." Danon's post is available at: https://twitter.com/dannydanon/status/1722613218437480704.

According to BBC, the accusations were based on "a report on the pro-Israel website Honest Reporting, which suggested — without supporting evidence — that the photographers' presence may have been 'part of the plan.'" According to *AP*, after the news outlets pushed back on the report, Honest Reporting executive director Gil Hoffman "admitted [on November 9 that] the group had no evidence to back up that suggestion. He said he was satisfied with subsequent explanations from several of these journalists that they did not know." Nevertheless, Hoffman stands behind the decision to accuse the photojournalists, claiming Honest Reporting was merely "raising questions." https://apnews.com/article/israel-hamas-photographers-attack-200be1ba47361f1c1fc113cdaeb65d04.

Although the news outlets deny the accusations, both *AP* and CNN have ceased working with one of the photojournalists, "Hassan Eslaiah, who was found to have been pictured with Hamas Gaza leader Yahya Sinwar," according to BBC.

As the *Bulletin* went to press, no retractions from the Israeli government had been identified, and Danon's and Gantz's posts on X have not been deleted.

On November 10, Plestia Alaqad, a Palestinian journalist whose videos from Gaza have been featured by NBC News and *The New York Times*, reported that her Instagram account had been hacked multiple times, according to CPJ. On November 22, the Coalition for Women in Journalism reported that Alaqad had decided to flee Gaza. "I used to always wear my press vest and helmet . . . but lately I stopped wearing them," Alaqad was quoted as saying by the Coalition for Women in Journalism. "I don't feel safe, but especially when wearing the press vest and helmet." Alaqad's statement is available online at: https://www.womeninjournalism.org/threats-all/gaza-palestinian-journalist-plestia-alaqad-flees-gaza-amid-ongoing-conflict.

On November 20, award-winning Palestinian poet Mosab Abu Toha, who had been contributing to *The New Yorker* and *The New York Times* about life inside Gaza during the war, was arrested and taken by IDF for questioning when, according to CNN, "there was intelligence indicating of [*sic*] a number of interactions between several civilians and terror organizations inside the Gaza Strip." Toha was later released. The CNN report is available online at: https://www.cnn.com/2023/11/20/world/mosab-abu-toha-gaza/index.html.

Israel-Hamas, *continued on page 4*

Israel-Hamas, *continued from page 3*

On Nov. 9, 2023, *The Washington Post* reported that "more than 750 journalists from dozens of news organizations [had] signed an open letter . . . condemning Israel's killing of reporters in Gaza and criticizing Western media's coverage of the war." The letter is available online at: https://www.protect-journalists.com/. By December 5, the number of signatures had risen to 1,484. The *Post* article is available online at: https://www.washingtonpost.com/style/media/2023/11/09/open-letter-journalists-israel-gaza/.

The letter cites the number of journalists who have lost their lives during the course of the war, stating that "we are appalled at the slaughter of our colleagues and their families by the Israeli military and government," some of whom "have been killed while visibly working as press" and allegedly "deliberate[ly] target[ed]" by Israeli forces, at times together with members of their families. The letter further cites issues with "extensive power outages, food and water shortages and a breakdown of the medical system."

The letter goes on to accuse Israel of restricting the flow of information, through "block[ing] foreign press entry, heavily restricted telecommunications and [by bombing] press offices," citing 50 press offices hit in Gaza, and stating that "Israeli forces explicitly warned newsrooms they 'cannot guarantee' the safety of [journalists and staffers] from airstrikes." "Taken with a decades-long pattern of lethally targeting journalists," the letter continued, "Israel's actions show wide scale suppression of speech."

"We stand with our colleagues in Gaza and herald their brave efforts at reporting in the midst of carnage and destruction," the open letter continued. "Without them, many of the horrors on the ground would remain invisible."

"This is our job: to hold power to account," the letter concluded. "We are renewing the call for journalists to tell the full truth without fear or favor."

At the end of the letter, there was a statement saying, "Writers of [this] letter are a group of U.S.-based reporters at both local and national newsrooms. All signatures have been verified. . . . More than 30 journalists have since asked to have their signatures removed, fearing reprisal from their employers. Those employers include the *Associated Press*, *The Washington Post*, Bloomberg, McClatchy, the *Chicago Tribune*, *LAist*, the *Modesto* (Calif.) *Bee*, KCRW, and KQED."

A disturbing example of the difficulties facing Palestinian journalists was captured in a video posted by *The Siasat Daily*, a newspaper located in India. The video shows Salman Al-Bashir, a Palestinian Authority TV channel journalist, making on-air remarks after hearing that a colleague, Mohammed Abu Hattab, had died just 30 minutes after the two were together on Thursday, November 2. In the video, Al-Bashir is shown weeping as he removes his press vest and helmet, and saying, "We can't take it anymore, we are exhausted. We are victims. The only difference between us is the time of death. We are killed one after another. And no one cares about the catastrophe or the crime that we endure in Gaza. No protection for anyone or anything. This gear and helmet do not protect any journalist, they are just empty slogans. We are victims, live on air. We are victims awaiting our turn to be killed. Mohammad [*sic*] was here half an hour ago (reporting). Now he lies dead with his family in this same hospital." The images of Al-Bashir are shown in a shared screen with a female news anchor sitting at a desk in a studio, also wiping away tears. The video is available online at: https://www.siasat.com/we-are-waiting-to-be-killed-palestinian-journalist-after-colleagues-death-2807161/.

CPJ has issued a report of journalists and media workers killed, injured, or missing in the war, which has led to the deadliest month — October 2023 — for journalists since CPJ began gathering data in 1992. CPJ's research and documentation covers all journalists, defined as individuals involved in news-gathering activity and includes those working for a broad range of public and privately-funded news outlets, as well as freelancers. Several of the journalists included in CPJ's list worked with media organizations such as Al-Quds and Al-Aqsa, which have been affiliated with Hamas; however, CPJ noted that "CPJ does not support journalists engaged in breaking the law. In the cases we have documented, multiple sources have found no evidence to date that any journalist was engaged in militant activity."

CPJ noted that "[t]he list published here includes names based on information obtained from CPJ's sources in the region and media reports. It includes all journalists involved in news-gathering activity. It is unclear whether all of these journalists were covering the conflict at the time of their deaths, but CPJ has included them in our count as we investigate their circumstances." CPJ's list is being regularly updated and is available online at: https://cpj.org/2023/12/journalist-casualties-in-the-israel-gaza-conflict/.

On Nov. 13, 2023, Article 19, a non-profit international organization based in London which fights censorship, issued a report about threats to journalists covering the war between Israel and Gaza, writing, "We condemn in the strongest terms the all-out assault on freedom of expression, which perpetuates cycles of violence and disinformation, obstructs reporting on the conflict, limits access to lifesaving information and disrupts the vital operations of hospital and humanitarian organisations [*sic*]. . . . Respect for freedom of expression is essential to bring an end to the ongoing hostilities and ensure accountability for international crimes." The Article 19 report concluded with a call for a ceasefire. Article 19's report is available online at: https://www.article19.org/resources/israel-and-occupied-palestinian-territories-stop-the-assault-on-free-speech-and-protect-civilians/.

Against the backdrop of the physical toll on journalists in the region, Israel has threatened to shut down some foreign news channels. According to an October 20 article from *The Times of Israel*, the threats were part of emergency regulations that would "allow [the Israeli government] to temporarily shut down foreign news channels during the current state of emergency due to the war with Hamas, if it believes the outlet is damaging national security." Moreover, if the Israeli communications minister, defense minister, and security cabinet all approve a shut down, "The communications minister can then order TV providers to stop broadcasting the news outlet in question; close its offices in Israel; seize its equipment; and shut down its website or restrict access to its website, depending on the location of its server." The *Times of Israel* article is available online at:

https://www.timesofisrael.com/govt-approves-emergency-regulations-that-could-pave-way-to-closing-al-jazeera-offices.

Israeli officials specifically identified Al-Jazeera and Al Mayadeen as media outlets that the government was considering shutting down. On November 13, *Reuters* reported that the Israeli government was holding off on shutting down Al-Jazeera but had moved forward with plans to block Al Mayadeen's websites and seize its equipment. According to *Reuters*, "The omission [of Al-Jazeera] pointed to a balancing act by Israel, which has been angered by Qatari ties to its arch-foe Iran and Hamas, but is looking to Doha [the capital of Qatar] to persuade the Palestinian militant group to free scores of hostages held in the Gaza Strip." The *Reuters* article is available online at: https://www.reuters.com/world/middle-east/israel-holds-off-threatened-shut-down-al-jazeera-locally-2023-11-13.

Sherif Mansour, who covers the Middle East for CPJ, criticized Israel's emergency regulations in an October 18 statement: "We are deeply concerned by Israeli officials' threats to censor media coverage of the ongoing Israel-Gaza conflict, using vague accusations of harming national morale. CPJ urges Israel not to ban Al Jazeera and to allow journalists to do their jobs. A plurality of media voices is essential in order to hold power to account, especially in times of war." The statement is available online at: https://cpj.org/2023/10/cpj-urges-israel-not-to-close-al-jazeera.

News Outlets Accused of Bias

In reporting on the ongoing Israel-Hamas war, news outlets have been accused of bias by a wide variety of groups and individuals. Additionally, questions about the appropriate vernacular have arisen as news outlets grapple with the implications of certain terms.

Some critics argue that Western media are biased in favor of Israel, skewing coverage of the conflict. Specifically, these critics have accused Western news outlets of "[p]ublishing unsubstantiated claims, telling only one side of the story, and painting Palestinians as nothing more than objects in Hamas's hands," according to an Al-Jazeera article that cites "media experts and Arab journalists." The article is available online at: https://www.aljazeera.com/news/2023/10/29/western-coverage-of-israels-war-on-gaza-bias-or-unprofessionalism.

These critics also believe Western news outlets are leaving out "vital historical context of the trauma Palestinians have been through for the past 75 years," according to Al-Jazeera. The Council on Foreign Relations (CFR), a nonpartisan, independent organization that researches and publishes issues on foreign affairs, summarized the history of the Israeli-Palestinian conflict in a post on its website after the Israel-Hamas war began. It described the inception of the conflict as follows: "The Israeli-Palestinian conflict dates back to the end of the nineteenth century. In 1947, the United Nations adopted Resolution 181, known as the Partition Plan, which sought to divide the British Mandate of Palestine into Arab and Jewish states. On May 14, 1948, the State of Israel was created, sparking the first Arab-Israeli War. The war ended in 1949 with Israel's victory, but 750,000 Palestinians were displaced, and the territory was divided into 3 parts: the State of Israel, the West Bank (of the Jordan River), and the Gaza Strip." The post goes on to recount other violent conflicts over the ensuing decades, including the 1967 Six-Day War, after which "Israel gained territorial control over the Sinai Peninsula and Gaza Strip from Egypt; the West Bank and East Jerusalem from Jordan; and the Golan Heights from Syria." The CFR post is available online at: https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict. According to NBC News, in 2005, Israel withdrew Israeli settlers and military forces from Gaza before instituting "a land, air and sea blockade on Gaza" which has continued to the present. The NBC News article is available online at: https://www.nbcnews.com/news/gaza-strip-controls-s-know-rcna119405.

By contrast, the American Jewish Committee (AJC), an advocacy group founded in 1906, accuses "some major media outlets" of "feeding an unequivocally false narrative" that Hamas and Israel are morally equivalent: "Instead of focusing on Hamas' massacre of Israeli civilians, Israel's efforts to thwart terrorists, destroy terrorist headquarters or weapons sites, and prevent more civilian deaths, some major media outlets characterize Israel's targeted response to terror attacks as attacks on innocent and beleaguered Palestinians." The AJC statement is available online at: https://www.ajc.org/news/what-to-know-about-media-bias-in-coverage-of-hamas-attack-on-israel.

Many of the accusations of media bias point to the language that news outlets use in describing the Israel-Hamas war. For example, the AJC statement criticized the use of the word "militant" rather than "terrorist" when describing members of Hamas, pointing to reporting from *The New York Times* on Oct. 7, 2023, as an example of news organizations choosing not to write "terrorist." Conversely, the Al-Jazeera article claimed, without citing any specific examples, that "many Western media networks . . . echo American and Israeli talking points including Israel's 'right to defend' itself and Hamas using civilians in Gaza as 'human shields.'"

On Nov. 23, 2023, *The Guardian* described the plans for a temporary pause in the conflict to enable Hamas to free hostages in exchange for Israel releasing Palestinian prisoners. The article was initially published with the headline "The Hostages to Be Freed Are Women and Children, and the Palestinian Prisoners Are Also Women and People Aged 18 and Younger, Both Sides Have Confirmed." Many social media users quickly condemned the publication for calling hostages taken by Hamas "children" while calling Palestinians imprisoned by Israel "people aged 18 and younger." *The Guardian* changed the headline the same day it was published and added a note at the end of the article reading, "This article was amended on 23 November 2023 because an earlier version referred to the Palestinian prisoners to be released as 'women and people aged 18 and younger.' That was changed to 'women and children.' Any insensitivity in the earlier expression was unintentional. To clarify: of those on the list of 300 prisoners potentially to be released, 32 are women aged 18-59; and the rest are mostly teenage boys, 124 of whom are under the age of 18 (the United Nations' definition of a child), including a girl of 15." *The Guardian* article is available online at: https://www.theguardian.com/world/2023/nov/23/israel-hamas-ceasefire-and-hostage-deal-wont-happen-before-friday-israeli-officials-say?CMP=twt_b-gdnnews. One thread on X, which

Israel-Hamas, *continued on page 6*

Israel-Hamas, *continued from page 5*

shows a sample of the response on social media, is available online at: https://twitter.com/muhammadshehad2/status/1727970159569035544.

The *AP Stylebook*, produced by the *Associated Press* (*AP*), recently created an "Israel-Hamas Topical Guide" (the Guide). Many news outlets and other publications adhere to the *AP Stylebook* rules or incorporate it into their own style guides. (The Silha *Bulletin* generally follows the *AP Stylebook*.) The Guide advises journalists on how they should cover the Israel-Hamas war. "When approaching the 75-year Israeli-Arab and Israeli-Palestinian conflict, it is important to understand the deep wells of anger, hurt, bitterness and grievance built up over generations among Israelis and Palestinians who have lived with insecurity and conflict their whole lives, and who have seen many attempts at negotiation and mediation fail," the Guide states. It urges journalists to "[a]void stereotyping, discuss nuance, and in broad ways maintain a balanced perspective." The Guide is available online at: https://perma.cc/BZ7A-67R3.

The Guide also includes recommendations for specific language journalists should use. Regarding the current conflict, the Guide calls it "*the latest war between Israel and Hamas*, *the latest Israel-Hamas war* or simply *the Israel-Hamas war* if the context makes clear that the reference is not to a previous war." It chose to use the term "war" because of "the high number of casualties, the mobilization of armies, the organized, cross-border fighting and bombardments, and Israel's declaration of war and announcement that Gaza will be under siege." The Guide says not to use "*Israel-Palestinian war* or *Gaza war*."

The Guide generally recommends avoiding the use of "terrorist" or "terrorism," explaining that the terms "have become politicized, and often are applied inconsistently." Instead, the Guide argues that "detailing what happened is more precise and better serves audiences." The Guide notes that *AP* continues to use these terms when quoting sources verbatim, and "in broad references to terrorism as a threat and *anti-terrorism efforts*, *fear of terror*, etc." According to the Guide, *AP* uses "militant" or "militants" to refer to Hamas. It also says, "*Hamas fighters*, *attackers or combatants* are also acceptable depending on the context" but advises against using "the term Hamas *soldiers* or Hamas *resistance*, other than in direct quotations." For Israel's military, the Guide states, "The *Israeli army* has soldiers. It also can be called the *Israeli military*. Use its official name, *Israel Defense Forces*, and the acronym *IDF* only in direct quotations." The Guide lists several other terms and provides additional tips.

According to Voice of America (VOA), *AP* has avoided using the terms "terrorist" or "terrorism" since the 1990s, but internally deliberated whether to change that policy in the wake of the Oct. 7, 2023, Hamas attack. Ultimately, *AP* stuck to its longstanding practice. John Daniszewski, the *AP*'s vice president for standards, told VOA: "This particular word is so vague and so loaded that different people will disagree about who is a terrorist and who is not." The VOA article then notes, "VOA does describe the October 7 raid as a terrorist attack. The U.S. government has designated Hamas as a terrorist group." The VOA article is available online at: https://www.voanews.com/a/why-news-outlets-are-avoiding-terrorist-labels-in-israel-hamas-war-/7344135.html. (According to its website, "VOA is part of the U.S. Agency for Global Media (USAGM), the government agency that oversees all non-military, U.S. international broadcasting. It is funded by the U.S. Congress." The website notes that a statutory "firewall prohibits interference by any U.S. government official in the objective, independent reporting of news, thereby safeguarding the ability of our journalists to develop content that reflects the highest professional standards of journalism, free of political interference." This information is available online at: https://www.insidevoa.com/p/5831.html.)

Other terms that have become part of the conversation on reporting on the Israel-Hamas war are "genocide" and "apartheid." According to a Nov. 11, 2023, article from *The Times of Israel*, "[o]ver 750 former and current journalists around the world have signed a petition calling on the media to begin using terms such as 'genocide' and 'apartheid' to describe Israel's actions in the conflict with the Palestinians, while blasting international media coverage of the Israel-Hamas war." The *Times of Israel* article is available online at: https://www.timesofisrael.com/750-global-journalists-say-media-should-cast-israeli-actions-as-genocide-apartheid. The Nov. 9, 2023, petition cites a statement from the United Nations (U.N.) which reads in part, "Time is running out to prevent genocide and humanitarian catastrophe in Gaza." The U.N. statement is available online at: https://www.un.org/unispal/document/gaza-is-running-out-of-time-un-experts-warn-demanding-a-ceasefire-to-prevent-genocide. The petition states, "We are renewing the call for journalists to tell the full truth without fear or favor. To use precise terms that are well-defined by international human rights organizations, including 'apartheid,' 'ethnic cleansing' and 'genocide.' To recognize that contorting our words to hide evidence of war crimes or Israel's oppression of Palestinians is journalistic malpractice and an abdication of moral clarity." The petition specifically "condemn[s] Israel's killing of journalists in Gaza" while also mentioning that four Israeli journalists were killed in the Oct. 7, 2023, Hamas attack. According to *The Times of Israel*, some of the journalists who signed the petition work for prominent news outlets, including *Reuters*, the *Los Angeles Times*, *The Boston Globe*, *The Guardian*, and *The Washington Post*. The petition is available online at: https://www.protect-journalists.com. (*The Times of Israel* is an online newspaper based in Jerusalem. Its website states that it "has no partisan political affiliation. It seeks to present the news fair-mindedly and offers a wide range of analysis and opinion pieces." More information about *The Times of Israel* is available online at: https://www.timesofisrael.com/about.)

Several journalists around the world have been fired for their comments on the Israel-Hamas conflict. According to an Oct. 25, 2023, *Newsweek* article, at least two American journalists had been fired by that time: "Jackson Frank, a sports writer for Philadelphia local news outlet PhillyVoice, and Michael Eisen, editor-in-chief of life sciences academic journal eLife." Frank, in a since deleted post, responded to an Oct. 8, 2023, statement by the Philadelphia 76ers condemning the Oct. 7, 2023, Hamas attack: "This post sucks! Solidarity with Palestine always." Eisen shared a satirical article from

The Onion on X with the headline "Dying Gazans Criticized For Not Using Last Words To Condemn Hamas." Eisen wrote in the post, "The Onion speaks with more courage, insight and moral clarity than the leaders of every academic institution put together. I wish there were a @TheOnion university." *Newsweek* reported that Eisen "is Jewish and has Israeli family members." The *Newsweek* article is available online at: https://www.newsweek.com/full-list-reporters-fired-pro-palestinian-remarks-1837834. Eisen's post on X is available online at: https://twitter.com/mbeisen/status/1712947590294306976.

On Nov. 30, 2023, MSNBC announced its decision to cancel Mehdi Hasan's Sunday night segment. The change was "part of a broader restructuring of the network's weekend lineup" that MSNBC claimed was "made with 2024 election coverage in mind," according to *The Washington Post*. After the announcement, however, "fans and prominent liberals questioned whether Hasan, one of the few Muslim hosts in cable news, was being penalized for his criticism of the Israeli government's actions in Gaza and strong support for the Palestinian people." For example, Rep. Ro Khanna (D-Calif.) wrote on X, "It is bad optics for MSNBC to cancel @mehdirhasan's show right at a time when he is vocal for human rights in Gaza with the war ongoing. As a strong supporter of free speech, MSNBC owes the public an explanation for this decision. Why would they choose to do this now?" Rep. Khanna's post is available online at: https://twitter.com/RoKhanna/status/1730280918638584282. According to the *Post*, "Hasan will remain with the network as an analyst and fill-in host," and "his time segment will be absorbed by fellow host Ayman Mohyeldin — who has also gone viral for segments about the conflict in Gaza and Israel." MSNBC and Hasan have not commented on the decision to cancel Hasan's show. An anonymous source "close to the situation" "said the decision was unrelated to his commentary about Israel and Gaza." The November 30 *Washington Post* article is available online at: https://www.washingtonpost.com/style/media/2023/11/30/mehdi-hasan-show-canceled-backlash-msnbc.

On Dec. 4, 2023, *Washington Post* columnist Perry Bacon Jr. wrote that the decision to cancel Hasan's show was "the latest in a series of recent moves by MSNBC that are pushing the network in the direction of being the television arm of the Democratic Party leadership, as opposed to a news outlet that upholds left-wing values and perspectives." Bacon argued that MSNBC "should reverse its decision on Hasan and make clear that it embraces progressive criticism of President Biden and other Democratic leaders." Although he acknowledged that "other MSNBC hosts, most notably Chris Hayes, have been critical of Israel's bombing of Gaza" and that Mohyeldin would be filling Hasan's former time block, Bacon surmised, "I doubt this decision was driven only by ratings and revenue. A one-hour show on Sunday night hosted by Hasan isn't a major cost for a big network such as MSNBC. The revenue and reputation of cable news networks are determined largely by their early-morning and prime-time shows on weekdays." Bacon's column is available online at: https://www.washingtonpost.com/opinions/2023/12/04/msnbc-bring-back-mehdi-hasan-show.

Protests Associated with the War Raise Questions About Freedom of Speech

The latest Israel-Hamas war has sparked protests around the world, including throughout the United States. The domestic protests have raised questions about freedom of speech, particularly in the context of protests on college campuses. These protests have highlighted sharp divides between younger and older Americans, Republicans and Democrats, and white people and people of color. A Gallup poll published on Nov. 30, 2023, highlights the divides between these groups and is available online at: https://news.gallup.com/poll/545045/americans-back-israel-military-action-gaza.aspx

These dynamics have played out in protests related to the war. According to *The Washington Post*, "In the 10 days following Hamas's attack, the Crowd Counting Consortium (CCC), an academic project tracking and sharing data on protests across the United States, tracked more than 400 U.S. vigils, rallies and protests in response to the war. Roughly 270 of those events were focused on backing Israel, while nearly 200 were in support of Palestinians." The Oct. 18, 2023, *Washington Post* article is available online at: https://www.washingtonpost.com/dc-md-va/2023/10/18/dc-protest-israel-gaza-ceasefire-jewish. However, according to a Nov. 21, 2023, *Los Angeles Times* article also citing CCC data, there had been more than 2,000 demonstrations in the U.S. with "nearly three times as many pro-Palestinian events as pro-Israeli ones. Demonstrations have decried the cross-border attack and called for release of Hamas-held hostages, a cease-fire and an end to Israeli blockades or occupation of Palestinian territories." The *Los Angeles Times* article is available online at: https://www.latimes.com/world-nation/story/2023-11-21/pro-palestinian-israeli-protests.

Many of these protests, demonstrations, and statements have taken place on college campuses. At Harvard, on Oct. 7, 2023, "dozens of student groups signed onto a letter from the Harvard Palestine Solidarity Committee (PSC) on Oct. 7 — the day Hamas launched its surprise attack on Israel — holding Israel 'entirely responsible for all unfolding violence,'" according to NPR. After the letter was publicized, it received "widespread backlash from students, faculty, high-profile alumni, politicians, and even Harvard's president." Many of the signatory groups recanted their support. Some students who were part of signatory groups have been "doxxed," meaning their personal information has been posted to the internet. The NPR article is available online at: https://www.npr.org/2023/10/14/1205809697/israel-gaza-college-campus-protests-statements. According to *The Harvard Crimson* (*The Crimson*), the student newspaper at Harvard, PSC's original statement "did not explicitly condemn violence against Israeli civilians, though a spokesperson for the group later wrote in a statement that 'the PSC staunchly opposes violence against civilians — Palestinian, Israeli, or other.'" Amid the backlash and doxxing, all remaining signatory groups were removed from the statement: "'For student safety, the names of all original signing organizations have been concealed at this time,' a footnote on the current statement reads." A PSC vigil, scheduled for Oct. 10, 2023, "to mourn 'all civilian lives lost'" was "postponed 'due to credible safety concerns and threats against student security,'" according to PSC. The Oct. 11, 2023, article from *The Crimson*

Israel-Hamas, *continued on page 8*

Israel-Hamas, *continued from page 7*

is available online at: https://www.thecrimson.com/article/2023/10/11/student-groups-withdraw-israel-statement. According to *The Crimson*, a PSC vigil was held on Nov. 29, 2023. No violence or safety hazards were reported. The Nov. 30, 2023, article from *The Crimson* is available online at: https://www.thecrimson.com/article/2023/11/30/psc-vigil-vermont-shooting.

On Oct. 27, 2023, after a rally at the Massachusetts Institute of Technology (MIT) in Cambridge, Mass., "at which attendees reportedly chanted their support for an Intifada," the MIT Free Speech Alliance (the Alliance) issued a statement in response to inquiries from the Alliance's members and volunteers. The statement reads: "The protection of free speech is most vital when the speech is extremely unpopular, highly controversial, distasteful, or even viewed as dangerous. Under governing Supreme Court precedents, decided decades ago, the vast majority of what we would describe as 'hate speech' is fully protected under the First Amendment. Of relevance to the current matter, the Supreme Court has set exacting definitions for when conduct crosses the line into actionable harassment, incitements to violence, and criminal threats. We do not discount the hurt, outrage, and even fear caused by these recent remarks. However, the thresholds at which this speech would lose its protection do not appear to have been met by these events on campus, and MIT would violate the speakers' rights by sanctioning them. It must not do so." It goes on to note that "MIT is a private institution, and thus not bound by the First Amendment," but argues that MIT should respect principles of free expression. Text following the statement clarifies that "[t]he MIT Free Speech Alliance is independent of the Massachusetts Institute of Technology" and "is a nonprofit 501(c)(3) organization founded, staffed and supported by MIT alumni." The statement is available online at: https://mitfreespeech.org/news_manager.php?page=33745. (According to Britannica, "intifada" refers to "either of two popular uprisings of Palestinians in the West Bank and Gaza Strip aimed at ending Israel's occupation of those territories and creating an independent Palestinian state." More information is available from Britannica online at: https://www.britannica.com/topic/intifada.)

On Nov. 11, 2023, the *Associated Press* (*AP*) reported on various punishments meted out that related to college campus demonstrations. At MIT, students occupied a building on campus "during a pro-Palestinian demonstration," and some did not leave after being warned they may be subject to suspension. Those that did not leave were subject to suspension "from non-academic campus activities," according to MIT President Sally Kornbluth.

> "The First Amendment provides broad protections to offensive, repugnant, and hateful expression. Retaliations against hate speech . . . can be used to suppress speech when the government disagrees with it."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

"It was far from the only disruption at college campuses in recent days over the war," the *AP* article noted. "Seven people were arrested at a demonstration on [Nov. 10, 2023] at Brandeis University, which this week banned a pro-Palestinian student group, while nearly two dozen students were arrested over a protest at Brown University. On [Nov. 10, 2023], Columbia University announced it was suspending Students for Justice in Palestine and Jewish Voice for Peace as official student groups through the end of the term. It accused both of repeatedly violating campus policies including an unauthorized event [on Nov. 9, 2023]." The *AP* article is available online at: https://apnews.com/article/mit-brown-brandeis-israel-palestinian-hamas-protests-97062792441e93f0a767b6f2f8b16633.

According to the Minneapolis *Star Tribune*, "Days after Hamas militants crossed into Israel and slaughtered Jewish civilians, interim University of Minnesota President Jeff Ettinger issued a statement condemning the [Oct. 7, 2023] attack and lamenting 'the countless innocent civilians who have lost their lives, been injured, or are being held captive.'" In response, 750 faculty and staff members "signed an open letter crafted a few days later, noting years of Palestinian suffering and citing thousands of Palestinian deaths in the war," and "called for an apology." The Nov. 4, 2023, *Star Tribune* article is available online at: https://www.startribune.com/tensions-on-minnesota-campuses-rise-as-colleges-and-universities-grapple-with-the-israel-hamas-war/600317258. The Oct. 14, 2023, letter from faculty and staff "mourn[ed] civilian deaths both in Israel and Palestine," but claimed "Ettinger's statements . . . have presented a one-sided perspective showing solidarity and concern only for Israel with no acknowledgment of the ongoing and historical suffering and death of Palestinians." The open letter is available online at: https://agitatejournal.org/the-university-of-minnesota-faculty-statement-in-solidarity-with-the-people-of-palestine.

On Nov. 10, 2023, Silha Center Director and Professor of Media Ethics and Law Jane Kirtley delivered a keynote speech entitled "'Setting Fire to Reason': Why the First Amendment Protects Hate Speech." The speech was part of a conference sponsored by the University of Minnesota's Hubbard School of Journalism and Mass Communication called "Balanced Reporting in Divisive Times." Kirtley started her speech by acknowledging the Israel-Hamas war and its impact on Jewish and Muslim Americans. "The Wall Street Journal had reported that Jewish and Muslim Americans have experienced a surge in harassment, intimidation, and assault since October 7," she said. "The Anti-Defamation League reported 312 antisemitic incidents in the two weeks following the attack, which was a 388% increase over the same period in 2022. The Council on American-Islamic Relations received 774 complaints up about 200% from a typical two-week period in 2022." Kirtley said that in this context "it is perhaps understandable that we see calls for censorship and for censure," but ultimately concluded, "My view is censorship and censure [are] never

the best solution when we're dealing with speech that we find disturbing and uncomfortable. And I think in most instances, it's a solution that simply is not compatible with the First Amendment."

Kirtley clarified that "hate crimes" and "hate speech" are "not the same thing" under United States law. An individual who commits a crime, "like trespassing or destroying somebody's property," may have their penalty enhanced "if it's shown that it's been motivated by hate as defined under the statute, but the speech itself is not criminal." She continued, "The First Amendment provides broad protection to offensive, repugnant, and hateful expression." After summarizing these standards and relevant First Amendment jurisprudence, Kirtley cautioned that criminalizing hate speech would enable the government to determine what constitutes hate speech: "Retaliations against hate speech . . . can be used to suppress speech when the government disagrees with it." She alluded to changes in government over the past four to eight years to underscore that individuals may not always agree with the government's perceptions on what constitutes hateful rhetoric. A recording of her speech is available online at: https://www.youtube.com/watch?v=MFMewKdoB30.

In a Nov. 10, 2023, *Washington Post* column titled "Another Casualty of War: Free Speech on Campus," columnist Fareed Zakaria argued that official university responses to the Israel-Hamas war threaten free speech. Zakaria condemned the Oct. 7, 2023, Hamas attack but wrote "it is better to hear those you violently disagree with than to ban or silence them." Zakaria criticized Florida Gov. Ron DeSantis for "directing Florida State University's chancellor to close down campus chapters of Students for Justice in Palestine." Zakaria continued, "DeSantis accused the group of giving 'material support to terrorism' — though, as far as I can tell, these groups have only organized protests and rallies." Zakaria said the pressure for universities to respond to controversy is a recent problem that was not present with other major moments in history, including the 1967 Civil Rights Movement or during the Iraq War. But according to Zakaria, "We are now in a different world. In recent years, the pressure on universities to take political positions has grown. A turning point might have been the murder of George Floyd, when many institutions decided to demonstrate their sensitivity and issue statements. Once they took a stand on one political issue, it is perfectly understandable that they have been asked to also condemn Hamas's attack last month. But where will it end? A Pandora's box has been opened." Zakaria's column is available online at: https://www.washingtonpost.com/opinions/2023/11/10/free-speech-campus-casualty-israel-gaza.

> "[I]t is better to hear those you violently disagree with than to ban or silence them."
>
> **— Fareed Zakaria, *Washington Post* columnist**

Questions of student free speech related to the Israel-Hamas war have not been limited to colleges and universities. On Oct. 25, 2023, Edina High School students staged a "Walkout for Palestine." According to KARE 11, two Muslim students were suspended for chanting a controversial phrase: "From the river to the sea, Palestine will be free." The students have filed a complaint with the U.S. Department of Education's Office of Civil Rights. In a Nov. 27, 2023, news conference held by the Council on American-Islamic Relations, their attorney Bruce Nestor said, "That is a slogan that is used by elected representatives here in the United States, it is used by hundreds of thousands of demonstrators in support of the aspirations of the Palestinian people for freedom." The KARE 11 story is available online at: https://www.kare11.com/article/news/local/breaking-the-news/complaint-filed-against-edina-schools-after-muslim-students-suspended-for-pro-palestinian-chant/89-8e3bf539-eec8-4456-831d-45f6ccc236d8. The Anti-Defamation League (ADL), a New York-based international Jewish non-governmental organization and advocacy group founded in 1913, considers the phrase to be antisemitic and wrote in an Oct. 26, 2023, statement, "It is fundamentally a call for a Palestinian state extending from the Jordan River to the Mediterranean Sea, territory that includes the State of Israel, which would mean the dismantling of the Jewish state." The ADL statement is available online at: https://www.adl.org/resources/backgrounder/allegation-river-sea-palestine-will-be-free.

Edina Public Schools sent a statement to KARE 11 reading, in part, "Edina Public Schools is aware that there has been threatened legal action against the District related to recent student walkouts that have occurred on District property. The District would like to affirm its unwavering support for students' First Amendment right to free expression and to peacefully advocate for causes that are important to them. Similarly, the District has strong policies prohibiting any type of discrimination against students based on their religion or any other basis protected under the Minnesota Human Rights Act." The statement noted that Edina Public Schools "cannot comment on any particular students or allegations as that information would be considered private data protected by the Minnesota Government Data Practices Act (MGDPA) and the Family Educational Rights and Privacy Act (FERPA)."

Misinformation Spreads Rapidly as the War Unfolds

Throughout the latest Israel-Hamas war, misinformation has proliferated on the Internet and social media. "While plenty of real imagery and accounts of the ensuing carnage have emerged, they have been intermingled with users pushing false claims and misrepresenting videos from other events," the *Associated Press* (*AP*) reported on Oct. 30, 2023. The *AP* article is available online at: https://apnews.com/article/israel-hamas-gaza-misinformation-fact-check-e58f9ab8696309305c3ea2bfb269258e.

NewsGuard, an organization which says it "provides transparent tools to counter misinformation for readers, brands, and democracies," has "identified 61 myths spreading across social media, and identified 214 sites spreading those myths." According to NewsGuard, "social media accounts and sites on both sides of the conflict have spread manipulated

Israel-Hamas, *continued on page 10*

Israel-Hamas, *continued from page 9*

or AI generated images or video as real, and taken war footage out of context. In October, a NewsGuard analysis found that 74% of the most viral misinformation about the war on X (formerly Twitter) was published by 'verified,' blue-check accounts." More information on the misinformation that NewsGuard is tracking is available online at: https://www.newsguardtech.com/special-reports/israel-hamas-war-misinformation-tracking-center.

In the October 30 article, *AP* addressed and debunked some of the misinformation on social media. For example, "users have shared false claims that a top Israeli commander had been kidnapped, circulated a false video imitating a BBC News report, and pushed old and unrelated clips of Russian President Vladimir Putin with inaccurate English captions." Other false claims included videos purporting to show a Palestinian "crisis actor" which in fact showed two different people, a video purporting to show United States Marines landing in Israel, a claim that a mosque in Iran raised a flag to call Muslims to war, and a claim that the Israeli military confirmed in a Facebook post that it bombed a hospital in Gaza because it lacked medical equipment and staff. The *AP* article provides further assessment of each false claim.

The misinformation has contributed to the divisive nature of the Israel-Hamas war, playing on people's emotions and distorting the truth. In a blog post, Todd C. Helmus and William Marcellino, senior behavioral scientists at the Pardee RAND Graduate School, argued that much of the misinformation is a calculated effort by interested groups on each side of the war. The blog post is available online at: https://www.rand.org/pubs/commentary/2023/10/lies-misinformation-play-key-role-in-israel-hamas-fight.html. To underscore their argument, Helmus and Marcellino pointed to the Al-Ahli Arab Hospital explosion in Gaza on Oct. 17, 2023: "Hamas quickly blamed the Israelis, and the Israelis quickly blamed Hamas. Israel even released a video purporting to prove the strike was a result of a malfunctioning Palestinian rocket only for the New York Times to discredit the video based on analysis of the video's time stamp. False assertions flew on the internet from deep benches of supporters. Evidence now seems increasingly in favor of a failed Palestinian rocket, but it was obvious that few waited to confirm facts." According to a Nov. 26, 2023, post from Human Rights Watch, the explosion "resulted from an apparent rocket-propelled munition, such as those commonly used by Palestinian armed groups, that hit the hospital grounds. . . . While misfires are frequent, further investigation is needed to determine who launched the apparent rocket and whether the laws of war were violated." The Human Rights Watch post is available online at: https://www.hrw.org/news/2023/11/26/gaza-findings-october-17-al-ahli-hospital-explosion.

For outside observers of the Israel-Hamas war, it can be difficult to ascertain what is true and what is false. The News Literacy Project (NLP) provides the following advice on its website: "1. Analyze what kind of information you encounter and be cautious about what you share," "2. Be aware that misinformation often flourishes during breaking news events," and "3. Seek credible news sources." (According to its website, NLP is "a nonpartisan education nonprofit, [that] is building a national movement to advance the practice of news literacy throughout American society, creating better informed, more engaged and more empowered individuals — and ultimately a stronger democracy." NLP's tips for sorting through misinformation are available online at: https://newslit.org/navigating-misinformation-in-the-israel-hamas-war.)

— Ryan Liston
Silha *Bulletin* Editor
— Elaine Hargrove
Silha Center Staff

The Silha Center for the Study of Media Ethics and Law was established in 1984 with an endowment from Otto and Helen Silha. Located in the Hubbard School of Journalism and Mass Communication at the University of Minnesota, Twin Cities, the Silha Center is the vanguard of the School's interest in the ethical responsibilities and legal rights of the mass media in a democratic society.

The Silha Center focuses on the concepts and values that define the highest ideals of American journalism: freedom and fairness. It honors the importance of these ideals by examining their theoretical and practical applications and by recognizing the interdependence of ethical and legal principles.

Former U.S. Supreme Court Justice Sandra Day O'Connor Passes Away

On Dec. 1, 2023, former U.S. Supreme Court Associate Justice Sandra Day O'Connor died of complications related to advanced dementia. Justice O'Connor, who was 93 years old, was known for her pragmatic and moderate approach to constitutional issues. In her time on the court, Justice O'Connor played a crucial role in shaping the Court's First Amendment jurisprudence and wrote landmark opinions on Copyright and Fourth Amendment protections.

U.S. SUPREME COURT

On Sept. 21, 1981, O'Connor became the first female Supreme Court Justice. Appointed by President Ronald Reagan, Justice O'Connor served on the Court for 24 years, retiring on Jan. 21, 2006. During her retirement, Justice O'Connor continued to advocate for judicial independence and the Rule of Law. In 2009, she was awarded the Presidential Medal of Freedom by President Barack Obama in recognition of her accomplishments.

In her time on the Court, Justice O'Connor wrote over fifty opinions involving First Amendment freedom of speech issues. Many of her influential opinions involve content-based speech restrictions. Justice O'Connor wrote the unanimous decision in *Simon & Schuster Inc. v. Members of New York State Crime Victims Board*. The case dealt with New York's 1977 "Son of Sam" law, which aimed to prevent criminals from profiting off crime by selling their stories. The law required proceeds from book deals go to an escrow account for victims. Justice O'Connor wrote that in passing the law, "New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income." Justice O'Connor concluded that the law amounted to a content-based restriction on speech. Although acknowledging the State's interest in compensating crime victims, the Court found that the law was overly broad and encompassed a wide range of expression beyond the criminal's direct story. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/502/105/. *Simon & Schuster Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991)

In *Virginia v. Black*, the Court evaluated the constitutionality of a Virginia statute that prohibited the burning of a cross with the intent to intimidate individuals or groups. Justice O'Connor wrote the plurality opinion, upholding the statute based on the government's interest in preventing true threats. However, O'Connor emphasized the importance of considering the intent of the expression and invalidated a provision that treated any cross burning as evidence of intent to intimidate. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/538/343/. Kent Willis, the Executive Director of the American Civil Liberties Union (ACLU) of Virginia at the time, commented: "We are pleased that the court reaffirmed free speech by making it clear that cross-burning, when it is not used as a direct threat, is protected by the Constitution." The statement is available online at: https://www.aclu.org/press-releases/us-supreme-court-upholds-va-cross-burning-ban-sends-law-back-state-court-refinement. *Virginia v. Black*, 538 U.S. 343 (2003)

> "While in the majority of nonpolitical cases [O'Connor] rules against individual rights to free speech, in the majority of political expression cases she ruled in favor of individual rights to free speech."
>
> **— Robyn Goodman, Alfred University Professor of Communications**

Justice O'Connor's jurisprudence reflects the viewpoint that the primary aim of the First Amendment is to protect political speech. In an analysis of her 12 years on the bench, Robyn Goodman, Professor of Communication Studies at Alfred University, noted that Justice O'Connor protected political speech more than nonpolitical speech: "While in the majority of nonpolitical cases she rules against individual rights to free speech, in the majority of political expression cases she ruled in favor of individual rights to free speech." Goodman's article, "Supreme Court Justice Sandra Day O'Connor's First Amendment Approach to Free Expression: A Decade of Review," was published in *Communications and the Law* Volume 15, Issue 4, in December 1993. It is available online at: https://perma.cc/U4B6-PDVE.

Justice O'Connor's support for political expression was strongest in cases involving the press. In *Philadelphia Newspapers Inc. v. Hepps*, the Court addressed the burden of proof in defamation cases involving public figures. In the case, Maurice Hepps, the principal stockholder of a large corporation, sued after a Philadelphia newspaper published a series of articles accusing him of having connections to organized crime. In a 5 to 4 decision by Justice O'Connor, the Court held that the burden rested on Hepps to prove the falsity of the statements, reasoning that requiring the press to prove the truth of each statement would impose a significant burden and chill speech. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/475/767/. *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986)

In an article for the *Texas Wesleyan Law Review* published on March 1, 2010, Emily Buchanan Buckles argued that Justice O'Connor was most influential in shaping the Court's public forum doctrine. Shortly after joining the bench, Justice O'Connor supplied the fifth vote in *Perry Education Association v. Perry Local Educators' Association*. The majority opinion in *Perry*, written by Justice Byron White, defined three categories of government property for purposes of expression: 1) traditional public forums, where restrictions on speech are highly suspect; 2) limited public forums, where reasonable restrictions on speech may be allowed with a compelling state interest; and 3) nonpublic forums, which the government may reserve for certain

O'Connor, *continued on page 12*

O'Connor, *continued from page 11*

purposes. Justice White's full opinion is available online at: https://supreme.justia.com/cases/federal/us/460/37/. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)

Justice O'Connor went on to write the majority opinion in *Cornelius v. NAACP Legal Defense Fund*, which, as Buckles notes, "introduced the concept that the forum need not be a physical place." Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/473/788/. Emily Buchanan Buckles' article is available online at: https://scholarship.law.tamu.edu/txwes-lr/vol16/iss3/2/. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788 (1985)

In addition to her impact on free speech issues, Justice O'Connor's jurisprudence was influential in cases involving the Establishment Clause of the First Amendment. Justice O'Connor introduced the "Endorsement Test" to determine whether government actions run afoul of the Establishment Clause by endorsing a religion. In *Lynch v. Donnelly*, the Court was asked to determine whether a city Christmas display in a shopping district violated the Establishment Clause. In a 5 to 4 decision authored by then-Chief Justice Warren Burger, the Court found that the display was not unconstitutional because it was not a purposeful effort to advocate for a particular religion. Justice O'Connor wrote a concurring opinion to suggest a clarification to the Establishment Clause doctrine. Under Justice O'Connor's proposed "Endorsement Test," courts must examine 1) what the government *intends* to communicate and 2) what message is *actually* conveyed. If a government either intends to endorse or disapprove of a religion, or in fact conveys a message of endorsement or disapproval, the Establishment Clause is violated. This test is frequently used in lower courts. Chief Justice Burger's opinion and Justice O'Connor's concurring opinion are available online at: https://supreme.justia.com/cases/federal/us/465/668/. *Lynch v. Donnelly*, 465 U.S. 668 (1984)

Justice O'Connor also provided the swing vote in *McCreary County v. American Civil Liberties Union of Kentucky*, which held that the display of the Ten Commandments at Kentucky courthouses violated the Establishment Clause. In her concurring opinion, Justice O'Connor defended the separation of church and state. "At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish," Justice O'Connor wrote. "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" Justice O'Connor's full concurring opinion is available online at: https://supreme.justia.com/cases/federal/us/545/844/. *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844 (2005)

Regarding copyright, Justice O'Connor authored the majority opinion in the landmark case *Feist Publications, Inc. v. Rural Telephone Service Co.* In this case, Rural Telephone Service Co., a local telephone company, sued Feist Publications for publishing an area-wide telephone directory using listings from Rural's local directory. The question before the Court was whether a compilation of facts (such as a telephone directory) is eligible for copyright protection when there is no originality in the selection or arrangement of those facts. In a unanimous opinion, Justice O'Connor emphasized that originality is a constitutional requirement for copyrightable works and that Rural's directory did not meet the requisite originality. She reasoned that Rural had not "selected, coordinated, or arranged" the facts held in its directory in any original way. In doing so, the Court rejected the "sweat of the brow" doctrine, which provided copyright protection on the basis of the effort and labor expended by authors. Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/499/340/#tab-opinion-1958569. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)

In an article written for the *Houston Law Review*, Craig Joyce and Tyler Trent Ochoa praised *Feist* as "among the greatest opinions in all of U.S. copyright history." They note that Justice O'Connor grounded the opinion in the constitutional text of the Copyright Clause and "firmly reinvigorated a standard for originality that has proven durable [and] flexible[.]" The article is available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607953.

Justice O'Connor also authored an important Fourth Amendment case, *Florida v. Bostick*. While riding on a Miami-to-Atlanta bus, Terrance Bostick was questioned by two Broward County (Fla.) Sheriff's Department officers who asked to search his belongings. With Bostick's permission, the officers conducted the search, found cocaine, and arrested Bostick. The Florida Supreme Court found that the search was *per se* unconstitutional because the officers did not allow passengers to leave the bus to avoid questioning. On appeal, the question before the Supreme Court was whether random bus searches with passengers' consent were *per se* violations of the Fourth Amendment's protection against unreasonable searches and seizures. In a 6 to 3 decision, the Court found no Fourth Amendment violations in Bostick's encounter with law enforcement. Justice O'Connor reasoned that the critical factor was the voluntariness of the encounter. Instead of looking at whether an individual feels "free to leave," Justice O'Connor wrote that the "more appropriate inquiry is whether a reasonable passenger would feel free to decline the officers' request or otherwise terminate the encounter." Justice O'Connor's full opinion is available online at: https://supreme.justia.com/cases/federal/us/501/429/. *Florida v. Bostick*, 501 U.S. 429 (1991)

The *Bostick* decision faced harsh criticism from racial justice advocates and opponents of the War on Drugs. David Cole, National Legal Director of the ACLU, critiques the case in his book *No Equal Justice*. Cole states that the reasonable person described in the *Bostick* opinion is "patently fictional" and mischaracterizes how most individuals would act in Bostick's position, with officers "standing over him, blocking his exit, displaying badges and a gun, and directing questions at him[.]" Cole argues that the Court's standard "allows the police to engage in substantial coercion under the rubric of 'consent[.]'" Cole also highlights how the standard can further exacerbate racial disparities in searches and seizures: "[A]lthough

the doctrine leaves the police free to target whomever they please, the targets will not be random; by and large they will be young black men." An excerpt from *No Equal Justice* is available online at: https://z.umn.edu/NoEqualJusticeBostickquote.

Throughout her time on the court, Justice O'Connor was the deciding vote in many important decisions involving affirmative action (*Grutter v. Bollinger*, 539 U.S. 306 (2003)), environmental protections (*Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004)), abortion (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)), voting rights and campaign finance (*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996)), disability rights (*Tennessee v. Lane*, 541 U.S. 509 (2004)), and more. (For more information regarding *McConnell v. Federal Election Commission*, see "In *FEC v. Wisconsin Right to Life*, Court Upholds As-Applied Challenge to McCain-Feingold Act in the Summer 2007 issue of the Silha *Bulletin*, and "U.S. Supreme Court Rules on Constitutionality of Bipartisan Campaign Reform Act" in the Fall 2003 issue.)

Justice O'Connor also provided the deciding vote in *Bush v. Gore*, the controversial case that settled a vote recount dispute between former President George W. Bush and former Vice President Al Gore in the 2000 presidential election. As votes were tallied on Nov. 8, 2000, it became clear that the election result would hinge on who won Florida's 25 electoral votes. The initial vote tally in Florida was close enough to trigger a recount and spark debates surrounding the process and deadlines for vote recounts. On Dec. 8, 2000, the Florida Supreme Court ordered a recount of the contested ballots. Four days later, on Dec. 12, 2000, the U.S. Supreme Court released a two-part *per curiam* opinion. First, in a 7 to 2 decision, the Court held that Florida's method for recounting ballots was unconstitutional under the Fourteenth Amendment. The Court reasoned that the Equal Protection Clause protected individuals from having their ballots devalued by "arbitrary and disparate treatment" and noted that the recount plan had no uniform standard. Next, in a 5 to 4 decision, the Court held that no other recount method could be decided and executed within the time limits imposed by U.S. election law. The decision stopped the Florida recounts and provided President Bush with the critical electoral votes to secure his presidency. *Bush v. Gore*, 531 U.S. 98 (2000)

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>
> **— Chief Justice John G. Roberts**

Reflecting on the case in 2013, O'Connor expressed uncertainty that the Court made the right decision in taking the highly political case. "It took the case and decided it at a time when it was still a big election issue," O'Connor told the *Chicago Tribune*. "Maybe the court should have said, 'We're not going to take it, goodbye.'" The *Chicago Tribune* article is available online at: https://www.chicagotribune.com/news/ct-xpm-2013-04-27-ct-met-sandra-day-oconnor-edit-board-20130427-story.html.

In May 1998, Justice O'Connor chaired the Ditchley Foundation's "The Media and the Law" conference in Oxfordshire, England. Silha Center Director and Professor of Media Ethics and Law Jane Kirtley, who was the Executive Director of the Reporters Committee at the time, worked with Justice O'Connor as one of the Group Rapporteurs. "She was incredibly gracious to me," Kirtley recalled. "She chaired the conference with her characteristic qualities of pragmatism and good humor, showing great insight about genuine issues regarding press freedom and competing interests." More information on the conference is available online at: https://www.ditchley.com/programme/past-events/1990-1999/1998/media-and-law.

Justice O'Connor modeled how to break glass ceilings with "courage, competence, and self-confidence," according to RonNell Anderson Jones, who served as one of Justice O'Connor's clerks and is currently the Lee E. Teitelbaum Chair in Law at the University of Utah. "Her truest gift to us wasn't that she broke every barrier. It was that she taught us how to keep breaking them," Anderson Jones stated. Her statement is available online at: https://www.americanbar.org/groups/litigation/resources/litigation-journal/2017-2022/impact-justice-sandra-day-o-connor/.

"A daughter of the American Southwest, Sandra Day O'Connor blazed a historic trail as our Nation's first female Justice," Chief Justice John G. Roberts, Jr. said in a statement on Dec. 1, 2023. "She met that challenge with undaunted determination, indisputable ability, and engaging candor." Chief Justice Roberts' statement is available online in a press release found at: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-01-23.

— Mallory Harrington
Silha Center Research Assistant

Small-Town Journalism Under Siege: Arrests of Alabama Reporter and Publisher Spark First Amendment Debate

A reporter and a newspaper publisher in Alabama caught up in small-town politics were arrested under allegations that an article they published revealed confidential grand jury evidence, eliciting anger from journalists and other First Amendment advocates.

ENDANGERED JOURNALISTS

On Friday, Oct. 27, 2023, newspaper publisher Sherry Digmon and reporter Don Fletcher of *Atmore News* in southwestern Alabama were arrested. The arrest stemmed from a story by Fletcher allegedly containing confidential information from grand jury documents. *Atmore News* is a weekly newspaper with a circulation of approximately 1,300 that serves Atmore, Ala., and the surrounding Escambia County area.

Fletcher had published an article in *Atmore News* on Oct. 25, 2023, reporting that Escambia County District Attorney Stephen Billy was investigating the Escambia County Board of Education's handling of federal COVID relief money. Billy's inquiry was announced during his remarks in support of outgoing Superintendent of Education Michele McClung on October 12. McClung's contract was not renewed, after a 4 to 3 vote. Billy had been an outspoken supporter of McClung. "I would normally not get involved with things of this nature, as far as an employment situation," he said. "But we discussed everything in a meeting recently that people in the communities have been hearing . . . that she was going to be indicted by a grand jury." He further criticized the contract non-renewal, referring to the decision as "Washington politics brought to Escambia County, Alabama." Fletcher's full article for *Atmore News* is available online at: https://z.umn.edu/AtmoreNewsCOVID.

Billy had previously expressed support for McClung, including in a September 21 letter, obtained by *The Washington Post*. "The fact is that Ms. McClung has the best interest of the children at heart and she has accomplished more in her short term than others have in years," he wrote. The full *Washington Post* article is available at: https://z.umn.edu/WaPoBillyLetter.

Billy stated that his office had opened an inquiry into the alleged impropriety of money paid to several board members through a federal COVID relief program. He confirmed to the *Atmore News* that McClung would not be a subject of the investigation.

> "[Digmon and Fletcher] should not be prosecuted for simply doing their jobs and covering a matter of local interest, such as the allocation of school board funds. Arresting them creates a chilling effect and is a gross misuse of taxpayer funds."
>
> **— Katherine Jacobsen**
> **CPJ's U.S. and Canada program coordinator**

The documents at issue were cited at the end of the article, where Fletcher referenced a subpoena issued by Billy on September 19 to the school district's current CFO and bookkeeper. The subpoena demanded copies of checks that were labeled "COVID" or "COVID BONUS" from 2020 to 2023.

Fletcher told *The Washington Post* that he obtained the court documents through an anonymous source who delivered them to the newspaper's office mailbox in late September. He claims that the materials included a copy of a grand jury subpoena served on two employees of the Escambia County School District.

The pair were arrested and subsequently charged by Billy with one count each of revealing grand jury evidence in the October 25 article. Police seized their phones and computers as part of the investigation. Both Digmon and Fletcher were released on $10,000 bonds. The source of the grand jury documents was allegedly Veronica "Ashley" Fore, the Escambia school system's payroll bookkeeper, who was also charged with revealing grand jury information.

Disclosing grand jury secrets is a felony under Alabama law. Ala. Code § 12-16-215. Conviction for this offense may result in imprisonment ranging from one to three years and a fine of up to $5,000. The full statute is available online at: https://z.umn.edu/Sec1216215. However, some legal precedent holds that a media outlet may publish leaked material from grand jury proceedings, as long they obtained it legally. According to the Freedom Forum, which describes itself as "a nonpartisan 501(c)(3)foundation dedicated to fostering First Amendment freedoms for all," "The government has never prosecuted a journalist for publishing leaked information. If it tried, they'd likely have to demonstrate 'direct, immediate and irreparable harm' caused by the publication." The information from Freedom Forum is available online at: https://www.freedomforum.org/leaks-and-the-media.

The arrests are further complicated because of Digmon's role as both the publisher for *Atmore News* and as a member of the Escambia County school board. Digmon voted for the removal of McClung at the October 12 meeting where Billy expressed his support for McClung and announced his investigation.

On the day of the arrests, *The Atmore Advance*, another newspaper serving Escambia County, published an article that included comments from Billy. He stood by the arrests, telling *The Atmore Advance* that publishing the grand jury information violated Alabama law. "All three of them, (including) [Ashley Fore], were all charged with the same thing. But, you just can't do that, and there's no reason for that. Innocent people get exposed, and it causes a lot of trouble for people," he said. Billy further alleged that the information Fletcher wrote in his October 25 story was incorrect,

specifically regarding the allegation that Billy mentioned the subpoena and the COVID checks at the October 12 meeting. *The Atmore Advance* asked Billy whether he believed that Fletcher and Digmon could be sued for libel if the statements in the article were false. "I think it's reckless to put that kind of information in name [*sic*], and base it as the subject of an ongoing investigation," Billy said. The full article is available online at: https://z.umn.edu/StephenBillyAtmoreAdvance.

First Amendment advocates and other press organizations were quick to criticize the arrests and Billy's choice to charge Digmon and Fletcher. "The First Amendment protects the right of newspapers to publish truthful speech about matters of public concern — basically categorically," said Jameel Jaffer, the executive director of the Knight First Amendment Institute at Columbia University. He told *The New York Times* that "[i]f the Nixon administration couldn't imprison journalists who printed the Pentagon Papers, [Billy] can't imprison journalists for writing stories about the Atmore, Alabama, school board."

Others were upset over the district attorney's choice to charge Digmon and Fletcher. "This idea of going after the messenger is a dangerous idea," said Anthony L. Fargo, director of the Center for International Media Law and Policy at Indiana University. "The press needs to do whatever it can to fight back against it," he said. The *New York Times* article is available online at: https://z.umn.edu/NYTimesAtmoreNews.

The Committee to Protect Journalists (CPJ), a press freedom advocacy group, called for the charges to be dropped as well, releasing a statement on October 31. "CPJ is outraged by the arrest of [Digmon and Fletcher] and calls on local authorities to immediately drop all charges against them. They should not be prosecuted for simply doing their jobs and covering a matter of local interest, such as the allocation of school board funds," said Katherine Jacobsen, CPJ's U.S. and Canada program coordinator. "Arresting them creates a chilling effect and is a gross misuse of taxpayer funds," she continued. CPJ's full statement is available online at: https://z.umn.edu/CPJAtmoreNewsStatement.

Silha Center Director and Professor of Media Ethics and Law Jane Kirtley warned *The Washington Post* of the dangers of arresting journalists like Digmon and Fletcher. She described the arrests as "a dead crow on a fence," discouraging potential leakers and other journalists from opening investigations because of the legal backlash. The article is available online at: https://z.umn.edu/WaPoAtmoreNews.

The National Press Club (NPC), a professional organization for journalists based in Washington, D.C., condemned the arrests on November 2. The organization's president, Eileen O'Reilly, and the National Press Club Journalism Institute's president, Gil Klein, published a statement criticizing the district attorney's actions. "Journalists in the United States have the right and the responsibility to report information of public interest to their communities. That is exactly what Don Fletcher and Sherry Digmon were doing when they reported and published an article on Oct. 25 regarding an investigation into a local school system's use of federal COVID funds." The organization expressed concern over the First Amendment rights of both Digmon and Fletcher, calling for the charges to be dropped immediately. The full statement is available online at: https://z.umn.edu/NPCAtmoreNewsStatement.

> "Journalists in the United States have the right and the responsibility to report information of public interest to their communities. That is exactly what Don Fletch and Sherry Digmon were doing when they reported and published an article on Oct. 25 regarding an investigation into a local school system's use of federal COVID funds."
>
> **— Eileen O'Reilly, National Press Club President**
> **— Gil Klein, National Press Club Journalism Institute President**

Earnest White, a lawyer for Digmon and Fletcher, told *The New York Times* in a statement that the charges against his clients were "politically motivated." He argued that Digmon had recently voted against McClung's superintendent contract renewal, the candidate that Billy had publicly supported. "I can't prove that it was [politically motivated], but it all smells," White told the *Times*.

Fletcher was reached by phone for comment by the *Times*, saying that Digmon was "obviously disturbed by [the arrest] because she's a strong Christian person." He added, "As far as me, I'm obviously concerned, too." Moreover, in an earlier article also published in *Atmore News* on October 23, Fletcher reported that Escambia County sheriff's deputies had obtained search warrants and seized the cell phones of all four board members who voted against the renewal of McClung's contract during the October 12 school board meeting.

"If anyone doubted that District Attorney Steve Billy was upset over the Escambia County Board of Education's recent 4-3 vote to bring Michele McClung's tenure as school superintendent to end, those doubts were erased Monday, October 23," Fletcher wrote.

He reported that an anonymous source told Fletcher that the district attorney planned to charge each of the four board members with violating various provisions of Alabama's Open Meetings Act (OMA). The source alleged that Billy planned to charge the four board members with conspiring to not attend a September 28 board meeting at which McClung's contract was to be discussed. However, Fletcher's article noted that under the most recent version of OMA, violations were reclassified as civil, rather than criminal, offenses. Ala. Code § 36-25A-9(g). Fletcher's October 23 article is available online at: https://z.umn.edu/AtmoreNewsPhoneSeizures.

The arrests of Fletcher and Digmon echo the contentious law enforcement operation on August 11, 2023 targeting *The Marion County Record*. Local authorities accused the small newspaper in Kansas of unlawfully downloading an individual's motor vehicle record, prompting the dispatch of police and sheriff's deputies to both the newspaper's office and the co-owner's residence to secure evidence.

Atmore News, *continued on page 16*

Atmore News, *continued from page 15*

The raid was widely criticized as infringing on press protections under the First Amendment. The incident gained national media attention, especially following the death of 98-year-old Joan Meyer, the mother of co-owner and editor Eric Meyer, a day after law enforcement searched their home while Joan was present. In response to the criticism, the county attorney withdrew the warrant and returned confiscated items to the newspaper. The local police chief in charge of the operation resigned last month. (For additional information about the raid of The Marion County Record, see "Raid of Small Kansas Newspaper Prompts Widespread Backlash and Concerns About Press Protections" in the Summer 2023 issue of the Silha *Bulletin*.)

NBC 15 News reported that Digmon was arrested on November 1 on separate charges of violating state ethics law. The first count alleges she used her school board position to purchase advertisement space in *Atmore Magazine*, another publication Digmon manages, for over $2,500. Alabama ethics law prohibits public officials from soliciting money through their positions, carrying a potential fine of up to $30,000 and a maximum prison sentence of 20 years. Ala. Code § 36-25-5(a). The second count alleges that Digmon solicited payment for advertising from a subordinate, in violation of Alabama law. Ala. Code § 13A-25-5(d). The *NBC 15 News* article and the indictment are available online at: https://z.umn.edu/DigmonArrest.

White, Digmon's attorney, told the *Post* the charges were baseless, pointing out that the school system routinely purchased newspaper advertisements to promote community events and congratulate graduates for years, even before Digmon was a school board member.

On November 3, the grand jury issued a report that recommended Digmon be removed from the school board, alleging she neglected her official duties. Her removal could reverse the controversial 4 to 3 vote that ousted McClung and initiated the fallout, according to *The Washington Post*. The full article is available online at: https://z.umn.edu/WapoAtmoreNews2.

Digmon and Fletcher have largely remained quiet in the wake of their arrests, frequently declining public comment. Their bail terms prohibit them from publishing stories about the grand jury or the school board. According to the Freedom of the Press Foundation, both were directed to have "no communication about ongoing criminal investigations, including school board matter" until further notice. That organization condemned the arrests in a statement. "[Alabama law] does not — and under the First Amendment, cannot — codify a prior restraint that bars the press from disclosing grand jury information it obtains from a source." The full statement is available online at: https://z.umn.edu/FPFstatement.

The gag order has restricted the pair from reporting on any updates about the school board, but it has not stopped *Atmore News* from publishing about their arrests. In a November 8 story, "Impeachment!," referring to Digmon's impeachment from the school board, the *Atmore News* criticized the felony charges, calling the county grand jury "the DA's weapon of choice last week in his legal assault on Atmore News Publisher and Co-owner Sherry Digmon." The full article is available online at: https://z.umn.edu/AtmoreNewsImpeachment.

All the cases are pending in Escambia County, which complicates the situation. The *Post* reported on the challenges of criminal proceedings in a small town like Atmore. The county's two circuit judges and a district judge have recused themselves from the matter, alleging "prior professional relationships" or "social friendships" with either Digmon, Fletcher, or Billy. All three worked for Billy in the district attorney's office. Another is White's nephew, who previously worked in his law office. Fore's attorney is also White's brother.

— Jack Tate
Silha Center Research Assistant

Nevada Supreme Court Holds Murdered Journalist's Electronic Devices Are Covered by the State Reporter's Privilege

On Oct. 5, 2023, the Nevada Supreme Court ruled that murdered journalist Jeff German's electronic devices are covered by the state reporter's privilege and that the newspaper he worked for can assert that privilege on his behalf.

REPORTER'S PRIVILEGE

The Las Vegas Metropolitan Police Department (LVMPD) seized the devices from the crime scene and German's home as part of the murder investigation. German was an investigative reporter for the *Las Vegas Review-Journal* (*Review-Journal*). He was stabbed to death outside of his home on Sept. 2, 2022. Robert Telles, former Clark County public administrator, is accused of murdering German and is awaiting trial. German had reported allegations that Telles created a hostile working environment and "had an inappropriate relationship with one of" his employees, according to CBS News. The CBS News article is available online at: https://www.cbsnews.com/news/jeff-german-las-vegas-reporter-killed-investigating-robert-telles-wrongdoing. *Las Vegas Review-Journal v. State*, 536 P.3d 914 (Nev. 2023)

After German's murder, LVMPD acquired and executed a search warrant, pursuant to which LVMPD seized numerous electronic devices and other property belonging to German from his home and his person. In a Sept. 22, 2022, letter, the *Review-Journal* demanded LVMPD turn over the devices to the newspaper and cited the federal Privacy Protection Act and Nevada's reporter's privilege, according to a *Rolling Stone* article. The *Rolling Stone* article is available online at: https://www.rollingstone.com/culture/culture-news/jeff-german-murder-case-first-amendment-1234609765. Thereafter, the *Review-Journal*, along with several of its employees and managing staff, sued LVMPD and the State of Nevada in the Eighth Judicial District Court in Clark County, Nev., seeking to stop LVMPD from searching the contents of German's electronic devices. The *Review-Journal* invoked a statute that enables an aggrieved party to bring a motion for the return of seized property, Nev. Rev. Stat. § 179.085. In the motion, the newspaper cited the state reporter's privilege statute, Nev. Rev. Stat. § 49.275, and the federal Privacy Protection Act, 42 U.S.C. § 2000aa, *et seq.* Pursuant to these statutes, the newspaper claimed that German's devices probably contain privileged journalistic material and that the LVMPD illegally seized the devices. The newspaper demanded the devices be returned to it.

The Nevada reporter's privilege provides: "No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation." Nev. Rev. Stat. § 49.275. The statute goes on to list government bodies and officials before which parties may assert the privilege, including "any officer of a local government." Nev. Rev. Stat. § 49.275(4).

The federal Privacy Protection Act generally prohibits federal or state law enforcement officials, "in connection with the investigation or prosecution of a criminal offense," from searching for or seizing materials "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce" with limited exceptions. 42 U.S.C. § 2000aa, *et seq.* The statute covers "materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs," and other "work product." 42 U.S.C. § 2000aa-7(a)–(b).

The return of seized property statute enables a party to bring a motion "on the ground that: (a) The property was illegally seized without warrant; (b) The warrant is insufficient on its face; (c) There was not probable cause for believing the existence of the grounds on which the warrant was issued; (d) The warrant was illegally executed ; or (e) Retention of the property by law enforcement is not reasonable under the totality of the circumstances." Nev. Rev. Stat. § 179.085(1).

As the Nevada Supreme Court explained in its opinion, "[t]he district court initially granted a preliminary injunction [in October 2022] that prevented LVMPD and respondent the State of Nevada (collectively Metro) from inspecting, searching, or reviewing any information on the seized devices that might otherwise be subject to a journalistic privilege," but "dissolved that injunction and put in place a search protocol" on May 26, 2023. The protocol allowed LVMPD and the Clark County District Attorney's office to search the devices for information relevant to the criminal case against Telles, "and to thereafter provide the Review-Journal imaged copies of any materials that a reasonable person would understand may constitute journalistic materials for the Review-Journal to assert any claimed privilege."

The search protocol, however, never went into effect, because the district court issued a stay of the protocol on May 26, 2023, "pending [the Nevada Supreme Court's] decision on an anticipated future motion for stay." Thereafter, the *Review-Journal* moved to stay the May 26 order, as anticipated by the district court, arguing that the newspaper faced irreparable harm if the protocol went into effect because the protocol would undermine the newspaper's efforts to protect the potentially privileged materials on German's devices. LVMPD opposed the stay, arguing that the *Review-Journal* would not be irreparably harmed, that LVMPD and the public would be irreparably harmed by delaying the investigation and Telles's trial, and that the *Review-Journal* was unlikely

German, *continued on page 18*

German, *continued from page 17*

to succeed on appeal. On July 21, 2023, before adjudicating the merits of the case, the Nevada Supreme Court granted the *Review-Journal*'s motion to stay the search protocol. *State v. Las Vegas Review-Journal*, 532 P.3d 1245 (Nev. 2023)

On Oct. 5, 2023, the Nevada Supreme Court ruled in favor of the *Review-Journal*, nullifying the district court's search protocol and remanding the case to the district court to follow an alternative procedure. In so ruling, the court held that the *Review-Journal* had standing under both the motion to return seized property statute and the Nevada reporter's privilege. The court did not address the newspaper's Privacy Protection Act arguments. *Las Vegas Review-Journal v. State*, 536 P.3d 914 (Nev. 2023)

Regarding the seized property statute, the court wrote that "[i]t would be absurd to conclude that the property the Review-Journal wants returned would fall under the statute if it were printed materials or in another tangible form but would be excluded because it only exists in electronic form stored on a device that is otherwise subject to the statute." It further stated, in a footnote, that "any party 'aggrieved'" under the statute does not require "that the party hold an ownership interest in the property."

Under the reporter's privilege, the court determined that the privilege remained applicable despite German's death and that the newspaper could invoke the privilege on his behalf postmortem. Quoting past Nevada Supreme Court cases, the court stated that the "statute's purpose is to 'protect[ ] confidentiality during and after the news gathering process'" and "is also designed 'to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution.'" The court concluded, "To hold that the privilege [Nev. Rev. Stat. §] 49.275 creates ends with German's death is not required by the statute's plain text and would be directly contrary to the statute's purpose. We therefore hold, consistent with courts elsewhere, that the Review-Journal has standing to assert the privilege provided by [Nev. Rev. Stat. §] 49.275 in this case."

Although the Nevada Supreme Court decided that the reporter's privilege survived German's death and that the *Review-Journal* could invoke the privilege, it noted that the privilege is "not absolute" and may be overcome by a criminal defendant's "countervailing constitutional rights." Nevertheless, the court determined that, "the search protocol entered by the district court constitutes an abuse of discretion because it allows that privilege to be violated before the court has the opportunity to weigh the privilege against any assertion of countervailing constitutional rights." The court emphasized further that the search protocol would "irreparably destroy[] any privilege the Review-Journal may have" upon disclosure of journalistic information. It also noted that the newspaper claimed to have confidential sources within LVMPD and the district attorney's office, whose identities presumably could be uncovered by searching German's devices.

Moreover, the court was unconvinced that a confidentiality order issued by the district court in tandem with the search protocol would be sufficient to preserve the reporter's privilege: "Permitting the search to proceed would therefore allow 'the government's fox [to be] left in charge of the appellants' henhouse,'" the court wrote quoting *In re Grand Jury Subpoenas 04-124-03 & 04-124-05*, 454 F.3d 511 (6th Cir. 2006).

The Nevada Supreme Court directed the district court on remand to take LVMPD and the district attorney's office out of the "search team," and instead ordered the use of "the Review-Journal and Telles' [*sic*] search team consisting of the Honorable Peggy A. Leen (retired) as the Special Master and David Roger, general counsel of the Police Protective Association, as the Assistant Special Master." Unusually, Telles was aligned with the *Review-Journal* in this proceeding and was also seeking to prevent LVMPD and the district attorney's office from searching German's devices.

The same day the Nevada Supreme Court issued the opinion discussed above, Oct. 5, 2023, it also declined to overrule the district court's denial of a motion for sanctions brought by the *Review-Journal* against LVMPD. According to a pair of *Review-Journal* articles, one of the LVMPD search warrants revealed that LVMPD identified Telles as a suspect in part using "data from German's phone." "Attorneys for Metro did not confirm that the phone had been searched until Dec. 1, [2022], according to court documents," according to one of the *Review-Journal* articles. In the motion for sanctions, the *Review-Journal* wrote, "Metro has claimed since before these proceedings ever began that it never searched the devices. However, it is now known that Metro's representations were false." The newspaper "asked the judge to order Metro to pay the newspaper's attorney fees, strike the department's pleadings from the case, and disclose the details of the search of German's phone."

In a hearing on the motion on Jan. 25, 2023, district court Judge Michelle Leavitt said, "I'm inclined to deny the motion for sanctions because it would affect the criminal case adversely, and I don't think that that would be appropriate." Judge Leavitt ultimately did deny the motion. On appeal, the Nevada Supreme Court stated, "Having considered the petition and its supporting documentation, we are not persuaded that our extraordinary and discretionary intervention is warranted." The *Review-Journal* articles are available online at: https://www.reviewjournal.com/crime/courts/rj-seeks-sanctions-after-police-search-of-slain-reporters-phone-2715941, and: https://www.reviewjournal.com/crime/courts/judge-denies-rj-request-for-sanctions-against-metro-over-search-of-slain-reporters-phone-2718236. *Las Vegas Review-Journal v. Eighth Judicial Dist. Court of Nev.*, 535 P.3d 1204 (Nev. 2023)

Ashley Kissinger and Elizabeth Schilken of Ballard Spahr, who represented the *Review-Journal* along with other attorneys, wrote on *JDSupra* that the Nevada Supreme Court's ruling "is the first holding that the reporter's privilege — which shields from disclosure any information gathered by a journalist in reporting the news — survives the death of the journalist who gathered the information." They also reported that prior to the ruling "[t]he Review-Journal received several calls from sources of German who expressed fear of being 'outed' if the search proceeded." The *JDSupra* post is available online at: https://www.jdsupra.com/legalnews/nevada-supreme-court-holds-reporter-s-1394287.

Kissinger also reported the ruling to the U.S. Press Freedom Tracker (Tracker) via email after the decision. Kissinger said the court "recognized the obvious point that allowing police and prosecutors to review confidential press materials destroys the confidentiality, and neutral special masters must conduct any search in a situation like this." She added: "This is a very important win for the press in Nevada and nationwide. The Nevada Supreme Court rightly rejected the argument that when a reporter dies, the right to maintain the confidentiality of sources and ongoing news investigations dies with them." The Tracker post is available online at: https://pressfreedomtracker.us/all-incidents/devices-illegally-seized-in-investigation-of-reporters-murder-review-journal-argues.

Liam Scott, a Voice of America (VOA) reporter, described the case as "a press freedom win for newsroom members who are still grappling one year later with the killing of their colleague." Glenn Cook, executive editor of the *Review-Journal*, told VOA, "There's just relief and happiness among our staff. This case was so important for us because it had ramifications far beyond our own organization." Cook called the holding that the privilege survives a reporter's death "the single most important part of this ruling." He added: "To have that written very clearly in a Nevada Supreme Court ruling is exceptionally important for press freedom everywhere." The VOA article is available online at: https://www.voanews.com/a/nevada-court-ruling-protects-slain-reporter-s-devices/7300248.html.

According to a *Review-Journal* article published after the ruling, Cook said, "The Nevada Supreme Court has firmly upheld the press protections that allowed Jeff German to become one of the best-sourced, most-trusted journalists in the state." The *Review-Journal* article is available online at: https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-supreme-court-protects-phone-computers-of-slain-reporter-2916660.

According to a Poynter article, Cook emphasized the unprecedented nature of the case. "We had no precedent for that before this, and to now have that clearly and strongly articulated at a state supreme court level is critical to the health of shield laws across the United States," Cook said. "Nevada's shield law has always been recognized as the gold standard. . . . And so to have this ruling further buttress the strongest shield law in the country is hugely reassuring." The Poynter article is available online at: https://www.poynter.org/reporting-editing/2023/police-cannot-search-murdered-journalists-electronic-devices-nevada-supreme-court-rules.

> "This is a very important win for the press in Nevada and nationwide. The Nevada Supreme Court rightly rejected the argument that when a reporter dies, the right to maintain the confidentiality of sources and ongoing news investigations dies with them."
>
> **— Ashley Kissinger, Ballard Spahr Attorney and Counsel for the *Las Vegas Review-Journal***

In a LinkedIn post, the Reporters Committee for Freedom of the Press (Reporters Committee) called the decision "an important court victory" and noted that the Reporters Committee submitted several friend-of-the-court briefs throughout the various legal proceedings. The LinkedIn post is available online at: https://www.linkedin.com/posts/the-reporters-committee-for-freedom-of-the-press_nevada-supreme-court-protects-phone-computers-activity-7116206113024339968-lsN_/?trk=public_profile. In its Aug. 7, 2023, brief filed with the Nevada Supreme Court, the Reporters Committee wrote that its brief was intended "to underscore the danger the district court's [search] order poses to press freedom in Nevada." The Reporters Committee was specifically concerned that allowing the search to continue would "threaten[] the confidentiality of [German's] sources." The brief then recited many of "the most consequential report[s] on the functioning of government" — including Watergate, the National Security Agency's illegal wiretapping program, "the use of so-called 'enhanced' interrogation techniques on terrorism suspects," and the Panama Papers — and noted that each of these reports relied on confidential sources. The brief is available online at: https://www.rcfp.org/wp-content/uploads/2022/09/2023-08-07-LVRJ-v.-State-of-Nevada-amicus-brief-filed-by-RCFP-and-53-media-organizations-Nevada-Supreme-Court.pdf.

In a statement on X, the Freedom of the Press Foundation posted, "Confidential sources need to be able to talk to journalists without fearing that they'll be outed if the journalist dies. It's great news that Nevada's highest court ruled the reporter's privilege still protects slain journalist Jeff German's devices." The Freedom of the Press Foundation joined the Reporters Committee's *amicus* briefs supporting the *Review-Journal*. The post is available online at: https://twitter.com/FreedomofPress/status/1710319081780339026.

As the *Bulletin* went to press, the criminal case against Telles was pending.

— Ryan Liston
Silha *Bulletin* Editor

Cameras Likely to Be Banned from Most of Former President Donald Trump's Upcoming Trials

Members of the press have requested that courts grant them access to record and broadcast former President Donald Trump's ongoing and upcoming trials, but based on longstanding rules and judicial hostility, it is likely that most of Trump's cases will not be broadcast to the public. Of Trump's cases pending in Georgia state court, New York state court, D.C. federal court, and Florida federal court, only the Georgia case is likely to be broadcast. Nonetheless, members of the press, and even Trump's defense team in some cases, continue to push for audiovisual access to the legal proceedings.

TRUMP AND THE MEDIA

Federal D.C. Court Unlikely to Allow Camera Access to Trump's Election Obstruction Trial Despite Push by Media, Trump

On Oct. 5, 2023, a coalition of news organizations filed an application in the United States District Court for the District of Columbia requesting audiovisual access to former President Donald Trump's March 2024 criminal trial. The application asks the court to make an exception to the longstanding rule that bars cameras from federal courtrooms, citing the need to secure the public's confidence in the criminal judicial process. The news coalition's application is available online at: https://www.washingtonpost.com/documents/4bae2df7-d42a-426c-b15b-0fbd47b85b01.pdf?itid=lk_inline_manual_5.

"Since the founding of our Nation, we have never had a criminal case where securing the public's confidence will be more important than with *United States v. Donald J. Trump*," the news coalition said in its application to the court. The coalition further argued that the trial of the former president and presumptive 2024 Republican nominee on charges of obstructing the 2020 election "presents the strongest possible circumstances for continuous public oversight of the justice system."

However, Special Counsel Jack Smith for the Department of Justice opposed the application and argued that the court's hands were tied, citing Rule 53 of the Federal Rules of Criminal Procedure which bars "the broadcasting of judicial proceedings from the courtroom." Smith noted that the federal Judicial Conference, which is the "policy-making arm of the federal court system," reiterated in September 2023 that the policy barring cameras in criminal trials remains the same. Quoting the Judicial Conference's recent policy decision, Smith said, "[t]he reasons for that policy choice were . . . because, among other considerations, remote broadcast 'could increase the potential for witness intimidation or complicate witness sequestration — vital considerations in ensuring trial proceedings are fair to all parties.'"

> "Given the historic nature of the charges brought forth in these cases, it is hard to imagine a more powerful circumstance for televised proceedings . . . . If the public is to fully accept the outcome, it will be vitally important for it to witness, as directly as possible, how the trials are conducted, the strength of the evidence adduced and the credibility of witnesses."
>
> **— Letter from House Democrats to secretary of the Judicial Conference Judge Roslynn R. Mauskopf**

Smith concluded that whether cameras should be allowed in federal criminal trials is ultimately a question of policy that is "best left to legislators and rulemakers." The full text of the Justice Department's reply to the news coalition's application is available online at: https://storage.courtlistener.com/recap/gov.uscourts.dcd.260552/gov.uscourts.dcd.260552.16.0.pdf.

On Nov. 10, 2023, attorneys representing Trump filed a response supporting the news coalition's request for their client's upcoming trial to be televised. "President Trump absolutely agrees, and in fact demands, that these proceedings should be fully televised so that the American public can see firsthand that this case, just like others, is nothing more than a dreamt-up unconstitutional charade that should never be allowed to happen again," Trump's attorneys wrote. The full response by Trump's attorneys is available online at: https://storage.courtlistener.com/recap/gov.uscourts.dcd.260552/gov.uscourts.dcd.260552.19.0_2.pdf.

On Nov. 13, 2023, Special Counsel Smith filed a specific reply to Trump's response calling on the court to deny his request. Smith argued that Trump's goal in having cameras in his trial is to "create a carnival atmosphere from which he hopes to profit by distracting, like many fraud defendants try to do, from the charges against him." Referencing Trump's civil fraud trial in New York in which Trump called the case a "political witch hunt," Smith argued that the court should not "further motivate the defendant and his counsel to make improper statements inside the courtroom to provoke a public reaction outside of it" by allowing cameras. The full text of Smith's reply to Trump is available online at: https://storage.courtlistener.com/recap/gov.uscourts.dcd.260552/gov.uscourts.dcd.260552.21.0_6.pdf.

In addition to the media and attorneys for Trump supporting the exception to allow cameras in the courtroom, several U.S. lawmakers have called on the court to allow the Trump trials to be broadcast. On Aug. 3, 2023, about three dozen House Democrats, led by Rep. Adam Schiff (D-Calif.), sent a letter to Judge Roslynn R. Mauskopf, who serves as the secretary of the Judicial Conference, calling for the Conference to allow the broadcasting of Trump's federal trials.

"Given the historic nature of the charges brought forth in these cases, it is hard to imagine a more powerful circumstance for televised proceedings," the representatives wrote in the letter. "If the public is to fully accept the outcome, it will be vitally important for it to witness, as directly as possible, how

the trials are conducted, the strength of the evidence adduced and the credibility of witnesses." The full text of the House Democrats' letter to the Judicial Conference is available online at: https://schiff.house.gov/imo/media/doc/trump_trial_transparency_letter.pdf.

The letter follows legislation introduced to give federal judges more discretion in allowing cameras in the courtroom. In March 2023, before Trump's federal indictments, a bipartisan bill sponsored by Sens. Chuck Grassley (R-Iowa) and Amy Klobuchar (D-Minn.) called the Sunshine in the Courtroom Act of 2023 was introduced. According to a press release from Grassley's office, the Act "would grant the presiding judge in all federal courts, including the Supreme Court, the discretion to allow cameras in the courtroom while protecting the identities of witnesses and jurors when necessary or upon request." The full proposed text of the Sunshine in the Courtroom Act of 2023 is available online at: https://www.grassley.senate.gov/imo/media/doc/sunshine_in_the_courtroom_act_of_2023.pdf. The press release is available online at: https://www.grassley.senate.gov/news/news-releases/grassley-renews-bipartisan-push-to-put-cameras-in-federal-supreme-courts.

According to *The Washington Post*, on October 26, a rulemaking panel for the Judicial Conference denied a request to exempt Trump's case from Rule 53. But the panel did agree to appoint a subcommittee to consider a future rule change to allow for exceptions in extraordinary cases or at a judge's discretion. However, any formal amendment to the rule would take at least three years to be implemented — long after Trump's trials are set to begin.

Director of the Silha Center and Silha Professor of Media Ethics and Law Jane Kirtley wrote in an email to *The Washington Post* that it was her "sincere hope" that the courts would at least allow audio live-streaming but that she was not optimistic. "Judges don't like to give up control, and they see cameras in the court as the camel's nose under the tent," Kirtley said. The full article from *The Washington Post* is available online at: https://www.washingtonpost.com/dc-md-va/2023/11/04/trump-trial-cameras-court-televise/.

In an interview with *The Messenger*, Kirtley noted that, although rare, there have been instances where a federal judge adjusted restrictions on audiovisual recording to address special circumstances.

For example, in 1996, Judge Robert J. Ward in the U.S. District Court for the Southern District of New York permitted cameras to film parts of a case involving New York City's child welfare system citing the "profound social, political and legal issues" that were raised. However, as a result of Judge Ward's decision, the Judicial Conference clarified that local rules could not supersede the national ban on cameras in courtrooms. A 1996 *New York Times* article detailing Judge Ward's decision is available online at: https://www.nytimes.com/1996/03/02/nyregion/a-federal-judge-allows-cameras-at-court-hearing.html.

"There certainly is precedent for the general idea — not exactly that rules are made to be broken, but that extraordinary circumstances demand an extraordinary reaction," Kirtley told *The Messenger*. "And that in those circumstances, it might make sense to deviate from the stated rule." The December 4 article from *The Messenger* is available online at: https://themessenger.com/politics/trump-televise-trial-washington-dc-chutkan-media.

According to *The Washington Post*, hours after a filing by Smith, on Dec. 11, 2023, the U.S. Supreme Court said that it would consider Smith's request to fast-track the appeals process to determine whether Trump is immune from prosecution due to presidential immunity. The *Washington Post* article is available online at: https://www.washingtonpost.com/nationalsecurity/2023/12/11/trump-immunity-supreme-court-jan-6-special-counsel/. A landing page for the Supreme Court's docket of the Trump case is available online at: https://www.supremecourt.gov/Search.aspx?FileName=/docket/docketfiles/html/public/23-624.html. The Supreme Court ultimately rejected Smith's request on December 22.

"The United States recognizes that this is an extraordinary request," Smith wrote in his filing to the Court. "This is an extraordinary case."

In his filing, Smith urged the Court hear the appeal in order to ensure that the March 2024 trial remains on schedule.

"It is of imperative public importance that respondent's claims of immunity be resolved by this Court and that respondent's trial proceed as promptly as possible if his claim of immunity is rejected," Smith argued in his filing. The full text of Smith's request is available online at: https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rH_Rxzpcitdw/v0.

On December 20, Trump's legal team filed a response to Smith's request arguing that the Supreme Court should allow the normal appellate process to play out. The response also accused the prosecution of "confus[ing] the 'public interest' with the manifest *partisan* interest in ensuring that President Trump will be subjected to a months-long criminal trial at the height of a presidential campaign where he is the leading candidate and the only serious opponent of the current Administration." Trump's response is available online at: https://www.documentcloud.org/documents/24234451-trumpscotusfiling.

On December 22, the Supreme Court rejected Smith's request. The denial of *certiorari* is available online at: https://www.documentcloud.org/documents/24237415-supreme-court-orderdenying-smiths-request-to-expedite-case.

Federal Florida Court Unlikely to Allow Cameras in Trump's Classified Documents Trial

Like the federal trial in Washington, D.C., it is unlikely that the judge overseeing former President Donald Trump's federal criminal trial in Florida will allow cameras in the courtroom.

On June 12, 2023, U.S. Magistrate Judge Jonathan Goodman ruled that photographs and videos would not be permitted for Trump's June 13 arraignment in the U.S. District Court for the Southern District of Florida on charges of retention and mishandling of classified documents.

Judge Goodman's ruling was a response to a request by a coalition of local and national news media organizations to allow cameras at Trump's arraignment and all future hearings. It noted that the coalition had not cited any legal authority supporting allowing cameras in Trump's arraignment and added that "allowing photographs would undermine the massive security arrangements put in place."

The magistrate judge specified that his ruling would apply only to Trump's arraignment and that future requests for audiovisual access should be directed to U.S. District Judge Aileen

Trump Cameras, *continued on page 22*

Trump Cameras, *continued from page 21*

Cannon who will oversee the case moving forward. The full text of Judge Goodman's ruling is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flsd.648652/gov.uscourts.flsd.648652.11.0.pdf.

In a separate order issued the same day, the chief judge for the district court, Cecilia M. Altonaga, prohibited news reporters and other members of the media from bringing cell phones or other electronic equipment into the courtroom for Trump's arraignment. The full text of Chief Judge Altonaga's order is available online at: https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2023-40.pdf.

After new charges in the case were brought against Trump and two codefendants on July 27, 2023, the local and national media coalition again requested audiovisual access to the court proceedings. On Aug. 9, 2023, Judge Cannon rejected the request. A *Washington Examiner* article explaining the media's request and Judge Cannon's decision is available online at: https://www.washingtonexaminer.com/policy/courts/donald-trump-indicted-judge-cannon-rejects-request-electronics.

Although no ruling has officially been made as to the trial set to begin May 2024, the Freedom of the Press Foundation wrote that "the court's initial rulings on cameras and press access more generally leave us pessimistic about the odds of cameras in the courtroom for Trump's Florida trial." The post from the Freedom of the Press Foundation is available online at: https://freedom.press/news/press-battles-camera-bans-in-trump-trials-updated/.

Georgia State Judge to Allow Cameras in Trump Racketeering Case

Judge Scott McAfee for the Superior Court of Fulton County, Ga., is the only judge so far to signal that he will allow cameras in one of former President Donald Trump's upcoming trials. Judge McAfee is overseeing the racketeering case against Trump in Georgia state court.

According to CNN, in a court hearing on July 31, 2023, Judge McAfee said he would make all hearings and potential trials available to be broadcast on the Fulton County Court YouTube channel. Judge McAfee also said he would allow "pool" cameras to be shared by news organizations and would allow members of the media to use cell phones and other electronic devices for non-recording purposes in the courtroom. The CNN article is available online at: https://www.cnn.com/2023/08/31/politics/fulton-county-trump-trial-tv-cameras/index.html.

The court rules in Georgia specifically allow for judicial proceedings to be recorded with the approval of the judge and lay out criteria a judge must meet in order for a request to be denied. The Georgia rule governing recording of court proceedings is available online at: https://s3.amazonaws.com/cobbcounty.org.if-us-east-1/s3fs-public/2018-07/Rule-22-Use-of-Recording-Devices-and-Cell-Phones.pdf.

Among those supporting the decision to allow Trump's Georgia trial to be televised is Sonja R. West, a professor at the University of Georgia's law school. "The American people have a right to judge the evidence and the arguments for themselves," West told *The Washington Post*. "Cameras are essentially a technology that lets us make the courtroom big enough for anyone who is interested to have a front-row seat." The Sept. 1, 2023, *Washington Post* article is available online at: https://www.washingtonpost.com/lifestyle/2023/09/01/trump-trial-livestream-televised/.

However, not all were satisfied with Judge McAfee's decision to allow the Trump proceedings to be broadcast. Stephen L. Carter, a professor of law at Yale University, wrote an opinion article for *Bloomberg* in which he acknowledged that he was "troubled" by McAfee's ruling. "[I]n a case this sensational, I'm skeptical that many viewers will come away with their minds changed." Instead, Carter worried that the case would turn into a "spectacle." Carter's Sept. 3, 2023, *Bloomberg* opinion article is available online at: https://www.bloomberg.com/opinion/articles/2023-09-03/televising-trump-s-jan-6-trials-will-create-spectacle-not-justice?embedded-checkout=true.

New York State Courts Unlikely to Allow Cameras in Trump's Civil Fraud and Criminal Trials

Although a New York state judge allowed recording in former President Donald Trump's civil fraud trial before the beginning of opening statements, the rest of the trial has not been televised, and it is unlikely that Trump's March 2024 New York state criminal trial, related to alleged hush money payments to adult film star Stormy Daniels, will be televised.

Current New York law bans the use of photos or videos in most court proceedings. N.Y. Civ. Rights Law § 52. The full text of the New York law is available online at: https://www.nysenate.gov/legislation/laws/CVR/52.

Judge Juan Merchan ruled that five photographers would be allowed to take still photos in the courtroom before Trump's arraignment in the Manhattan criminal court in April 2023. However, no cameras or other electronic devices were allowed in the courtroom once the arraignment began. A *Politico* article explaining Judge Merchan's ruling is available online at: https://www.politico.com/news/2023/04/03/electronics-courtroom-trump-arraignment-judge-00090281.

No ruling has yet been made about the trial being recorded or broadcast in March 2024, but given New York state law, it is unlikely that cameras will be allowed.

Referencing Trump's civil fraud trial in New York and hinting at the concerns of allowing cameras in the courtroom, former White House press secretary Ari Fleischer told the *Associated Press* (*AP*) that for Trump, "[e]very day is a day on the stump, whether it's in Iowa, New Hampshire or in the courtroom. Every appearance is an opportunity to ring a bell, strike a message, say he's the victim of a weaponized Justice Department and he's the only one who can change Washington." The *AP* article is available online at: https://apnews.com/article/trump-civil-fraud-trial-2024-campaign-court-fb73b4275be2d43b0f92031737d3e9eb.

Despite concerns that Trump would turn a televised trial into a campaign stop, others, including U.S. Rep. Jerry Nadler (D-N.Y.), argue that allowing cameras in New York's courtrooms is essential for transparency.

"Transparency is essential to our democracy. Without televised access, the courts are effectively out of reach to most of the public. That is why I have long sponsored legislation to require cameras in the federal courts," Nadler said in a statement to *Politico*. "I hope that New York will follow the lead of other states and ensure that the public is able to witness important judicial proceedings in real time." The April 3, 2023, *Politico* article is available online at: https://www.politico.com/news/2023/04/03/trump-indictment-court-cameras-new-york-00090130.

— Charlotte Higgins
Silha Center Research Assistant

Former President Donald Trump's Defamation Cases Persist Amid Campaign, Criminal Charges

Among former President Donald Trump's many ongoing legal battles are several defamation cases. First, Trump is set to face trial in January 2024 on damages in a second defamation case filed against him by writer E. Jean Carroll after a court granted Carroll summary judgment in the case. In October 2023, Trump dropped a defamation case against his former lawyer Michael Cohen. In the same month Trump also sought to halt proceedings temporarily in a defamation case against him filed by a Pennsylvania poll worker. Meanwhile, *The Washington Post* continues to fight claims that it defamed Trump's media company in a May 2023 article. As all of these legal proceedings persist, Trump, his campaign, and his allies have indicated that he will seek "retribution" if he is elected in 2024.

DEFAMATION

Carroll's Defamation Suit Against Trump Set for Trial in 2024; Jury to Remain Anonymous

Writer E. Jean Carroll's 2019 defamation case against former President Donald Trump is set to go to trial in federal district court in 2024 to determine damages after Carroll prevailed on a motion for summary judgment. Meanwhile, Trump continues to argue in the federal court of appeals that presidential immunity bars him from facing Carroll's defamation claim.

Carroll originally filed two defamation suits against Trump, one in 2019 and one in 2022, both in the U.S. District Court for the Southern District of New York. In the 2022 case, Carroll also alleged one count of sexual battery under New York's Adult Survivor's Act (ASA). The ASA was passed in 2022 and created a one-year period in which adult sexual assault survivors could sue their alleged assaulters for claims that would otherwise be untimely. (For more information about the Carroll defamation lawsuits, see *Trump Loses Bid to Countersue Carroll in Second Defamation Case*, *Faces Trial in 2024* in "Three Defamation Cases Against Former President Donald Trump Continue to Play Out in Courts" in the Summer 2023 issue of the Silha *Bulletin*; *Jury Rules Against Trump in Defamation Trial; Second Suit Postponed Indefinitely* in "Former President Donald Trump Involved in Lawsuits Regarding Access, Copyright, and Defamation" in the Winter/Spring 2023 issue; and "Courts Reject Efforts to Block or Impede Publication of Books about President Donald Trump" in the Fall 2020 issue.)

In May 2023, a jury found Trump liable for sexually abusing Carroll in the late 1990s and subsequently defaming her in October 2022 when he called Carroll's claim a "hoax and a lie." *Carroll v. Trump*, 22-cv-10016 (S.D.N.Y. Nov. 24, 2022) ("*Carroll II*"). The jury awarded $5 million in damages to Carroll. The full text of the jury's verdict is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.590045/gov.uscourts.nysd.590045.174.0_3.pdf.

Trump subsequently appealed the verdict to the U.S. Court of Appeals for the Second Circuit. The notice of appeal is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.590045/gov.uscourts.nysd.590045.179.0_2.pdf.

In July 2023, Judge Lewis A. Kaplan, who presided over the trial, denied Trump's motion for a new trial and refused to lower the $5 million damages amount. Judge Kaplan's opinion in support of his order is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.590045/gov.uscourts.nysd.590045.212.0_3.pdf.

Carroll's lawsuit originally filed in November 2019 is now set for trial in January 2024 to determine damages. *Carroll v. Trump*, 20-cv-7311 (S.D.N.Y Nov. 4, 2019) ("*Carroll I*"). Carroll is seeking $10 million in damages for the defamatory statements made by Trump in June 2019, while he was still President.

On Aug. 7, 2023, Judge Kaplan, who is also presiding over this case, dismissed a counterclaim for defamation filed by Trump against Carroll. The full text of Kaplan's opinion granting the dismissal is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.200.0.pdf.

On Aug. 10, 2023, Trump filed a motion to stay the case pending an appeal to the Second Circuit based on his defense of presidential immunity. The full text of Trump's motion to stay is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.203.0.pdf.

Judge Kaplan subsequently denied Trump's motion to stay, categorizing it as a "frivolous" attempt to further delay justice. The full text of Judge Kaplan's order is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.208.0.pdf.

On Sept. 6, 2023, Judge Kaplan granted Carroll's motion for summary judgment on nearly all of her defamation claims. Accordingly, the upcoming January 2024 trial will be limited to the question of damages only. The full text of Judge Kaplan's order granting summary judgment is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.214.0.pdf.

On Sept. 13, 2023, the Second Circuit also denied Trump's motion to stay the upcoming trial pending his appeal on the issue of presidential immunity. The full order is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.215.0.pdf.

On Dec. 13, 2023, the Second Circuit ruled that Trump had waived his presidential immunity defense by waiting too long to raise the issue, affirming Judge Kaplan's earlier ruling.

A three-judge panel for the Second Circuit wrote in its opinion that the three-year gap between Trump's 2020 response to Carroll's initial complaint and his 2023 request to amend his response and raise the defense of presidential immunity was an "undue delay" that "unduly prejudiced" Carroll. The full text of the Second Circuit's opinion is available online at: https://perma.cc/V49X-L9DU.

"We are pleased that the Second Circuit affirmed Judge Kaplan's rulings and that we can now move forward with trial next month on January 16," one of Carroll's attorneys said in an emailed statement to the *Associated Press* (*AP*).

In an email to *AP*, Alina Habba, one of Trump's attorneys, called the Second Circuit's ruling "fundamentally flawed" and said that the former president's legal

Trump Defamation, *continued on page 24*

Trump Defamation, *continued from page 23*
team would be immediately appealing the decision to the U.S. Supreme Court. The full *AP* article is available online at: https://apnews.com/article/trump-sexual-assault-defamation-trial-presidential-immunity-1794a1b9c32dbb83ec6de6f3342fca47.

On Nov. 3, 2023, Judge Kaplan ruled that the prospective jurors' identities in the upcoming trial "shall not be revealed," citing the "strong likelihood" of harassment, unwanted media attention and influence attempts. In his order, Judge Kaplan also cited the conduct of Trump in this and other unrelated cases as another reason to require juror anonymity.

"In view of Mr. Trump's repeated public statements with respect to the plaintiff and court in this case as well as in other cases against him, and the extensive media coverage that this case already has received and that is likely to increase once the trial is imminent or underway, the court finds that there is strong reason to believe the jury requires the protections," he said.

Specifically, the prospective jurors' names, addresses and places of employment will not be disclosed. Additionally, at the beginning and end of each day, the chosen jurors will gather at an undisclosed location from which they will go to and from court. The full text of Judge Kaplan's order is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.543790/gov.uscourts.nysd.543790.222.0.pdf.

According to *Law360*, the Second Circuit heard oral arguments on the issue of presidential immunity on Oct. 23, 2023. Lawyers for the former president claimed that the statements made by Trump in 2019 fell in the "outer perimeter of his official duties."

Meanwhile, Joshua Matz, one of Carroll's attorneys, claimed that Trump had waived presidential immunity by failing to raise the issue until three years into the case. Matz further argued that presidential immunity does not extend to every action made while in office.

"Somebody who holds the office of the president may engage in public speech on matters that have nothing to do with the operation or administration of the government," he said. The full text of the *Law360* article is available at: https://perma.cc/RN9E-DZ3F.

Trump Drops Defamation Suit Against Cohen

On Oct. 3, 2023, former President Donald Trump moved to dismiss without prejudice his defamation suit against his former lawyer Michael Cohen — although a spokesperson for the former president indicated that the case might be revived in the future.

Trump originally filed suit against Cohen in April 2023 in the U.S. District Court for the Southern District of Florida over allegations that Cohen violated attorney-client privilege and breached a confidentiality agreement by maliciously "spreading falsehoods" about Trump.

Trump sought $500 million in damages for Cohen's conduct, which he alleged occurred through the publication of two books, a podcast series and "innumerable mainstream media appearances" regarding Trump. The April 2023 complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flsd.645291/gov.uscourts.flsd.645291.1.0_2.pdf.

Over the course of the case, Cohen accused Trump of failing to fully and properly respond to discovery requests. A September 2023 motion filed by Cohen outlining the discovery disputes is available at: https://storage.courtlistener.com/recap/gov.uscourts.flsd.645291/gov.uscourts.flsd.645291.62.0_1.pdf.

The October 2023 motion for voluntary dismissal comes amid Trump's 2024 reelection campaign and his ongoing legal battles. The notice of voluntary dismissal is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flsd.645291/gov.uscourts.flsd.645291.77.0_2.pdf.

A Trump spokesperson told *Law360* that "while the president is fighting against the meritless claims that have been lodged against him in New York, Washington, D.C., Florida, and Georgia, as well as continuing his winning campaign . . . to serve as our next president of the United States, President Trump has decided to temporarily pause his meritorious claims against Michael Cohen."

Following the notice of dismissal, Cohen told *Law360* that the case against him "was nothing more than a retaliatory intimidation tactic, and [Trump's] attempt to hide from routine discovery procedures confirms as much." The *Law360* article is available at: https://perma.cc/U4K7-B55Q.

***The Washington Post* Seeks to Have Trump Defamation Claim Against It Dismissed**

In May 2023, former President Donald Trump filed a $3.8 billion defamation suit against *The Washington Post* over allegations that the paper published an "egregious hit piece" about Trump Media, which owns the Truth Social platform, that accused it of securities fraud and allegedly harmed Truth Social's prospects of going public.

The suit, which was originally filed in a Florida state court, focused on a May 13, 2023, *Post* article headlined, "Trust linked to porn-friendly bank could gain a stake in Trump's Truth Social." The *Post* reported that the ES Family Trust (which has links to a Caribbean bank with ties to adult entertainment sites) would gain a sizable share of Trump Media. However, according to whistleblower documents shared with the *Post*, Trump's company committed securities fraud by never disclosing that the trust stood to gain a stake in the company. The full *Post* article is available online at: https://www.washingtonpost.com/technology/2023/05/13/trump-truth-social-loan-questions/.

In its complaint, Trump Media alleged that the *Post* article was "materially false" because the company did not conceal that ES Family Trust stood to gain a stake in the company. The company also alleged that the whistleblower referenced in the *Post* article, Will Wilkerson, who is a former Trump Media executive and was fired in 2022, had been shopping "false stories" about the company to media outlets.

Trump Media also accused the *Post* of being on a "years-long crusade" against the company. The full text of the complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flmd.416050/gov.uscourts.flmd.416050.1.2.pdf.

On July 10, 2023, the *Post* filed a notice of removal to have the case removed to the federal U.S. District Court for the Middle District of Florida. The notice of removal is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flmd.416050/gov.uscourts.flmd.416050.1.0.pdf.

A week later, on July 17, the *Post* filed a motion to dismiss Trump Media's claim against it. The newspaper argued that Trump Media failed to plausibly allege that the statements at issue were published with actual malice, a

requirement for a successful defamation claim.

The *Post* alleged that it had reasonably believed Wilkerson's whistleblower documents, which he also provided to the Securities and Exchange Commission (SEC).

"The complaint contains no plausible allegation as to why the Post, as subjective matter, would not believe the veracity of such internal company documents provided to federal investigators by the company's former co-founder and executive," the newspaper said. The *Post*'s motion to dismiss is available online at: https://perma.cc/R2HP-TU7A.

Trump Seeks to Pause Pennsylvania Poll Worker's Defamation Case

In a motion filed on Oct. 2, 2023, former President Donald Trump asked a Pennsylvania state court to pause an election worker's defamation case while Trump handles the criminal cases against him in Georgia and Washington, D.C.

The defamation case was originally filed by James Savage, a Delaware County, Pa., poll worker, against Trump, former New York City Mayor Rudy Giuliani and a pair of Republican poll watchers in November 2021. The suit alleged that Savage was subjected to death threats and suffered two heart attacks as a result of the false claims made by the parties about the 2020 election.

"While Mr. Savage was performing his duties, two GOP poll watchers accused the plaintiff of tampering with the presidential election vote tabulation by fraudulently uploading 50,000 votes for Joseph Biden, when the plaintiff did nothing of the sort," the complaint said. "Despite knowing the impossibility of such claims and/or insinuations, defendant Donald J. Trump, his surrogates — including defendant Rudolph W. Giuliani herein — and their followers spread, reposted and disseminated these outrageously defamatory claims and/or insinuations against Mr. Savage, subjecting him to threats of physical violence and causing plaintiff to suffer inter alia two heart attacks."

The full text of the complaint is available online at: https://www.politico.com/f/?id=0000017c-e374-da3d-a77f-ff7f01170000.

In August 2023, Judge Michael Erdos for the Philadelphia Court of Common Pleas found that Trump was covered by presidential immunity for the statements he made about the 2020 election while in office but that he must face the defamation claims against him based on statements made after his time in office. Specifically, Trump must account for a 2022 letter sent to Rep. Bennie Thompson (D-Miss.) of the House committee investigating the Jan. 6, 2021, attack on the U.S. Capitol in which Trump repeated the allegations of election fraud in Delaware County. Judge Erdos's decision regarding presidential immunity is available online at: https://perma.cc/3S55-CKLK.

In October 2023, attorneys for Trump requested the Pennsylvania state court to temporarily halt the proceedings given the "unique and unprecedented situation" involving Trump's criminal indictments in the lead-up to the 2024 presidential election.

"Given the paramount interests at play, the significant threat to President Trump's constitutional rights, and the minimal harm, if any, that would result to plaintiff, a stay of proceedings in this action is necessary and warranted," Trump's attorneys wrote in their brief. Trump's full brief requesting a stay is available online at: https://perma.cc/YPL3-VXWS.

Trump Campaign, Allies Paint a Picture of a Vengeful Second Administration If Elected, Particularly Toward the Press

Former President Donald Trump has continued campaigning amid his ongoing legal entanglements, with Trump himself saying "retribution" would be a priority for a second administration.

In March 2023, Trump told attendees of the Conservative Political Action Conference, "I am your warrior, I am your justice. And for those who have been wronged and betrayed, I am your retribution." According to *The Hill*, "Trump's own words paint a clear picture of an individual appearing increasingly fixated on targeting those he believes have wronged him if he is able to return to the White House, and he is using exceedingly incendiary rhetoric to make his point." A Nov. 16, 2023, article from *The Hill* with more information is available online at: https://thehill.com/homenews/campaign/4311194-trump-signals-revenge-in-second-term.

In September 2023, Trump wrote on his social media platform, Truth Social, that he intended to investigate news outlets if he is reelected.

"I say up front, openly, and proudly, that when I WIN the Presidency of the United States, they and others of the LameStream Media will be thoroughly scrutinized for their knowingly dishonest and corrupt coverage of people, things, and events," he said in the post. "Why should NBC, or any other of the corrupt & dishonest media companies, be entitled to use the very valuable Airwaves of the USA, FREE? They are a true threat to Democracy and are, in fact, THE ENEMY OF THE PEOPLE! The Fake News Media should pay a big price for what they have done to our once great Country."

A former Trump Administration official added credence to this threat. On Dec. 5, 2023, the *Associated Press* (*AP*) reported that Kash Patel, who worked in Trump's Justice Department and Defense Department, said that Trump's "administration will retaliate against people in the media 'criminally or civilly.'" The *AP* article is available online at: https://apnews.com/article/trump-2024-second-term-prosecute-media-b892fd6f3ce721016eb1176e82aa51c3.

Patel's comments were made on Steve Bannon's podcast, *War Room*. Bannon served as the White House's chief strategist during the Trump Administration. According to *AP*, "Trump's campaign distanced itself from Patel's comments, saying that proclamations 'like this have nothing to do with' them. The campaign did not respond to questions about whether Trump is considering the plans Patel described."

Brian Stelter, a special correspondent for *Vanity Fair* and former CNN anchor, said these threats should be taken seriously: "I worked at CNN when Trump used his presidential bully pulpit to hound CNN's parent AT&T. I remember the day when he suggested a boycott of AT&T and there was a collective shrug in response. The company's stock ticked up 1.67% that day. The big difference now is that Trump's anti-press tirades are also campaign promises. The words of Trump's first term will translate to actions in a second term." Stelter's commentary is available online at: https://www.niemanlab.org/2023/12/media-owners-in-the-crosshairs-as-trump-craves-retribution.

— Charlotte Higgins
Silha Center Research Assistant

— Ryan Liston
Silha *Bulletin* Editor

Minnesota Supreme Court Rules #MeToo Facebook Post Receives Heightened First Amendment Protection as a Matter of Public Concern

On Sept. 20, 2023, the Minnesota Supreme Court ruled in favor of the defendant in a defamation case involving a Facebook post containing the #MeToo hashtag that accused the plaintiff of sexual assault. The court held that the post involved a matter of public concern: sexual assault within the context of the broader #MeToo movement. Therefore, the statement was protected speech under the First Amendment and the defendant must prove actual malice to prevail in the defamation case. *Johnson v. Freborg*, No. A21-1531 (Minn. Sept. 20, 2023)

DEFAMATION

This case involved a statement posted on Facebook by Kaija Freborg, accusing Byron Johnson and two other Twin Cities dance instructors of sexual assault. Freborg and Johnson met in 2011, when Freborg began taking dance lessons from Johnson at a local studio. They had a casual, consensual sexual relationship for about three years. Freborg alleges that in early 2015, while attending a house party, Johnson "approached her while she was intoxicated and alone, grabbed her hand and put it down his pants onto his genitals without [her] consent." Following the party, Freborg and Johnson ended their relationship and only communicated about dance lessons. By 2020, they had not spoken at all for several years. *Johnson v. Freborg*, 978 N.W.2d 911 (Minn. Ct. App. July 25, 2022)

On July 14, 2020, Freborg posted the following statement on her Facebook page: "Feeling fierce with all these women dancers coming out. So here goes…I've been gaslighted/coerced into having sex, sexual[ly] assaulted, and/or raped by the following dance instructors: Byron Johnson [and two others]. If you have a problem with me naming you in a public format, th[e]n perhaps you shouldn't do it [three emojis of a woman shrugging] #metoo #dancepredators." Freborg later clarified in the comments to her post that she was not accusing Johnson of rape and edited her post to read: "I've experienced varying degrees of sexual assault . . .." Johnson responded via comment, stating: "This is a very serious accusation which I categorically deny." The Facebook post received over 300 reactions, 182 comments, and was shared 16 times. The responses were mixed: some commenters praised Freborg for her bravery and added their own experiences of sexual assault in the Twin Cities dance community; others defended Johnson and accused Freborg of "slander" [commenters referred to the post as slander in a colloquial sense, although libel would be the applicable legal term] and "criticized her unwillingness to engage with Johnson's response to her posts." On July 27, 2020, Freborg deactivated her Facebook account, removing the post in the process. *Johnson v. Freborg*, No. A21-1531 (Minn. Sept. 20, 2023)

On April 2, 2021, Johnson sued Freborg for defamation in the Hennepin County District Court in Minneapolis, Minn., arguing that he suffered reputational harm and lost business because of the Facebook post. The district court granted summary judgment in favor of Freborg in October 2021, finding that the speech was true. Alternatively, the district court held that the speech involved a matter of public concern and was not made with actual malice. *Johnson v. Freborg*, No. 27-CV-21-3888 (Hennepin Cnty. Dist. Ct. Oct. 25, 2021)

On appeal, the Minnesota Court of Appeals reversed and remanded. It found that the truth or falsity of the statement was a genuine issue of material fact and not suitable for summary judgment. The court also held that the statement involved a private concern, not a public concern. *Johnson v. Freborg*, 978 N.W.2d 911 (Minn. Ct. App. July 25, 2022)

In a Dec. 22, 2022, blog post, Leventhal PLLC, a business litigation law firm in Edina, Minn., agreed with the Appellate Court's decision: "One cannot avoid liability on a defamation claim for sexual assault by virtue of the fact that our culture is actively grappling with this terrible social ill (the broad and pernicious exploitation and mistreatment of women by men). Clearly, this is a matter of great public concern. But so isn't [*sic*] crime, corporate malfeasance, and child abuse. It cannot be that comments in these contexts are carved out of the reach of defamation law." The blog post is available online at: https://www.leventhalpllc.com/metoo-free-speech-defamation/.

The Minnesota Supreme Court granted Freborg's petition for review on a single issue in this case: whether her statement involved a matter of public concern. This issue would determine the relevant standard of intent required to establish liability and to collect damages.

Under common law, "a plaintiff pursuing a defamation claim 'must prove that the defendant made: (a) a false and defamatory statement about the plaintiff; (b) in [an] unprivileged publication to a third party; (c) that harmed the plaintiff's reputation in the community.'" *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019) (quoting *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 673 (Minn. 2003)). For types of speech that are defamatory *per se* — including allegations of sexual assault — reputational harm may be presumed. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996). Johnson claimed that this was the relevant standard for his case.

However, under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and subsequent cases, "a private plaintiff may not recover presumed damages for defamatory statements involving a matter of public concern unless the plaintiff can establish actual malice." *Maethner*, 929 N.W.2d at 878–79. A statement is made with actual malice if it was "made with the 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Maethner*, at 873 (first quoting *Weinberger*, 668 N.W.2d at 673; then quoting *Sullivan*, 376 U.S. at 279-80). To determine whether speech is a matter of public or private concern, courts assess the "totality of the circumstances, reviewing the content, form, and context of the speech on a case-by-case basis. *Maethner*, 929 N.W.2d at 881. Freborg claimed that her statement was a matter of public concern, and therefore the actual malice standard should apply.

In the majority opinion by Justice Margaret Chutich, the Minnesota Supreme Court held that Freborg's statement involved a matter of public concern and thus would receive heightened protection under the First Amendment. The case was remanded back to the Hennepin County District Court for trial proceedings. To recover damages, Johnson must now show that the statement is false and that Freborg made the statement with actual malice. The court reasoned that Freborg's overall purpose of the Facebook post was to add her voice to the broader #MeToo movement. The court noted that Freborg's post discussed how she was encouraged by other women to speak out and made use of the #MeToo and #DancePredators hashtags. Justice Chutich wrote that the passage of time between the end of Freborg and Johnson's relationship and the inclusion of two other names in the post "implies that the post had less to do with Freborg's previous relationship with Johnson, and more about speaking up about alleged sexual abuse in the Twin Cities dance community generally."

The court also emphasized that the post received "robust and unfettered discussion" in the comment section, supporting the claim that this was a matter of public concern. The majority opinion discussed the importance of the #MeToo movement and focused on not chilling the speech of survivors of sexual assault. However, the court noted that statements about sexual assault are not matters of public concern *per se*; rather, they are assessed on a case-by-case basis.

Former Chief Justice Lorie Gildea, who has since retired from the court, wrote a dissenting opinion, joined by Justice Barry Anderson and current Chief Justice Natalie Hudson, arguing that Freborg's statement was not "central to the purpose of the First Amendment" and thus should not receive heightened protections. Chief Justice Gildea noted that the actual malice standard "applies to protect speech about a public figure, government official or the performance of government more generally, but the standard does not apply to speech about a private plaintiff on a matter of private concern." The dissent observed that Freborg's speech did not concern the government or government officials and argued that the majority opinion "essentially equates matters of interest to the public to those of public concern." Justice Gildea continued that, despite the use of the #MeToo hashtag, Freborg's speech involved an "undeniable personal element" and called out a private person for private behavior. The dissent also emphasized that the court is tasked with evaluating the single Facebook post, not the entire #MeToo movement. Therefore, the dissent would have held that Freborg's speech was not a matter of public concern under the First Amendment.

> "What is new now is that [Johnson] must additionally be able to show that [Freborg] either knew that what she published was not true or that she published it recklessly. This is a breathtaking opinion to me in terms of the breadth of the protection for speech that the majority has articulated here."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

The full opinion and dissent are available online at: https://law.justia.com/cases/minnesota/supreme-court/2023/a21-1531.html.

Silha Center Director and Professor of Media Ethics and Law Jane Kirtley discussed the impact of this decision for defamation law in Minnesota with MPR News: "What is new now is that he has to additionally be able to show that she either knew that what she published was not true or that she published it recklessly," Kirtley said. "This is a breathtaking opinion to me in terms of the breadth of the protection for speech that the majority has articulated here." The MPR News article is available online at: https://www.mprnews.org/story/2023/09/21/minnesotas-high-court-sides-with-defendant-in-metoo-lawsuit.

According to Jennifer Mondino, Director of the TIME'S UP Legal Defense Fund, based at the National Women's Law Center in Washington, D.C., defamation cases against victims of sexual assault or harassment are a common form of retaliation. Mondino commented to *The Intercept* that these cases often target victims with few resources to fight the lawsuits: "For those people it is all the more intimidating to be faced with the possibility of being sued." The article is available online at: https://theintercept.com/2023/07/22/metoo-defamation-lawsuits-slapp/.

— Mallory Harrington
Silha Center Research Assistant

Florida Supreme Court to Decide Whether the State's Anti-Riot Act Is Unlawfully Ambiguous

On Oct. 4, 2023, the Florida Supreme Court heard oral arguments in a case challenging Florida's "Combating Public Disorder Act" (the Act), a statute ostensibly aimed at curtailing riots, but which critics say will criminalize some peaceful protests. The court appeared to favor the state in the proceedings.

FREEDOM OF SPEECH

Florida's push for anti-riot legislation arose following the widespread protests against the police killing of Minneapolis resident George Floyd in May 2020. In September 2020, Gov. DeSantis, a Republican, announced the state's efforts to push back against protestors. The timing of the announcement was unusual, nearly six months before Florida's annual 60-day legislative session that was set to begin in March 2021. "Recently in our country, we have seen attacks on law enforcement, we've seen disorder and tumult in many cities," Gov. DeSantis said. He criticized the behavior of protestors. "You see these videos of these innocent people eating dinner and you have these crazed lunatics just screaming at them and intimidating them," Gov. DeSantis said. He continued, "You're not going to do that in the state of Florida." The full statement is available online at: https://z.umn.edu/DeSantisAnnouncement.

Gov. DeSantis made an additional plea for the bill on Jan. 7, 2021, shortly after Trump supporters stormed the U.S. Capitol. He condemned that attack in a press conference, arguing that the incident further reinforced why Florida needed to pass a law restricting and penalizing protestors.

The Florida House of Representatives passed the bill on March 26, 2021, sending HB1 to the Senate. On April 15, 2021, the bill narrowly passed the Senate, shortly before the end of the legislative session.

Gov. DeSantis signed the Act into law on April 19, 2021. It takes a hardline stance against violent and disorderly assemblies. In a public statement, delivered from the Polk County Sheriff's Office, Gov. DeSantis said, "In Florida, we are taking an unapologetic stand for the rule of law and public safety. We are holding those who incite violence in our communities accountable, supporting our law enforcement officers who risk their lives every day to keep us safe and protect Floridians from the chaos of mob violence." The full statement is available online at: https://z.umn.edu/DeSantisHB1Statement.

The Act is a wide-ranging piece of legislation. It defines a riot as "three or more people acting in common to assist each other in violent and disorderly conduct" that results in injury, property damage, or imminent danger of injury or property damage, Fla. Stat. § 870.01(2). It makes battery on a police officer "in furtherance of a riot or an aggravated riot" punishable by a minimum of six months in prison. Fla. Stat. § 784.07(2)(b). Pulling down a memorial or historic property "willfully or maliciously" would constitute a second-degree felony. Fla. Stat. § 806.135(2). It also creates an affirmative defense in civil personal injury lawsuits if a plaintiff's injuries occurred while the plaintiff was participating in a riot or unlawful assembly, Fla. Stat. § 870.07. The full text of the Act is available online at: https://z.umn.edu/FloridaHB1.

Supporters of the Act included Rep. Chris Sprowls (R-Clearwater), then-speaker of the Florida House, who told *The New York Times*, "We weren't going to allow Florida to become Seattle. We were not going to allow Florida to become Portland." That article is available online at: https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html.

Pushback against the legislation was swift. Florida Rep. Evan Jenne (D-Hollywood) accused Gov. DeSantis of having ulterior motives. "The thing that gave birth to this idea of his and other Republicans in power in Tallahassee was to try to quash the voices of African Americans," he told *The Associated Press* (*AP*). The *AP* article is available online at: https://z.umn.edu/APDeSantis.

The American Civil Liberties Union (ACLU) of Florida posted on X, on April 15, 2021, "HB 1 is racist, unconstitutional, and anti-democratic, plain and simple. The bill was purposely designed to embolden the disparate police treatment we have seen over and over again directed towards Black and brown people who are exercising their constitutional right to protest." The post is available online at: https://z.umn.edu/ACLUTweet. Writing in *The New York Times* on April 21, 2021, reporters Reid Epstein and Patricia Mazzei observed that "while Democrats seized on Mr. Floyd's death [in May 2020] to highlight racism in policing and other forms of social injustice, Republicans responded to a summer of protests by proposing a raft of punitive new measures governing the right to lawfully assemble."

"This is consistent with the general trend of legislators' [*sic*] responding to powerful and persuasive protests by seeking to silence them rather than engaging with the messages of the protests," Vera Eidelman, an attorney for the ACLU, told *The New York Times*.

Florida Senate Minority Leader Audrey Gibson denounced the bill as politically motivated. "The governor is attaching himself to Donald Trump's propaganda and manufacturing a non-existent law and order crisis in Florida. It's political fearmongering to bolster a president's re-election bid," Gibson said to *AP* on Sept. 21, 2020.

In the same article, Kelly Benjamin, co-founder of the non-profit Tampa for Justice, criticized the statute on First Amendment grounds. "The right to peaceably assemble is enshrined in the U.S. Constitution. This is an attempt to chill legitimate dissent and somehow equate protests against police killing Black people with criminal activity despite the clear evidence the protests occurring in Florida are overwhelmingly peaceful."

Since January 2017, 21 states have enacted 42 statutes curtailing the right to protest, according to the International Center for Not-for-Profit Law. Forty-five states have considered such legislation. The full list is available online at: https://z.umn.edu/ProtestLawTracker.

On May 11, 2021, the NAACP Legal Defense and Educational Fund, the ACLU, and the Community Justice Project filed a lawsuit in the U.S. District Court for the Northern District of Florida in Pensacola, alleging their First Amendment rights had been chilled because of the law's restrictions on protests. The complaint named Gov. DeSantis, Florida Attorney General Ashley Moody, Leon County Sheriff Walt McNeil, Jacksonville Sheriff Mike

Williams, and Broward County Sheriff Gregory Tony as defendants. A large consortium of Black-led organizations, including The Dream Defenders, the Black Collective, Chainless Change, Black Lives Matter Alliance of Broward, the Florida State Conference of the NAACP, and the Northside Coalition of Jacksonville were co-plaintiffs. The suit alleges that the Act violates the First and Fourteenth Amendments by discouraging protected speech and criminalizing protest activity. The organizations declined to schedule a demonstration on May 25, 2021, the first anniversary of George Floyd's death, fearing repercussions under the Act. The full complaint is available online at: https://z.umn.edu/HB1Complaint.

On Sept. 9, 2021, U.S. District Judge Mark Walker barred Florida from enforcing the Act. His opinion began with a retelling of the case of two Black students who were arrested in Tallahassee, Fla. for "inciting a riot" during a 1956 bus boycott. The two students were arrested for quietly riding a bus in the "whites-only" section.

Judge Walker characterized the Act as another example of a Florida anti-riot law that criminalized behavior that is constitutionally protected. "Now this court is faced with a new definition of 'riot' — one that the Florida legislature created following a summer of nationwide protest for racial justice and in support of the powerful statement that Black lives matter." Judge Walker criticized the vagueness of the statute, specifically Florida's definition of a "rioter" as one who "willfully participates in a violent public disturbance," Fla. Stat. § 870.01(2). He cited an extensive list of hypothetical situations that would be unclear under the law. "Is it enough to stand passively near violence? What if you continue protesting when violence erupts? What if that protest merely involves standing with a sign while others fight around you?"

Judge Walker granted the plaintiffs' request to block Florida from enforcing the Act's definition of "riot." "If this court does not enjoin the statute's enforcement, the lawless actions of a few rogue individuals could effectively criminalize the protected speech of hundreds, if not thousands, of law-abiding Floridians," he wrote in his decision. The full opinion is available online at: https://z.umn.edu/DreamDefendersvDeSantis. *Dream Defenders v. DeSantis*, 553 F. Supp. 3d 1052 (N.D. Fla. 2021)

In a news conference in New Port Richey on the day the decision was rendered, Gov. DeSantis stated that the state intended to appeal to the generally more conservative U.S. Court of Appeals for the 11th Circuit, based in Atlanta, Ga., according to *The New York Times*. The governor referred to the ruling as a "foreordained conclusion" and pledged, "We will win that on appeal, I guarantee you." The full article from *The New York Times* is available online at: https://z.umn.edu/NYTimesHB1Lawsuit.

By contrast, the ACLU of Florida called the decision "a major victory for civil rights and racial justice advocates." The coalition of plaintiff organizations released a statement as well. "Today's decision enjoining enforcement of a key provision of HB 1 [the Act] will greatly contribute to the safety of Black organizers and others affected by this unjust law. HB 1 effectively criminalizes our constitutional right to peacefully protest and puts anyone — particularly Black people demonstrating against police violence — at risk of unlawful arrest, injury, and even death. This targeting of protesters is shameful and directly contradicts our Constitution." Both statements are available online at: https://z.umn.edu/ACLUPressRelaseFL.

In March 2022, a three-judge panel from the 11th Circuit heard arguments in *Dream Defenders et al. v. DeSantis*.

On Jan. 10, 2023, the panel handed down its unanimous decision. It agreed with the district court that the plaintiffs faced a "credible threat of prosecution" and provided evidence that their speech was being chilled by "self-censoring for fear of the challenged statute's enforcement against them." The panel also left the injunction against the enforcement of the law in place. However, the court concluded that the issue of the vagueness of the statute should be resolved by the Florida Supreme Court. "Whether Florida's riot statute is unconstitutional turns on the proper interpretation of the new definition of 'riot' under Florida law — a question the Florida Supreme Court, the final arbiter of state law, has not yet addressed," Judge Jill Pryor wrote. The opinion deferred deciding the constitutionality of the law and certified a question of what "riot" meant to the Florida Supreme Court. The full order is available online at: https://z.umn.edu/11thCircuitOpinion. *Dream Defenders v. DeSantis*, 57 F.4th 879 (11th Cir. Jan. 10, 2023)

Ben Frazier, founder of the plaintiff organization the Northside Coalition of Jacksonville, called the 11th Circuit opinion a "step in the right direction." "This means that I can continue to exercise my Constitutional right to protest and not worry about being arrested under the unfair provisions of HB 1," he said. Gov. DeSantis's team also reacted favorably to the ruling. "We are pleased that the 11th Circuit did not adopt the district court's view that the statute is unconstitutional, and we look forward to defending our interpretation of state law in the state's highest court," said Jeremy Redfern, deputy press secretary for Gov. DeSantis in an email to *WFSU News*. The full article is available online at: https://z.umn.edu/WFSUArticle.

At oral arguments before the Florida Supreme Court on Oct. 4, 2023, justices agreed with the defendants. "I think you're here because the federal court adopted a willfully unreasonable interpretation of the statute," said Chief Justice Carlos Muniz. Chief Justice Muniz also pushed back against James Tysse, an attorney representing the plaintiffs: "Why are you so wedded to this idea that the legislature did something wrong that we have to save the legislature from itself?"

Justice Charles Canady told Tysse that "some of [the justices] are not convinced that there is ambiguity here." Justice John Couriel also asked counsel to "[h]elp me understand why I should twist myself into a pretzel [*sic*] to find a legislative decision to criminalize protected conduct."

Despite being peppered with questions, Tysse remained optimistic after the argument. "The questions we got suggest that the court will adopt a construction that will protect constitutional rights," Tysse told *Bloomberg Law*. A *Bloomberg Law* article recapping oral arguments is available online at: https://z.umn.edu/RiotLawGetsFavorableTreatment.

As the *Bulletin* went to press, the case was pending.

— Jack Tate
Silha Center Research Assistant

Colorado Supreme Court to Hear Case Against Bakery that Refused to Make Cake Celebrating Gender Transition

A new case involving Masterpiece Cakeshop, the same bakery that was party to the 2018 U.S. Supreme Court case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, has been granted certification by the Colorado Supreme Court.

FREEDOM OF SPEECH

In the first lawsuit against Masterpiece Cakeshop (Masterpiece), a gay couple requested that Jack C. Phillips, the owner and principal cake designer of the Lakewood, Colo., business, create a wedding cake for them in early 2012. Citing his religious views, Phillips refused to provide the couple with a custom wedding cake. The couple filed charges under the Colorado Anti-Discrimination Act (CADA), alleging discrimination based on their sexuality. The Colorado Civil Rights Commission (the Commission) sued Phillips and Masterpiece on their behalf. An Administrative Law Judge ruled in favor of the couple, and the Colorado Civil Rights Commission and the Colorado Court of Appeals affirmed the ruling. The Colorado Supreme Court denied a writ of *certiorari*. The case went to the U.S. Supreme Court where it was decided on June 4, 2018 (*Masterpiece I*). *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)

The Supreme Court focused on the anti-religious bias of the Commission, rather than deciding the case on free speech grounds. The Court ruled that the Commission had violated Phillips's First Amendment right to freedom of religion by criticizing his Christian beliefs, declining to comment on whether Phillips could refuse service to gay customers. (For more information on *Masterpiece I*, see "Retrospective: Justice Breyer's Jurisprudence, Legacy" in the Winter/Spring 2022 issue of the Silha *Bulletin* and "U.S. Supreme Court Considers Section 230, Free Expression, Anti-Discrimination, and True Threats" in the Winter/Spring 2023 issue.)

On June 26, 2017, the same day the Supreme Court granted *certiorari* in *Masterpiece I*, Autumn Scardina called Masterpiece to place an order. Scardina, who is an attorney and transgender woman, informed the cakeshop that she would like to order a custom pink cake with plain blue frosting. Debra Phillips, Jack Phillips's wife, informed Scardina that they could provide the cake as requested. Scardina then told Debra Phillips that the cake was to celebrate her birthday and her identity as a transgender woman. Debra Phillips informed Scardina that she did not think her husband would make the cake "because of the message," according to the Court of Appeals opinion. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, 528 P.3d 926 (Colo. Ct. App. 2023)

Before the matter was resolved, the call was disconnected. Scardina called back shortly after, and the Phillipses' daughter Lisa Eldfrick answered. Eldfrick informed Scardina that Masterpiece would not make the cake she requested.

Scardina described the second phone call to *them.*, a website dedicated to LGBT news, as "very hostile" and said that the woman who answered her call immediately "shut [the idea of the cake] down." The full interview with Scardina is available online at: https://z.umn.edu/themScardinaInterview.

Jack Phillips testified later that he "won't design a cake that promotes something that conflicts with [his] Bible's teachings" and that "he believes that God designed people male and female, that a person's gender is biologically determined." *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, 528 P.3d 926 (Colo. Ct. App. 2023)

Scardina testified that she was seeking to "challenge the veracity" of Phillips's stand on refusing cakes for LGBTQ individuals, hoping to potentially "call [his] bluff."

Scardina informed *them.* in a June 17, 2021, interview that she empathized with Jack Phillips's decision to refuse to make the custom wedding cake for the gay couple in 2012, despite disagreeing with him. She stated that she is a devout Christian and recounted the conversation she had with Phillips before she attempted to order the cake. "I remember him saying several times: '[Same-sex marriage] is about a singular religious event. This doesn't have to do with the individuals,'" Scardina told *them*. "I disagreed with his ultimate position, but some part of me understood how difficult it must be . . . to watch the world change on him. I wanted to believe him."

She filed a charge with the Colorado Civil Rights Division (CCRD), alleging that Masterpiece and Phillips violated CADA. The relevant provision holds that "[i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. § 24-34-601(2)(a).

CADA protects Colorado citizens from discrimination by businesses, including those that provide goods and services to the public. Remedies available to the aggrieved party include civil litigation brought themselves or allowing the CCRD to take administrative action or pursue civil litigation on their behalf. Colo. Rev. Stat. §§ 24-34-306–307.

On June 28, 2018, the CCRD issued a probable cause determination finding that it was likely Phillips had violated CADA by refusing Scardina's cake request. On Oct. 2, 2018, the Commission voted to file a formal complaint against Masterpiece Cakeshop. Colo Rev. Stat. § 24-34-306(4).

Shortly after Scardina filed her complaint, on Aug. 14, 2018, Phillips filed a federal lawsuit against Aubrey Elenis, director of the CCRD, and numerous other state officials. Phillips accused the Commission and Colorado of targeting him in its handling of Scardina's complaint. The case, *Masterpiece Cakeshop v. Elenis*, was settled in March 2019, as both Masterpiece and the state agreed to drop their cases, according to *The Denver Post*. The full article is available online at: https://z.umn.edu/DenverPostMasterpiece. *Masterpiece Cakeshop v. Elenis*, 445 F. Supp. 3d 1226 (2019).

The CCRD administratively closed the case on March 7, 2019. Since the March 2019 settlement did not involve Scardina, she exercised her right under Colo. Rev. Stat. § 24-34-306(14), which allows an aggrieved party to bring a claim to sue an alleged wrongdoer in district court once they exhaust their administrative remedies. Scardina filed a lawsuit in Denver District Court under CADA against Masterpiece on June 5, 2019.

On June 15, 2021, Denver District Court Judge A. Bruce Jones ruled that Phillips's denial of Scardina's request for a pink cake with blue frosting to celebrate her gender transition violated CADA. In his ruling, Judge Jones focused on Phillips's refusal to sell a product based on Scardina's gender identity, instead of deciding the case on First Amendment grounds. "The anti-discrimination laws are intended to ensure that members of our society who have historically been treated unfairly, who have been deprived of even the everyday right to access businesses to buy products, are no longer treated as 'others,'" Judge Jones wrote. *Scardina v. Masterpiece Cakeshop*, No. 2019CV32214 (D. Colo. June 15, 2021)

Judge Jones focused on Masterpiece's admission that it would have made an identical-looking cake for other customers, and that it was willing to make the cake until Scardina indicated that it was to celebrate her gender transition. He referenced Masterpiece's refusal to make a cake for a same-sex couple that led to the 2018 U.S. Supreme Court decision.

"Defendants have a religious objection to making cakes that reflect the identity of LGBT people — as LGBT people — including cakes that recognize same-sex relationships, cakes that recognize gay pride, or cakes that recognize transgender status. Defendants' willingness to serve the LGBT community in some circumstances is premised on a 'limited menu' offering that courts have repeatedly rejected," Judge Jones concluded. He ordered Phillips to pay Scardina $500 as a penalty for violating CADA. The full opinion is available online at: https://z.umn.edu/ScardinavMasterpieceDC.

The group representing Phillips, Alliance Defending Freedom (ADF), released a statement condemning the district court decision. "Radical activists and government officials are targeting artists like Jack because they won't promote messages on marriage and sexuality that violate their core convictions," said general counsel Kristen Waggoner. "We will appeal this decision and continue to defend the freedom of all Americans to peacefully live and work according to their deeply held beliefs without fear of punishment." The full statement from ADF is available online at: https://z.umn.edu/ADFDistrictCourtStatement.

John McHugh, one of Scardina's attorneys, told the *Associated Press* (*AP*) that the case is a microcosm of how LGBT people are treated. "This is about a business that is open to the public that simply says to an entire class of people in the community that your identity, who you are, is something that is objectionable," he said. The full *AP* article is available online at: https://z.umn.edu/APScardinaStatement.

> "Free speech is for everyone. The Colorado Supreme Court should apply 303 Creative to reverse the appeals court's decision punishing Jack. You don't need to agree with Jack's views to agree that Americans shouldn't be compelled to express what they don't believe."
>
> **— Jake Warner, Attorney, ADF**

The case reached the Colorado Court of Appeals in October 2022. At trial, Jake Warner, an attorney from ADF representing Phillips, argued that requiring Phillips to produce a cake with a message that he did not agree with was compelled speech, violating his First Amendment rights, according to an Oct. 5, 2022, article from *The Denver Post*. McHugh pushed back, pointing out that Scardina asked for a plain cake that Phillips testified he would have sold to anyone else. The full article is available online at: https://z.umn.edu/DenverPostMasterpiece.

Phillips attempted to delay the Court of Appeals ruling, hoping that the Supreme Court would release its decision for *303 Creative LLC v. Elenis*, a case that ruled on the First Amendment rights of a wedding website designer under CADA, but he was ultimately unsuccessful. (For more information on *303 Creative* see "U.S. Supreme Court Considers True Threats, Free Expression, and Section 230" in the Summer 2023 issue of the Silha *Bulletin*.) *303 Creative LLC v. Elenis*, 143 S. Ct. 2298 (2023).

On Jan. 26, 2023, the Colorado Court of Appeals ruled in favor of Scardina, affirming the lower court's decision. The three-judge panel ruled that the cake Scardina had requested was not a form of speech and therefore not entitled to First Amendment protection.

"The trial court did not err by concluding that Masterpiece and Phillips discriminated against Scardina because of her status as a trans woman," wrote Judge Timothy J. Schutz in a 43-page opinion. *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, 528 P.3d 926 (Colo. Ct. App. 2023)

The panel differentiated the current matter from *Masterpiece I* by comparing the differences between the two cakes and whether either was compelled speech. Judge Schutz cited the Supreme Court decision that held, "if a baker refused to design a special cake with words or images celebrating the marriage — for instance, a cake showing words with religious meaning — that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018)

Relying on these *dicta*, the Colorado Court of Appeals concluded that "creating a pink cake with blue frosting is not inherently expressive and any message or symbolism it provides to an observer would not be attributed to the baker." *Scardina v. Masterpiece Cakeshop, Inc.*, 2023 COA 8, 528 P.3d 926 (Colo. Ct. App. 2023)

After the ruling, McHugh celebrated the court's opinion while criticizing Masterpiece's action. "[Masterpiece] just object[s] to the idea of Ms. Scardina wanting a birthday cake that reflects her status as a transgender woman because they object to the existence of transgender people,"

Masterpiece, *continued on page 32*

Fifth Circuit Rejects First Amendment Challenge to Texas Drone Regulations, Dealing Blow to Journalists

On Oct. 23, 2023, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit ruled unanimously that a Texas state law restricting the use of drones does not violate the First Amendment. The court held that the law was not facially unconstitutional, but it did leave leeway for future First Amendment and due process challenges, noting that a future challenge "may persuasively show that a particular enforcement [of the law] runs afoul of free speech or fairness principles." The court repeatedly recited the same maxim throughout its ruling, writing that the press has no special exemption to invade the rights and liberties of others by recording them or their property without authorization. The case can be found online at: https://z.umn.edu/NPPAvMcCraw. *Nat'l Press Photographers Ass'n v. McCraw*, 2023 U.S. App. LEXIS 28050 (5th Cir. 2023)

FREEDOM OF PRESS

In 2013, the Texas legislature enacted Chapter 423 to regulate the increasing use of drones in Texas' airspace. Tex. Gov't Code Ann. § 423.003. The full text of Chapter 423 is available online at: https://z.umn.edu/TexCh423. Several years after its enactment, Chapter 423 began to pose issues for journalists. In 2017, Joseph Pappalardo, a freelance journalist, was informed by one of the media companies he worked for that they would not pay for his legal defense if he used his drone in reporting for it. Pappalardo claimed that Chapter 423 prevented him from reporting on Hurricane Harvey, as he was unable to take aerial photos with his drone to document the widespread flooding. Other journalists began to run afoul of Chapter 423 shortly thereafter. In July 2018, Guillermo Calzada, a journalist for the *San Antonio Express-News*, was capturing images of an apartment fire with his drone. A federal agent approached him and informed Calzada he was interfering with a federal investigation and called the local police on him. The officer informed Calzada that he was in violation of Chapter 423 and would violate the statute again if he published the images captured. Others have expressed concerns about Chapter 423, like Brandon Wade, a freelance journalist who claims that the statute is costing him business by preventing him from using his drone in newsgathering.

Pappalardo, along with the National Press Photographers Association (NPPA), which is representing Calzada and Wade, and the Texas Press Association (TPA) filed suit against Steve McCraw, Director of the Texas Department of Public Safety (DPS), in late 2019. The plaintiffs alleged that Chapter 423 violated the First Amendment, the Due Process Clause of the Fourteenth Amendment, and federal preemption principles. https://z.umn.edu/NPPAvMcCrawComplaint.

Two provisions of Chapter 423 are at issue. Throughout the litigation, the parties have nicknamed them the "Surveillance" and "No-Fly" provisions. The Surveillance provision states that a person violates the law when they "use an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image." Tex. Gov't Code Ann.

Masterpiece, *continued from page 31*

he said in a statement to *Fortune* on Jan. 26, 2023. The article is available online at: https://z.umn.edu/FortuneMasterpieceScardina.

Warner, from ADF, who represented Phillips on appeal, objected to the opinion in a Jan. 26, 2023, statement. "One need not agree with Jack's views to agree that all Americans should be free to say what they believe, even if the government disagrees with those beliefs," he said. The full statement from Warner and ADF is available online at: https://z.umn.edu/ADFStatementCOA.

On Oct. 3, 2023, the Colorado Supreme Court agreed to hear Phillips's appeal, in the wake of the U.S. Supreme Court's ruling in *303 Creative* that allowed a Colorado Christian wedding website designer to refuse service to same-sex couples. The court specifically granted *certiorari* to examine three issues:

- "Whether Scardina's CADA claim is barred because Scardina did not appeal the Commission's dismissal of the administrative complaint before suing Masterpiece Cakeshop and Phillips."
- "Whether the decision by Masterpiece Cakeshop and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition violated CADA's prohibition on transgender-status discrimination."
- "Whether the decision by Masterpiece Cakeshop and Phillips not to create a pink cake with blue frosting that was to be used to celebrate a gender transition was protected by the First Amendment."

The court's full order is available at: https://z.umn.edu/COSupremeCourtOct3.

ADF released a statement praising the court's decision to grant the appeal. "Free speech is for everyone," said Warner. "The Colorado Supreme Court should apply 303 Creative to reverse the appeals court's decision punishing Jack. You don't need to agree with Jack's views to agree that Americans shouldn't be compelled to express what they don't believe," he added. The full statement from ADF is available online at: https://z.umn.edu/COSupremeCourtADF.

McHugh stated that the *303 Creative* ruling was unlikely to change the outcome of the case because of its narrow scope and applicability only to businesses that create speech of their own. "It's very important for businesses and the public in Colorado to understand that our anti-discrimination law still is in full force and there is no general right to discriminate against people in Colorado if you're a business owner," McHugh told *The Colorado Sun* on Oct. 4, 2023. The full article is available at: https://z.umn.edu/MasterpieceAppealColoradoSun.

As the *Bulletin* went to press, the case was pending.

— Jack Tate
Silha Center Research Assistant

§ 423.003(a). The No-Fly provision makes it illegal to fly a drone above sites deemed sensitive by the Texas government, including critical infrastructure facilities, prisons, and large sports venues. Tex. Gov't Code Ann. § 423.0045(b). Both of these provisions have numerous exemptions, but do not have a specific exemption for the press or newsgathering.

The U.S. District Court for the Western District of Texas in Austin ruled in 2022 that the two provisions violated both the First Amendment and the Due Process Clause of the Fourteenth Amendment. Judge Robert Pitman found that the process of creating photos and videos was a practice that was protected by the First Amendment and that using drones to document news is a protected expression. As a result, he enjoined the Texas DPS and the Texas Highway Patrol from enforcing Chapter 423. The district court decision is available online at: https://z.umn.edu/NPPAvMcCraw. *Nat'l Press Photographers Ass'n v. McCraw*, 594 F.Supp.3d 568 (W.D. Tex. 2020)

"NPPA is very pleased with the result in this case and we hope that it sends a clearer message to other states and municipalities to stop enacting unconstitutionally restrictive drone laws," said NPPA general counsel Mickey H. Osterreicher after the district court decision. Jim Hemphill, co-counsel for the plaintiffs, added, "Judge Pitman entered an opinion that carefully considers every issue, exhaustively reviews precedent, and holds decisively that drone photography is fully protected by the First Amendment as an integral tool in 21st-Century journalism." The NPPA's full statement is available online at: https://z.umn.edu/NPPAstatement.

Both sides appealed the judgment. On appeal, the defendants alleged that the plaintiffs' arguments failed on standing, sovereign immunity, and on merit. The plaintiffs argued that the district court should have enjoined enforcement of Chapter 423 additionally because it is preempted by federal aviation law.

U.S. Circuit Judge Don Willett, writing for the unanimous three-judge panel, reversed the lower court's decision. Beginning with the No-Fly provisions, the court rejected the plaintiffs' arguments that drone use was "inherently expressive" and thus entitled to First Amendment protection. "The operation of a drone is not inherently expressive — nor is it expressive to fly a drone 400 feet over a prison, sports venue, or critical infrastructure facility." Judge Willett made clear that the court would not entertain an interpretation of the statute that found drone flight to be speech. He analogized the case to a Supreme Court Case, *Zemel v. Rusk*, 381 U.S. 1 (1965). In that case, the Court upheld the State Department's authority to refuse to validate a passport for travel to Cuba, observing that just because a citizen may believe it is a useful newsgathering opportunity to break into the White House, that does not mean that there is a First Amendment right to do so. *Nat'l Press Photographers Ass'n v. McCraw*, 2023 U.S. App. LEXIS 28050 (5th Cir. 2023)

> "The very same aerial image can be unlawfully captured using a drone but lawfully captured using a helicopter, a tall ladder, a high building, or even a really big trampoline."
>
> **— U.S. Circuit Judge Don Willett**

However, the Fifth Circuit panel appeared more receptive to the idea of a First Amendment challenge of the Surveillance provision of Chapter 423. The plaintiffs characterized aerial surveillance as speech and argued that Texas carved out numerous exceptions for other entities, but none for the press, thus violating the First Amendment. Judge Willett acknowledged that determining First Amendment restrictions on the right to film has been a moving target recently. He pointed to a Fourth Circuit case where the court held that animal rights activists have a First Amendment right to infiltrate agricultural operations undercover and film them. *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n Inc.*, 60 F.4th 815 (4th. Cir. 2023). The Fifth Circuit looked to controlling precedent to determine that the plaintiffs' First Amendment arguments relating to the Surveillance provision were subject to intermediate scrutiny, citing *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017). The plaintiffs had argued that strict scrutiny should apply for three reasons: 1) the Surveillance provisions are content-based restrictions on speech, 2) the Surveillance provisions discriminate based on the speaker (i.e. the drone operator), and 3) Chapter 423 imposes a direct burden on newsgathering and journalism.

The Fifth Circuit rejected all three of these arguments, finding that the Surveillance provisions are not content-based, but instead are based on *how* the images are captured. "The very same aerial image can be unlawfully captured using a drone but lawfully captured using a helicopter, a tall ladder, a high building, or even a really big trampoline," Judge Willett wrote. The court also rejected the plaintiffs' second claim, explaining that to trigger strict scrutiny, the law needs to be based on the speaker's message, not just the way the speaker communicates. As for the Plaintiffs' argument regarding an excessive burden on newsgathering, the panel looked to past Supreme Court precedent. Citing the reporters' privilege ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Fifth Circuit recognized that the Supreme Court stated that the press "has no special immunity from the application of general laws . . . no special privilege to invade the rights and liberties of others."

Applying intermediate scrutiny, the court reasoned that as long as Chapter 423 promotes a substantial government interest that would be achieved less effectively without the regulation, it survives. The court considered its earlier ruling in *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), a case involving the interception of a telephone conversation which held that the government has a substantial interest in protecting the privacy of its citizens. The panel also found that the law is properly tailored to ban only the kind of surveillance that could be achieved with drones, as it allowed drone images to be captured from eight feet above ground level and below, or about the height of an adult man reaching his hands above his head.

The plaintiffs' federal preemption claim also failed. The Fifth Circuit

Drones, *continued on page 34*

OpenAI, *Associated Press* Enter Into Licensing Agreement Amid Concerns Over AI Learning

On July 13, 2023, OpenAI and the *Associated Press* (*AP*) announced that the companies had entered into a licensing agreement whereby OpenAI will have access to *AP*'s text archive for its AI technology training, while *AP* will utilize OpenAI's technology and product expertise. The financial terms of the deal were not disclosed.

ARTIFICIAL INTELLIGENCE

According to *AP*, OpenAI will have access to *AP*'s news archives dating back to 1985. The archive can be used to train and improve OpenAI's artificial intelligence systems known as "large language models" like ChatGPT.

"OpenAI is committed to supporting the vital work of journalism, and we're eager to learn from the Associated Press as they delve into how our AI models can have a positive impact on the news industry," said Brad Lightcap, chief operating officer at OpenAI, in a joint statement released by the two companies. "The AP continues to be an industry leader in the use of AI; their feedback — along with access to their high-quality, factual text archive — will help to improve the capabilities and usefulness of OpenAI's systems." The joint statement is available online at: https://www.ap.org/press-releases/2023/ap-open-ai-agree-to-share-select-news-content-and-technology-in-new-collaboration.

In the statement, *AP* said that it does not use generative AI in its news stories but "continues to look closely at standards around [the technology]." However, *AP* acknowledged that it publishes automated stories to preview and recap some sporting events and uses AI technology to help transcribe audio and video from live events such as press conferences. Additionally, in May 2023, *AP* launched an AI-enabled search capability on AP Newsroom, which, according to *AP*, "can yield precise results for search queries based on descriptive language." AP Newsroom is available online at: https://newsroom.ap.org/editorial-photos-videos.

"We are pleased that OpenAI recognizes that fact-based, nonpartisan news content is essential to [the] evolving technology [of generative AI], and that they respect the value of our intellectual property," said Kristin Heitmann, *AP* senior vice president and chief revenue officer, in the joint statement. "AP firmly supports a framework that will ensure intellectual property is protected and content creators are fairly compensated for their work. News organizations must have a seat at the table to ensure this happens, so that newsrooms large and small can leverage this technology to benefit journalism."

Shortly after the announcement of the licensing agreement, on August 16, 2023, *AP* released guidance to clarify

Drones, *continued from page 33*

observed that "federal law has not completely preempted the field regarding [drones] flying over certain buildings and structures," pointing out that the Federal Aviation Administration (FAA) has expressly chosen not to preempt all state regulations of drone usage. The FAA stated in a final rule that it "decided that specific regulatory text addressing preemption is not required in the final rule." Operation and Certification of Small Unmanned Aircraft Systems, 81 FR 4206401, 42194 (June 28, 2016).

Toward the end of the opinion, the panel criticized the plaintiffs' approach, emphasizing the difficulty of mounting a successful facial challenge. Judge Willett characterized their approach as seeking "an unqualified First Amendment right to conduct aerial surveillance on non-consenting private individuals on private property, and a First Amendment right to fly drones at low altitudes over critical infrastructure."

However, the court appeared receptive to future as-applied challenges under specific facts. "It is possible that, in an as-applied challenge, a plaintiff or defendant may persuasively show that a particular enforcement of Chapter 423 runs afoul of free speech or fairness principles," Willett wrote in the conclusion of the opinion.

The NPPA released a statement in response to the decision. "We wholeheartedly disagree with the appellate court and we will be discussing our options with the leadership and the other attorneys on the case." In the meantime, the NPPA warned drone owners in Texas to comply with Chapter 423. "It is important that when using drones, you discuss this risk with your employers and your clients and find out whether they will support you if you're challenged while using your drone." The full statement is available online at: https://z.umn.edu/NPPA5thCirStatement.

Some have criticized the decision for ignoring the Federal Aviation Administration's (FAA) regulations and guidance. Writing for Wiley Rein LLP's legal blog, attorneys Sara Baxenberg and Joshua Turner characterized the opinion as "disappointing." "The Fifth Circuit's treatment of the fact sheet underscores that while the document is a great first step in outlining the scope of federal preemption and state and local authority, more needs to be done," they wrote. The pair criticized the court's interpretation of terms outlined by the FAA in a fact sheet, which were ignored by the court in the opinion. "[T]he Fifth Circuit misunderstands and overlooks portions of the fact sheet that are actually quite clear." There is still hope, Baxenberg and Turner write, as the FAA can continue to refine its public guidance and take a greater role in regulatory leadership. The full article is available online at: https://z.umn.edu/WileyReinMcCraw.

— Jack Tate
Silha Center Research Assistant

further how its reporters use generative AI in their reporting. Amanda Barrett, *AP* vice president for standards and inclusion, said in a news release that "while AP staff may experiment with ChatGPT with caution, they do not use it to create publishable content."

"Accuracy, fairness and speed are the guiding values for AP's news report, and we believe the mindful use of artificial intelligence can serve these values and over time improve how we work," Barrett said.

According to *AP*'s guidance, its reporters are expected to treat output from generative AI "as unvetted source material," and "AP staff must apply their editorial judgment and AP's sourcing standards when considering any information for publication."

The guidance also acknowledged that "[g]enerative AI makes it even easier for people to intentionally spread mis- and disinformation" and that *AP* journalists "should exercise the same caution and skepticism they would normally" to avoid inadvertently using such information.

Barrett emphasized that "[w]e do not see AI as a replacement of journalists in any way." Barrett's article on *AP*'s guidance for using generative AI in its reporting is available online at: https://blog.ap.org/standards-around-generative-ai.

According to *The Wall Street Journal* (*WSJ*), when *AP* was negotiating the licensing agreement, it included a provision which would allow the company to renegotiate the terms of the deal with OpenAI. *WSJ*, which cited sources "familiar with the agreement," reported that *AP* would be allowed to reset the terms of the agreement if another company gets a better deal from OpenAI. The full text of the *WSJ* article is available at: https://www.wsj.com/articles/as-publishers-seek-ai-payments-ap-gets-a-first-mover-safeguard-f5a6f186.

Although *AP* was the first global news agency to reach an agreement with a major AI company, other news publishers are looking for possible solutions to tackle the rising prominence of AI. According to *WSJ*, News Corp, its parent company, has been working with a consultant to determine the value of its news content for the purposes of AI training, information that could be used in future negotiations with AI companies. News Corp has also discussed the possibility of using blockchain technology that could detect when AI companies use their content without permission and possibly be used to pursue licensing revenue. Other publishers, including *The New York Times*, have discussed forming a coalition to deal with the issue of AI.

> "Accuracy, fairness and speed are the guiding values for AP's news report, and we believe the mindful use of artificial intelligence can serve these values and over time improve how we work."
>
> **— Amanda Barrett, *AP* vice president for standards and inclusion**

Additionally, as first reported by the *Times* in July 2023, Google pitched a generative AI product to executives at the *Times*, *The Washington Post*, and News Corp that could be used in newswriting. The product, internally referred to as "Genesis," is able to write its own news articles based on details from current events.

Jenn Crider, a Google spokesperson, said in a statement that the company was "in the earliest stages of exploring ideas to potentially provide A.I.-enabled tools to help their journalists with their work."

"Quite simply, these tools are not intended to, and cannot, replace the essential role journalists have in reporting, creating and fact-checking their articles," she added, instead suggesting that they could provide journalists options for headlines and other writing styles.

According to the *Times*, two executives who saw the pitch for "Genesis" described it as "unsettling," while others suggested that the AI-enabled product took for granted the work that went into creating accurate and artful news stories. The full text of the *Times* article discussing "Genesis" is available online at: https://www.nytimes.com/2023/07/19/business/google-artificial-intelligence-news-articles.html.

AP's licensing agreement and news organizations' broader discussions about the use of AI comes at a time when authors and artists have expressed concern over the use of their work in training AI models and the potential for copyright and intellectual property infringement. In June and July 2023, comedian Sarah Silverman and other novelists filed class action lawsuits against OpenAI and Meta for allegations of copyright infringement. On Nov. 20, 2023, a judge dismissed the class action against Meta but gave the parties until Dec. 11 to file an amended complaint to keep the case alive. Also in July 2023, the Author's Guild and more than 15,000 writers sent an open letter to the CEOs of prominent AI companies to call attention "to the inherent injustice in exploiting our works as part of your AI systems without our consent, credit, or compensation." The landing page for the class action suits is available online at: https://llmlitigation.com/. The full text of the judge's order dismissing the case against Meta is available online at: https://storage.courtlistener.com/recap/gov.uscourts.cand.415175/gov.uscourts.cand.415175.56.0_1.pdf. The full text of the authors' open letter is available online at: https://authorsguild.org/app/uploads/2023/10/Authors-Guild-Open-Letter-to-Generative-AI-Leaders.pdf. (For more information on copyright issues involving generative AI, see "Artists, Writers Sue AI Companies for Copyright Infringement" on page 36 of this issue of the Silha *Bulletin*.)

— Charlotte Higgins
Silha Center Research Assistant

Artists, Writers Sue AI Companies for Copyright Infringement

Several lawsuits have been filed against artificial intelligence (AI) companies by artists and writers who claim that the companies have violated their copyright by using their work to train their AI models without permission or license.

ARTIFICIAL INTELLIGENCE

On Jan. 13, 2023, three visual artists, Sarah Andersen, Karla Ortiz and Kelly McKernan, filed a class action lawsuit in federal court in California against Stability AI, Midjourney, and DeviantArt over allegations that the companies used the artists' work to train their AI models without permission, constituting copyright infringement. Each of these AI models can generate artistic work based on text prompts. The full text of the complaint is available online at: https://admin.bakerlaw.com/wp-content/uploads/2023/09/ECF-1-Complaint-2.pdf.

After several rounds of pleadings, Judge William Orrick of the U.S. District Court for the Northern District of California granted the AI companies' motion to dismiss on Oct. 30, 2023. Each of the claims brought by the plaintiffs, including direct copyright infringement, vicarious copyright infringement, violation of the Digital Millennium Copyright Act (DMCA), and violation of California's statutory and common law right to publicity, were dismissed. According to the U.S. Copyright Office, vicarious copyright infringement occurs when the party had "(1) the right and ability to supervise or control the infringing activity; and (2) a direct financial benefit from that activity." A full overview of this concept is available online at: https://www.copyright.gov/docs/regstat072204.html. The only claim to survive was Andersen's direct copyright infringement claim against Stability AI. Judge Orrick granted the plaintiffs leave to amend their complaint within 30 days to keep their claims alive.

Judge Orrick categorized the original complaint as "defective in numerous respects," ruling that the plaintiffs generally needed to be more specific about how each of the defendants "separately violated their copyrights, removed or altered their copyright management information, or violated their rights of publicity." The full text of Judge Orrick's order granting the motion to dismiss is available online at: https://storage.courtlistener.com/recap/gov.uscourts.cand.407208/gov.uscourts.cand.407208.117.0_3.pdf.

On November 29, the plaintiffs filed an amended complaint, which also added several more artists to their claim.

"Though Defendants like to describe their AI image products in lofty terms, the reality is grubbier and nastier: AI image products are primarily valued as copyright-laundering devices, promising customers the benefits of art without the costs of artists," the artists wrote in their amended complaint. The full text of the amended complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.cand.407208/gov.uscourts.cand.407208.129.0_1.pdf.

Getty Images brought a separate case against Stability AI on Feb. 3, 2023, that alleged copyright and trademark infringement. Getty Images accused Stability AI of copying "more than 12 million photographs" and their "associated captions and metadata" in an effort to build "a competing business." In its complaint, filed in the U.S. District Court for the District of Delaware, Getty Images provided examples of Stability AI's model, Stable Diffusion, which produced modified versions of watermarked Getty images that include distortions of the Getty Images' logo. The full text of the complaint is available online at: https://admin.bakerlaw.com/wp-content/uploads/2023/09/ECF-1-Complaint-1.pdf. No major developments have occurred in the case.

In addition to claims by visual artists, several writers have brought lawsuits against AI companies for copyright infringement. On June 28, 2023, authors Paul Tremblay and Mona Awad filed a class action against OpenAI for copyright infringement. On July 7, 2023, comedian Sarah Silverman and novelists Christopher Golden and Richard Kadrey filed class action lawsuits against OpenAI and Meta over similar allegations of copyright infringement. The lawsuits, which were filed in the U.S. District Court for the Northern District of California, allege that the named company copied the texts from the authors' books without permission by scraping the text from illegal "shadow libraries" and used those texts to train its AI model. The complaint against Meta is available online at: https://llmlitigation.com/pdf/03417/kadrey-meta-complaint.pdf. Golden, Kadrey, and Silverman's complaint against OpenAI is available online at: https://llmlitigation.com/pdf/03416/silverman-openai-complaint.pdf. Awad and Tremblay's complaint against OpenAI is available online at: https://admin.bakerlaw.com/wp-content/uploads/2023/09/ECF-1-Complaint-3.pdf.

On July 28, a California district judge ordered the Tremblay and Silverman cases to be related. According to the law firm Tyson & Mendes, relatedness is a different concept than consolidation. Unlike consolidation, related cases remain separate for trial purposes, but parties should be served with all pleadings and discovery from each of the related cases. Thus, the effect of cases being "related" is primarily procedural in nature. A full overview of the difference between relatedness and consolidation is available online at: https://www.tysonmendes.com/lost-translation-demystifying-consolidation-multi-party-litigation.

On August 11, Awad voluntarily dismissed her claim against OpenAI with prejudice, offering no reason for doing so, but this did not affect the claims of the other authors in either the Tremblay or Silverman cases. On August 28, OpenAI filed motions to dismiss both the Tremblay and Silverman cases. The authors opposed the motions, but the district court has yet to rule on the motions to dismiss. A separate class action was later filed against OpenAI on September 8 in the Northern District of California by writers Michael Chabon, David Henry Hwang, Matthew Klam, Rachel Louise Snyder, and Ayelet Waldman on similar claims of copyright infringement. On October 10, the court granted a motion to relate the Tremblay and Chabon cases against OpenAI. A landing page outlining the recent updates in the Tremblay and Silverman cases against OpenAI is available online at: https://www.bakerlaw.com/tremblay-silverman-v-openai/. The full text of the Chabon complaint against OpenAI

is available at: https://admin.bakerlaw.com/wp-content/uploads/2023/09/ECF-1-Chabon-OpenAI-Complaint.pdf.

In the authors' case against Meta, Judge Vince Chhabria granted Meta's motion to dismiss all but one of the claims against Meta on Nov. 20, 2023. Judge Chhabria's order left the authors' main claim of copyright infringement intact but dismissed remaining claims that alleged vicarious copyright infringement, unfair competition, unjust enrichment, and negligence. However, the judge gave the plaintiffs leave to amend their complaint by December 11 to keep each of these claims (apart from the negligence claim which was dismissed with prejudice) alive. Judge Chhabria's order granting Meta's motion to dismiss is available online at: https://storage.courtlistener.com/recap/gov.uscourts.cand.415175/gov.uscourts.cand.415175.56.0_1.pdf.

On Sept. 19, 2023, another lawsuit was filed against OpenAI, this time by the Authors Guild and other writers including John Grisham and George R. R. Martin. The complaint, which was filed in U.S. District Court for the Southern District of New York, accuses OpenAI of knowingly and wrongfully copying the writers' work in order to train its AI model, ChatGPT, in an act of "systematic theft on a mass scale." The full text of the complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.606655/gov.uscourts.nysd.606655.1.0_1.pdf.

The plaintiffs later amended their complaint on Dec. 4, 2023, to add Microsoft as a defendant, accusing the company of materially or directly assisting in OpenAI's alleged copyright infringement. "OpenAI's 'training' [of] its [large language models] could not have happened without Microsoft's financial and technical support," the amended complaint said. The full text of the amended complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.606655/gov.uscourts.nysd.606655.39.0.pdf.

In response to this and the many other copyright lawsuits against it, an OpenAI spokesperson told *Reuters* on Sept. 21, 2023, that the company respects authors' rights and is "having productive conversations with many creators around the world, including the Authors Guild." The *Reuters* story is available online at: https://www.reuters.com/legal/john-grisham-other-top-us-authors-sue-openai-over-copyrights-2023-09-20/.

The Authors Guild lawsuit follows a previous attempt by the Guild to voice their grievances to AI companies regarding the issue of copyright infringement. In July 2023, the Guild and more than 15,000 writers sent an open letter to the CEOs of prominent AI companies to call attention "to the inherent injustice in exploiting our works as part of your AI systems without our consent, credit, or compensation." The full text of the authors' open letter is available online at: https://authorsguild.org/app/uploads/2023/10/Authors-Guild-Open-Letter-to-Generative-AI-Leaders.pdf.

> "Artists look at other artists to learn how to solve visual problems and be inspired, but that's as far as looking at other artists will get you. Artists bring their own technical knowledge, problem solving, experience, thoughts and personal lives into each artwork. This is also why humans who are trained in the same way, who paint the same objects will yield different results. AI's can never accomplish that."
>
> **— Karla Ortiz, plaintiff**

In another example of copyright claims against AI companies, a group of six authors, led by Mike Huckabee, a former governor of Arkansas who sought the Republican nomination for president in 2008 and 2016, filed a class action suit against Meta, Bloomberg, Microsoft, and The EleutherAI Institute, over allegations that Meta's, Bloomberg's, and Microsoft's use of EleutherAI's Books3 dataset in training their AI models infringed upon 183,000 copyrighted e-books. The complaint, which was filed on Oct. 17, 2023, in the U.S. District Court for the Southern District of New York, alleged that the defendant's wrongfully used the dataset with the "full knowledge and understanding" that the training data being used was "assembled from copyrighted works, including copyrighted works of the Plaintiffs." The case has had no significant developments since its filing. The full text of the complaint is available online at: https://admin.bakerlaw.com/wp-content/uploads/2023/10/ECF-1-Complaint.pdf.

As the legal battles against AI companies continue, some scholars and commentators claim that copyright infringement is not the claim on which artists, writers, and other content creators should be focused. Matthew Sag, a law professor at Emory University, said that the general theory that large language models (LLMs) "copy" artists' work is misplaced.

In testimony to the U.S. Subcommittee on Intellectual Property in July 2023, Sag said, "Rather than thinking of an LLM as copying the training data like a scribe in a monastery, it makes more sense to think of it as learning from the training data like a student. If an LLM like [OpenAI's] GPT-3 is working as intended, it does not copy the training data at all. The only copying that takes place is when the training corpus is assembled and pre-processed." The full text of Sag's testimony is available online at: https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_sag.pdf.

"There are a lot of questions that AI creates for almost every aspect of society," Mike Masnick, editor of the technology blog *Techdirt*, told *Wired*. "But this narrow focus on copyright as the tool to deal with it, I think, is really misplaced." The full *Wired* article is available online at: https://www.wired.com/story/artificial-intelligence-copyright-law/.

Even when looking at the claim that AI companies use illegally obtained "shadow libraries" or datasets to train their LLMs, Masnick said that lawfully obtaining access to works may be irrelevant to a defense that the AI companies were merely "inspired" by the works.

AI Copyright, *continued on page 38*

Defamation Case Tests Legal Liability for AI Outputs

On June 5, 2023, Mark Walters, a radio host and Georgia resident, filed a defamation lawsuit against OpenAI, maker of ChatGPT, in Georgia's Superior Court of Gwinnett County. The case is the first to test the legal liability of AI companies for content generated by AI products. *Walters v. Open AI, LLC*, No. 23-A-04860-2 (Ga. Super. Ct. 2023)

ARTIFICIAL INTELLIGENCE

ChatGPT is an AI chatbot product that allows users to interact with the platform by entering questions or prompts. ChatGPT then generates written responses. The case began with journalist Fred Riehl's interactions with ChatGPT. Riehl was reporting on a lawsuit involving the Second Amendment Foundation ("SAF"), a nonprofit organization founded by Alan Gottlieb that supports gun rights. Riehl asked ChatGPT to summarize the accusations in the lawsuit and provided a link to the complaint. ChatGPT allegedly responded:

"[The document is] a legal complaint filed by Alan Gottlieb, the founder and executive vice president of the Second Amendment Foundation (SAF), against Mark Walters, who is accused of defrauding and embezzling funds from the SAF. The complaint alleges that Walters, who served as the organization's treasurer and chief financial officer, misappropriated funds for personal expenses without authorization or reimbursement, manipulated financial records and bank statements to conceal his activities, and failed to provide accurate and timely financial reports and disclosures to the SAF's leadership."

Walters alleges that every "fact" ChatGPT produced about him was false. Walters was not a party to the lawsuit and was never accused of fraud, embezzlement or misappropriation. Although Walters is an advocate for gun rights, he has never been employed by SAF.

Walters alleged that OpenAI is aware that ChatGPT sometimes makes up facts (a phenomenon known as "hallucination"), knew or should have known that ChatGPT's statements about Waters were false, and made no attempt to verify the program's statements about Walters. Walters claims that "[b]y sending the allegations to Riehl, [OpenAI] published libelous matter regarding Walters." Walters' full Amended Complaint, filed Sept. 8, 2023, is available at: https://perma.cc/N9MN-FDKW.

AI Copyright, *continued from page 37*

"If a musician were inspired to create music in a certain genre after hearing pirated songs in that genre, would that make the songs they created [copyright infringement]?" Masnick posited in an article on his blog *Techdirt*, which is available online at: https://www.techdirt.com/2023/07/11/a-bunch-of-authors-sue-openai-claiming-copyright-infringement-because-they-dont-understand-copyright/.

However, Karla Ortiz, who is one of the plaintiffs in the lawsuit against Stability AI, took issue with this sentiment, arguing that inspiration for humans is much different than inspiration for AI.

"Artists look at other artists to learn how to solve visual problems and be inspired, but that's as far as looking at other artists will get you. Artists bring their own technical knowledge, problem solving, experience, thoughts and personal lives into each artwork. This is also why humans who are trained in the same way, who paint the same objects will still yield different results. AI's can never accomplish that," Ortiz wrote in testimony before the U.S. Subcommittee on Intellectual Property in July 2023. The full text of Ortiz's testimony is available online at: https://www.judiciary.senate.gov/imo/media/doc/2023-07-12_pm_-_testimony_-_ortiz.pdf.

One of the major questions raised by these copyright cases is whether the AI companies' use of others' work is "fair use." For example, in response to the artists' suit against Stability AI, a spokesperson for the company told *Reuters* that "anyone that believes that this isn't fair use does not understand the technology and misunderstands the law." The full text of the *Reuters* article is available online at: https://www.reuters.com/legal/transactional/lawsuits-accuse-ai-content-creators-misusing-copyrighted-work-2023-01-17/.

The U.S. Copyright Office defines fair use as "a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances." Section 107 of the Copyright Act offers four factors to consider when determining whether something constitutes fair use, including the (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount of the portion used in relation to the copyrighted work as a whole, and (4) effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107. A full overview of the fair use doctrine provided by the U.S. Copyright Office is available online at: https://www.copyright.gov/fair-use/.

Artists, writers, and other scholars disagree with the AI companies' defense that use of others' work constitutes fair use. Daniel Gervais, a professor at Vanderbilt Law School, told *The Verge*, "If you give an AI 10 Stephen King novels and say, 'Produce a Stephen King novel,' then you're directly competing with Stephen King. Would that be fair use? Probably not."

Gervais clarified that "'it is much more likely than not' that *training* systems on copyrighted data will be covered by fair use. But the same cannot necessarily be said for generating content."

Yet, given the open issue of copyright infringement by AI models, Andy Baio, a technologist who has been closely following the generative AI scene, told *The Verge* that it is impossible at this stage to know how the courts will decide.

"I see people on both sides of this extremely confident in their positions, but the reality is nobody knows. And anyone who says they know confidently how this will play out in court is wrong," Baio said. The full text of *The Verge* article is available online at: https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data.

— Charlotte Higgins
Silha Center Research Assistant

OpenAI argued that the ChatGPT statements were not defamatory because they were not understood as accurate. As *MediaPost* reported, Riehl questioned the accuracy of the information in a transcript of the chat provided to the court. Additionally, OpenAI argued that reasonable users know they should be fact-checking ChatGPT's output: "By its very nature, AI-generated content is probabilistic [*sic*] and not always factual, and there is near universal consensus that responsible use of AI includes fact-checking prompted outputs before using or sharing them," the company argued. "OpenAI clearly and consistently conveys these limitations to its users." The *MediaPost* article is available online at: https://www.mediapost.com/publications/article/387505/openai-seeks-dismissal-of-radio-hosts-libel-lawsu.html.

OpenAI asked to remove the case from state to federal court on July 14, 2023 on the basis of diversity of citizenship of the parties. U.S. District Judge Michael Brown presided over the motion in the Northern District of Georgia. OpenAI filed a brief on Aug. 21, 2023, arguing that "complete diversity exists between [Walters] and OpenAI" because all of OpenAI's members are located outside of Georgia. The brief is available online at: https://perma.cc/2TF8-CH2G. However, Judge Brown found the brief insufficient to prove diversity jurisdiction. *Walters v. OpenAI, LLC*, No. 1:23-cv-03122 (N.D. Ga. 2023)

On Oct. 6, 2023, OpenAI withdrew its removal notice. Walters asked the court to award him $11,120 in attorney fees, arguing that OpenAI knew removal notice in the case was not justified. OpenAI responded that it had a reasonable basis for removing the case to federal court: "While OpenAI chose to withdraw its motion to remand because it was not in a position to make further disclosures publicly naming all of the individual identities of its members, including individual employees and investors, OpenAI reasonably believed — and still believes — that complete diversity exists here." OpenAI's response is available online at: https://perma.cc/BNF6-D8UL.

On Oct. 13, 2023, OpenAI also filed a motion to dismiss the case for lack of personal jurisdiction and failure to state a claim for relief. Walters responded by arguing that OpenAI is subject to Georgia state law and is considered a resident of Georgia since it is registered to conduct business in the state.

> "If OpenAI is found liable, it might lead to increased scrutiny of AI-generated content and the implementation of stricter content moderation processes. Conversely, if OpenAI is not found liable, developers might continue to operate under the current legal framework without substantial change."
>
> **— Alvarez Technology Group**

Walters' response brief is available online at: https://perma.cc/62EH-4MS4.

On Oct. 25, 2023, Judge Brown remanded the case to the Superior Court of Gwinnett County in Georgia and denied as moot OpenAI's motion to dismiss, but did not award Walters's attorney fees. The matter will continue in state court. *Walters v. Open AI, LLC*, No. 23-A-04860-2 (Ga. Super. Ct. 2023)

In a blog post on *The Volokh Conspiracy*, First Amendment expert Eugene Volokh speculated that this particular lawsuit would be difficult to maintain, as "it doesn't appear from the complaint that Walters put OpenAI on actual notice that ChatGPT was making false statements about him" and "there seem to be no allegations of actual damages" in the complaint. However, Volokh noted that "such libel claims are in principle legally viable." Volokh's blog post is available online at: https://reason.com/volokh/2023/06/06/first-ai-libel-lawsuit-filed/printer/.

Volokh also commented to *Ars Technica* that Section 230 of the Communications Decency Act — which shields internet companies from liability for content posted on their platforms by third parties — may not apply in this case because it "doesn't immunize defendants who materially contribute to the alleged unlawfulness of online content." Because AI chatbots may create false information, they may not receive this liability shield. Volokh also suggested that OpenAI "can't immunize itself from defamation liability by merely saying, on every post, 'this post may contain inaccurate information[.]'" This article can be found online at: https://arstechnica.com/tech-policy/2023/06/openai-sued-for-defamation-after-chatgpt-fabricated-yet-another-lawsuit/.

Alvarez Technology Group, a "technology solutions" business based in California, speculated that "If OpenAI is found liable, it might lead to increased scrutiny of AI-generated content and the implementation of stricter content moderation processes. Conversely, if OpenAI is not found liable, developers might continue to operate under the current legal framework without substantial change." Either way, "this lawsuit could prompt conversations around AI regulation and the extent to which developers should be held accountable for AI-generated content." The company's full statement is available online at: https://www.alvareztg.com/mark-walters-openai-lawsuit/.

In the 38th Annual Silha Lecture, Professor James Grimmelmann, Tessler Family Professor of Digital & Information Law at Cornell Tech and Cornell Law School, discussed the complex legal questions raised by applying defamation law to AI. (For more information on Grimmelmann's lecture, see "38th Annual Silha Lecture Addresses AI and Defamation" on page 40 of this issue of the Silha *Bulletin*.)

— Mallory Harrington
Silha Center Research Assistant

38th Annual Silha Lecture Addresses AI and Defamation

What does actual malice look like? When Professor James Grimmelmann, Tessler Family Professor of Digital & Information Law at Cornell Tech and Cornell Law School, asked the AI image generator Midjourney to illustrate the concept, a striking image appeared. "What happens when an AI that is capable of turning two words into an image like this meets the legal system?" Grimmelmann asked.

SILHA CENTER EVENTS

On Oct. 23, 2023, Grimmelmann discussed artificial intelligence ("AI") and defamation during the 38th Annual Silha Lecture. With a J.D. from Yale Law School and an A.B. in Computer Science from Harvard College, Grimmelmann is both a law and computer expert. Grimmelmann's lecture focused on ChatGPT and the tort of defamation. ChatGPT, the public-facing AI chatbot developed by OpenAI, was released in November 2022, introducing the world to chatbot technology. In the past year, usage of AI has taken off, raising novel legal questions.

Approximately 180 individuals attended Grimmelmann's lecture titled "The Defamation Machine: Can ChatGPT Commit Libel?" in Cowles Auditorium on the West Bank of the University of Minnesota Twin Cities campus. An additional 70 individuals attended the lecture live utilizing the online option.

Following an introduction by Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, Grimmelmann began with an example of AI hallucination. The Second Amendment Foundation ("SAF") is a nonprofit organization that supports gun rights. While writing about a lawsuit involving SAF, a journalist asked ChatGPT to summarize it. ChatGPT responded: "[It is] a legal complaint filed by Alan Gottlieb, the founder and executive vice president of the Second Amendment Foundation (SAF), against Mark Walters, who is accused of defrauding and embezzling funds from the SAF." ChatGPT's response further stated that Walters, a radio host and Second Amendment rights activist,

"Actual Malice," created by AI image generator Midjourney

misappropriated funds and manipulated financial records while serving as SAF's Treasurer and Chief Financial Officer. In fact, Walters has never held a formal position at SAF and the statements ChatGPT produced about Walters were false. Walters sued OpenAI, the developer of ChatGPT, for defamation. This example teed up the central question of the lecture: Can ChatGPT commit defamation?

Grimmelmann explained that ChatGPT runs on large language models, or LLMs, trained on "pretty much all of the text that anybody has ever posted to the internet." The data is processed by computer chips that run a variety of calculations such as the frequency of how often a word is used in context and how often a word appears with another, teaching the model how words and concepts are connected. Through several months of processing and millions of dollars of investment in data centers, developers can create programs like ChatGPT that allow users to ask questions and receive responses.

Grimmelmann went on to summarize two of the elements that public figures must prove in defamation cases: falsity and actual malice. The plaintiff must show that the statement had a false meaning that a reasonable reader would understand to be harmful to the plaintiff's reputation. To show actual malice, public figures must show that the defendant had knowledge that the statement is false, or recklessly published the statement without regard for whether it was true or false.

The Walters case prompted scholars to speculate on how defamation law should apply to AI. Grimmelmann noted that responses tended to converge on two themes. First, because the average reader is likely to perceive ChatGPT outputs as factual, the system can convey false meanings. Second, as a computer program, ChatGPT has no state of mind or intent, leading to Grimmelmann's statement of a key paradox in the application of defamation law: How can ChatGPT produce *meaning* without *knowledge*?

Grimmelmann noted that some scholars may take philosophical issue with the idea that computers can create meaning at all. They may argue that a machine has no "knowledge" that the statements it produces are false. Therefore, a machine cannot commit defamation. Grimmelmann, however, argued that these philosophical objections oversimplify the issue.

First, Grimmelmann argued that meaning is attributed — that is, we treat what people say and write as meaningful. In the legal system, the "meaning" of a statement is what ordinary people think it means. Grimmelmann noted that meaning does not necessarily require a speaker. A philosophical thought experiment known as "The Turing Test," posed by Alan Turing, the British computer scientist and cryptologist, illustrates this point. Turing posited that if we want to answer the question of whether machines can think, we can imagine a test where we have to distinguish between the output of a computer and a person. In the test, there is an interrogator who communicates with both a computer and a person in separate rooms, passing written messages back and forth. The interrogator asks questions (for example, "Based on the positions of pieces on a chess board, what should my next move be?", and the person and computer offer answers. The point of the test is that it is *operational*; the interrogator does not need to know whether it is the computer or the person they are talking to. Either way, the interrogator is assessing the answer and potentially finding meaning in it.

Grimmelmann went on to argue that if meaning can be attributed,

then knowledge can be attributed too. Grimmelmann discussed another thought experiment developed by philosopher John Searle, "The Chinese Room." In this thought experiment, we imagine the interrogator communicating with another person in a separate room. However, this time the communication is in Chinese. The interrogator speaks Chinese, but the person they are communicating with does not. Instead, the person has a series of enormous books that direct them to an eventual answer ("Does the first character have a vertical stroke at the left? If yes, turn to page 829. If the answer is no, go to volume 60 and turn to page 80."). After a laborious process of cycling through instructions in the book volumes, the person is able to pass back an answer in Chinese. Because the Chinese Room is able to produce an appropriate answer to the question, can we say that the room has knowledge of the Chinese language? Searle argued that because the person in the room does not know Chinese, neither does the room itself. Rather, it is just a machine working through a process. Although the human can *know* information, the machine produces an output with no knowledge. However, Grimmelmann suggested that this thought experiment may miss something fundamental when it comes to knowledge in a legal sense: we frequently attribute knowledge to non-human entities.

As an example, Grimmelmann turned next to *Pompeii Estates, Inc. v. Consolidated Edison Co.* (*ConEd*), a case about a house under construction in Queens, N.Y. During construction, the energy delivery company, ConEd, turned off the power and the pipes froze, causing the house to flood. The construction company sued ConEd for the damage. ConEd replied that it turned the power off because the bill sent to the house address was not paid. The construction company countered that it previously sent a letter instructing ConEd to send bills to the construction office, not the house address. So, the question emerges: did ConEd, through its agents, know the right address to send bills to? *Pompeii Estates, Inc. v. Consolidated Edison Co.* (*ConEd*), 91 Misc. 2d 233 (N.Y. Civ. Ct. 1977).

Grimmelmann explained: "We are already, in law at least, very comfortable with saying that a company knew something even when it's not necessarily the case that there was anybody at the company who had all of the facts that were relevant."

ConEd, as a company, knew the correct address even though its computer system did not. Grimmelmann argued that The Chinese Room as a whole knows Chinese, even though the person inside it does not. Knowledge is attributed to the overall system. Similarly, Grimmelmann concluded, ChatGPT as a system "knows" a lot and has the ability to act on that knowledge.

> "The legal system is not barred from dealing with defamation cases by the philosophical problems of how ChatGPT works and whether it has mental states. Philosophers might want to be precise about this, but lawyers have a ruthless pragmatism that lets them do justice even in the face of facts that are a little bit inconvenient."
>
> **— Professor James Grimmelmann, 2023 Silha lecturer**

Applying defamation law to cases involving ChatGPT will raise difficult questions about meaning and knowledge. However, Grimmelmann argued that we cannot avoid these questions by proposing that as a machine, ChatGPT can never have actual malice.

"Should we treat ChatGPT as knowing about Mark Walters?" Grimmelmann posited. "That's a really interesting, hard problem that depends upon the state of AI technology. [It] depends upon the purposes of defamation law. It depends upon lots of facts that the legal system will have to develop gradually over the course of many cases. I don't think you can duck that question just by saying that AIs don't have mental states so they can't have actual malice. That proves way too much."

He continued: "The legal system is not barred from dealing with defamation cases by the philosophical problems of how ChatGPT works and whether it has mental states. Philosophers might want to be precise about this, but lawyers have a ruthless pragmatism that lets them do justice even in the face of facts that are a little bit inconvenient."

By using ChatGPT for research and writing, Grimmelmann argued, we have already committed to the idea that its outputs are meaningful. We should "take the pragmatic aspects of law seriously," he contended, and ask a critical policy question: Does it make sense to hold AI companies accountable for ensuring the correctness of the outputs of their products? Or should we tell users that they should not be relying on AI products for accurate information? "That's the kind of question that law can answer, and the philosophical objection shouldn't be an obstacle to asking those kinds of questions," he said.

Grimmelmann posited that there are at least three different ways the legal system could address the question of intent in AI defamation cases. First, we could change the law. We could still apply the actual malice requirement from *New York Times v. Sullivan* to human actors, but explicitly modify the law as it applies to computer systems. Alternatively, we could change our understanding of knowledge. We could say that computer systems like ChatGPT have knowledge in the same way that a business might have knowledge. Finally, "we could continue to insist that we are requiring actual knowledge and actual malice, and just completely lie about how the facts work and say ChatGPT has *constructive* knowledge of the truth. . . . We use legal fictions all the time," he concluded. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

In a Q&A session moderated by Kirtley, a philosophy professor in the Cowles auditorium asked Grimmelmann to expand upon the distinctions between meaning attribution and knowledge attribution. Grimmelmann stated: "Meaning is constructed by individual listeners and the knowledge

Lecture, *continued on page 42*

Lecture, *continued from page 41*
is inside other people's heads — it's fundamentally inaccessible to us. The legal system has to deal in external manifestations. The process by which we ascribe meaning is about asking what lots of different people perceive something to mean, not just each individual listener's reaction, but the hypothetical imaginary reasonable listener somehow synthesized from lots of people."

Another attendee asked about newspapers using ChatGPT to create content and republishing it. Grimmelmann commented that the legal system may look to whatever journalistic standard practices emerge to understand how to treat usage of ChatGPT in reporting. "If journalists collectively come to treat the output of ChatGPT or other generative AI like the work of an enthusiastic but somewhat clueless intern . . . then they wouldn't let the intern just write copy and put it on the front page. Somebody is going to read that skeptically. And if journalists' practice converges on that, then an organization that doesn't use that kind of step might be found to have actual malice."

Another attendee drew a comparison between ChatGPT and Wikipedia, the free online encyclopedia, in that both generated an initial wave of excitement and then skepticism over accuracy. Grimmelmann responded that we have developed certain norms around usage of Wikipedia, and generative AI may follow a similar path: "If I came back here and talked to the same group two years from now, it's quite possible we wouldn't talk about what those standards are anymore because they would be second nature to so many people here already."

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In response to a question about what negative societal impacts we may see until the legal system catches up to AI technology, Grimmelmann stated: "The thing that I'm most worried about is not the person who goes in and asks questions and gets misled — that's going to be relatively rare. The thing I'm most worried about is AI is an amplifier for people who are trying to engage in coordinated mass lying or influence."

Kirtley asked Grimmelmann what he is most optimistic about in regard to AI. Grimmelmann responded: "I'm most optimistic about the creativity that I see. The kinds of interesting art — everything from visual art to music to games. And it's interesting, it's fun. I feel a sense of creative possibilities coming alive again in a way I haven't seen in other places yet."

A video of the lecture is available online at: https://z.umn.edu/2023SilhaLectureVideo. As the *Bulletin* went to press, the video had had over 100 views. Silha Center activities, including the annual Silha Lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

— Mallory Harrington
Silha Center Research Assistant

Photo from the 2023 Silha Lecture of the Silha family with 2023 Silha Lecturer James Grimmelmann and Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley. L-R; Gordon Barnett, John Reimann, Alice Reimann, Stephen Silha, James Grimmelmann, Jane Kirtley, Johnny Reiman, and Sarah Likens.

A video of the 2023 Silha Lecture
"The Defamation Machine: Can ChatGPT Commit Libel?"
is available online at:
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SILHA CENTER

FOR THE STUDY OF MEDIA ETHICS & LAW

HUBBARD

SCHOOL OF JOURNALISM

& MASS COMMUNICATION

University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
Silha@umn.edu
www.silha.umn.edu
(612) 625-3421