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## Media Coverage of Virginia Tech Shootings Sparks Controversy and Scrutiny

In the days following the April 16, 2007 Virginia Tech shooting, media outlets scrambled to cover the event from every possible angle. One, NBC, found itself part of the story when the network received a package from shooter Seung-Hui Cho, apparently mailed mid-spree.

The network received the package in the mail two days after the shooting, on Wednesday, April 18. It contained 29 digital photos, text and a 10-minute video DVD from Cho, some of which the network aired that evening on its "NBC Nightly News with Brian Williams." According to the Associated Press (AP), other networks quickly followed by taping the video from NBC and replaying it later in their own news broadcasts that night.

By the next day, however, a growing public backlash caused most television networks to stop running the video. Family members of victims cancelled scheduled appearances on NBC's "Today" show, and Virginia State Police Col. Steve Flaherty was quoted by the AP saying, "I just hate that a lot of people not used to seeing that type of image had to see it."

By late Thursday morning FOX announced it would no longer air clips from the Cho videos, saying on air, "sometimes you change your mind." A memo sent to staffers from the channel's Senior Vice President John Moody read, "We believe that 18 hours after they were first broadcast and distributed via the Internet, our news viewers have had the opportunity to see the images and draw their own conclusions about them. We see no reason to continue assaulting the public with these disturbing and demented images."

It continued, however, "We reserve the right to resume airing them as news warrants."

Also on Thursday, NBC and ABC said they would severely restrict their use of the videos, and CBS and CNN said producers would need to get permission from their bosses before running more of the clips.

As the AP noted, however, those decisions came over 12 hours after the images were first widely broadcast, and they would have been "used less anyway" as time went on.

NBC defended its decision to air portions of the tapes, images and text, saying in a statement, "The decision to run this video was reached by virtually every news organization in the world, as evidenced by coverage on television, on Web sites and in newspapers. We have covered this story -- and our unique role in it -- with extreme sensitivity, underscored by our devoted efforts to remember and honor the victims and heroes of this tragic incident."

The AP quoted ABC News spokesman Jeffrey Schneider saying, "It has value as breaking news but then becomes practically pornographic as it is just repeated ad nauseam."

The wire service also quoted Jon Klein, president of CNN U.S., saying, "As breaking news, it's pertinent to our understanding of why this was done. Then, once the public has seen the material and digested it, then it's fair to say, 'How much should we be showing it?' I think it's to the credit of news organizations that they are dialing back."

Members of the public left messages alternately criticizing and supporting NBC for airing the material on Brian Williams' NBC blog, TheDailyNightly. One person wrote, "I am totally appalled that NBC News has chosen to broadcast the videos of a psychopath according to his wishes and thereby possibly encourage other disturbed individuals to attempt to gain infamy through similar or copycat acts. I find this to be irresponsible and particularly disrespectful to the families of the victims."

But others agreed with NBC's decision. Someone identifying him or herself as "Chris" wrote, "As a news organization NBC was obligated to present the information to the public. They showed restraint in not showing more than they did. This material answers the question, 'Why?' NBC would have abdicated its responsibility if it had not disclosed [sic] this information."

*Slate* writer Jack Shafer was similarly inclined in his April 19 column. He wrote, "NBC News needn't apologize to anybody for originally airing the Cho videos and pictures. The Virginia Tech slaughter is an ugly story, but the five W's of journalism—who, what, where, when, and why—demand that journalists ask the question 'why?' even if they can't adequately answer it." He continued, "If you're interested in knowing why Cho did what he did, you want to see the videos and photos and read from the transcripts. If you're not interested, you should feel free to avert your eyes."

Canadian Broadcasting Corporation's (CBC) Editor in Chief of News Tony Burman was critical of NBC and other stations which aired the footage. In a column at cbc.ca, he wrote, "At the CBC, we debated the issue throughout the evening and made the decision that we would not broadcast any video or audio of this bizarre collection. On CBC Television, Radio and CBC.ca, we would report the essence of what the killer was saying, but not do what he so clearly hoped all media would do. To decide otherwise - in our view - would be to risk copycat killings."

Virginia Tech Coverage, continued on page 2



**Virginia Tech Coverage, continued from page 1**

Burman continued, “I think [NBC’s] handling of these tapes was a mistake. As I watched them last night, sickened as I’m sure most viewers were, I imagined what kind of impact this broadcast would have on similarly deranged people. In horrific but real ways, this is their 15 seconds of fame. I had this awful and sad feeling that there were parents watching these excerpts on NBC who were unaware that they will lose their children in some future copycat killing triggered by these broadcasts.”

The full text of his column is available online at [http://www.cbc.ca/news/about/burman/letters/2007/04/a\\_story\\_of\\_victims\\_and\\_issues.html](http://www.cbc.ca/news/about/burman/letters/2007/04/a_story_of_victims_and_issues.html).

NBC News President Steve Capus and Brian Williams appeared on “The Oprah Winfrey Show” on April 24 to defend their decision to air the material. “Sometimes good journalism is bad public relations,” Capus said. “These are very difficult decisions.”

And on April 30, *The Washington Post*’s Howard Kurtz quoted Capus saying, “I’m stunned that people bang down our door at one moment, demanding we release it uninterrupted and without filter – then question whether it should have been released in the first place ... I’m just stunned at the depths of absurdity and hypocrisy.”

Silha Director and Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley was quoted in the April 27 edition of *UMNnews*, stating, “I think the shooter’s video is news. People had an intense interest in knowing about this individual, and the tape was his vision of himself.” She also said, “The media should always treat victims and families with respect, but victims’ families shouldn’t have veto power over whether something like this is aired. Where do we stop in accommodating people who object to this? I say turn off the TV or hit the mute button.”

The same article also quoted Chair of the University of Minnesota’s Communication Studies Department Edward Schiappa discussing concerns that media coverage might encourage other people to model their behavior after Cho’s. “A number of empirical studies have proven that media coverage serves as a ‘priming effect’ for aggressive individuals and increases the probability of subsequent violent behavior.” But he added, “Let me be clear that we cannot avoid any and all stories that might lead to copycat behavior.”

Kirtley concluded, “Telling tough stories is part of what the media are about. You have to make a judgment about the public interest. Concern about people who might copy can’t be the driving factor.”

NBC was also criticized for the way it distributed the contents of the package to competitors. It affixed its logo prominently to all clips of the images and on the video and sent out a list of rules, which included, “No Internet use. No archival use. Do not resell,” and “Mandatory credit, NBC News.”

An April 20 *New York Times* article noted that Paul Friedman, the vice president of CBS News, “said NBC had not done enterprise reporting to come into possession of this material, but had ‘picked it up in its mailroom.’” It continued, “And while the rules about usage were fairly standard for the television news business, Mr. Friedman said that ‘in this instance it seemed inappropriate’ for NBC to be so proprietary about material of such sensitive nature.”

Scrutiny of the media went beyond the decision to air Cho’s video and photos and extended to the media’s

“We’ve come to the point at which murderous psychopaths and TV news executives are of the same mind when it comes to human tragedy: It’s a branding opportunity.”

– Simon Dumenco  
Columnist,  
*Advertising Age*

coverage of the event as a whole.

*Advertising Age*’s Simon Dumenco compared the various networks’ graphic icons displayed in the corner of the screen during coverage of the event, writing in a column that the “insta-branding was out of control.”

He noted that during CNN’s “Anderson Cooper 360,” “CNN’s animated MASSACRE AT VIRGINIA TECH logo throbbed and twirled with all the subtlety of an “American Idol” bumper. ... A gaudy, twitchy animation effect caused the MASSACRE type to briefly explode outside of its red box, as did the AT VIRGINIA TECH type a moment later. It took me a couple of rewind passes on my DVR to realize that the grainy gray background behind the twitching type showed a gun sight’s crosshairs floating in slow motion across the screen.”

Dumenco also discussed FOX and CBS’ graphics, before noting that “ABC, in a minimalist mood, tagged its on-site reporting for ‘Good Morning America’ with the words BLACKSBURG, VIRGINIA, and, in the lower left-hand corner, appallingly, a stand-alone graphic of a gun sight’s crosshairs in white against a blood-red background.”

He concluded his column by stating, “We’ve come to the point at which murderous psychopaths and TV news executives are of the same mind when it comes to human tragedy: It’s a branding opportunity.” The full text is available online at [http://adage.com/print?article\\_id=116190](http://adage.com/print?article_id=116190).

But (Louisville, Ky.) *Courier-Journal* columnist Tom Dorsey wrote, “It’s not about ratings, though. The people reporting the stories are doing their best with a difficult topic, inching along day by day, grasping for the next journalistic foothold.” He continued, “There is an unintended benefit to this kind of continuous coverage. It provides a place where people can go to feel a part of a national sense of sorrow and puzzlement.”

In a separate column published April 17, *Slate*’s Jack Shafer noted that NBC and ABC had both left condolence messages on Virginia Tech students’ profile pages at the social networking Web site Facebook and added that if anyone knew Cho “we have anchors and producers on campus that would love to meet with you” (ABC), and “We have producers and camera crews nearby ready to talk to anyone who can supply information about him and his movements leading up to the tragedy” (NBC).

Shafer concluded, “There’s a thin line between responsible journalism and outrageous sensationalism, and bloodfests like the one in Blacksburg tend to erase it. If the networks weren’t pinging Facebook for leads, if the *New York Times* weren’t compiling a “Portraits of Grief” for the Blacksburg kids right now—as I bet they are—[*Bulletin* Editor’s note: *The Times* did eventually run obituaries of each of the victims, similar to the “Portraits of Grief” it ran after 9/11] and if the story came to a close tonight on Anderson Cooper’s show, readers and viewers would riot. As reporters intrude into the lives of the grieving to mine the story, they should be guided more by a sense of etiquette than ethics. If they don’t risk going too far, they’ll never go far enough.”

For a further discussion of the media coverage, see “Silha Forum Examines Media Coverage of Tragedies” on page 38 of this issue of the *Silha Bulletin*.

– ASHLEY EWALD  
SILHA FELLOW AND *BULLETIN* EDITOR

# Reporter's Privilege News

## Freelance Journalist and Blogger Released After 226 Days in Prison

*Joshua Wolf served the lengthiest prison term of any American journalist for refusing to comply with a subpoena*

Freelance journalist Joshua Wolf was released from prison April 3, 2007, after spending 226 days incarcerated for refusing to comply with a grand jury subpoena. In August 2005, the government subpoenaed Wolf and the raw videotape he filmed at a G-8 protest the month before, and he was held in civil contempt after he refused to comply with the subpoena. Wolf was released after he posted all of his footage on his personal Web site and signed an affidavit swearing he did not see the individuals who committed the underlying crimes being investigated by the grand jury. Under the terms of his agreement with prosecutors, Wolf will not have to testify in front of the grand jury or identify any of the individuals on the videotape.

In July 2005, Wolf published portions of the videotape almost immediately after the G-8 protest on his personal Web site, [www.joshwolf.net](http://www.joshwolf.net), a collective Web site [indaybay.org](http://indaybay.org), and sold segments to a San Francisco television station. The government subpoenaed the unaired footage from the videotape, and Wolf asked U.S. District Judge William Alsup to quash the subpoena but was denied. Wolf appealed to the U.S. Court of Appeals for the Ninth Circuit, but was denied relief there as well. Following the appellate court's ruling, the government moved to revoke Wolf's bail, and he entered the Dublin Federal Correctional Institute in California on Sept. 22, 2006. (See "Wolf Sets Jail Time Record for Refusing to Comply with Grand Jury Subpoena" in the Winter 2007 issue of the *Silha Bulletin*; "Blogger Ordered Back to Jail for Refusal to Disclose Videotapes" in the Fall 2006 issue; and "Court of Appeals Orders Freelance Journalist To Hand Over Videotape" in the Summer 2006 issue.)

According to a statement by Wolf posted on his Web site, he reached the agreement with the government securing his release after two "rather strenuous sessions of mediation." Addressing why he chose to release the tape after spending more than seven months in jail for refusing to do so, Wolf stated his primary objection to the subpoena was that it required him to testify in front of the grand jury in addition to disclosing the videotape. Once an agreement was reached that did not require him to testify, he complied in releasing the tape. He also said that his legal team told him that releasing the videotape three months after he lost his legal appeals would indicate the time in jail was having a coercive effect on him and imply he would be willing to testify when he was not. Wolf claims that this agreement is the same as one he proposed to the government in November, but the government rejected it at that time.

On National Public Radio's "Talk of the Nation," Wolf said that although he still believes his refusal to disclose the tape was a battle worth fighting, he should not have been sent to jail. However, once his appeals had been exhausted and he realized he was not going to receive any legal protection for the videotape, he decided there was no further reason to stay in jail when the government was no longer requiring him to testify to the grand jury.

Alsup's order states that after Wolf published the outtakes online, the government now had "all the materials sought in the subpoena." Had he not been released, Wolf could have been imprisoned until the grand jury term expires in July 2007.

Because he is an independent blogger, Wolf's status as a journalist has been called into question throughout his imprisonment. Wolf firmly asserts that he is a journalist deserving the full protection of the First Amendment, which he also contends should have shielded him from imprisonment. In his "Talk of the Nation" interview, Wolf stated "that protection should be afforded to me under the constitution as a journalist." He also said that "bloggers that are engaging in journalist activities are today's lowly [sic] pamphleteers" that, in his opinion, the First Amendment was written to protect.

However, some commentators such as *San Francisco Chronicle* columnist Debra Saunders describe him as a "blogger with an agenda and a camera," and question why anyone refers to him as a journalist. Saunders opined in her column that "a camera and a Web site do not a journalist make, any more than shooting a criminal makes a vigilante a cop."

In a footnote to its opinion affirming the district court's contempt order, the Ninth Circuit concluded that the California shield law did not apply to Wolf because he produced no evidence he was connected or employed by a newspaper, magazine, periodical publication, press association, or wire service as required by the statute. However, a decision from California Court of Appeals, *O'Grady v. Superior Court*, 139 Cal.App.4th 1423 (Cal. App. 2006), interpreted California's shield law as granting protection to bloggers. (See "Appeals Court Finds that Bloggers Have Same Protection as Journalists, Newsgatherers" in the Summer 2006 issue of the *Silha Bulletin*.)

Wolf is also controversial because he has described himself as an "artist, an activist, an anarchist and an archivist." In an interview with Kevin Sites of Yahoo! News in March while still in prison, Wolf stated his belief that "advocacy has a firm role within the realm of journalism" and that his number one goal is to "uncover the truth to deliver to the public." However, Saunders refuted this contention as well, stating, "When you're an activist cavorting with the people you're chronicling, then you are not a journalist."

But Wolf's decision has gained the respect of some in the journalism community. The *Los Angeles Times* quoted media attorney Kelli Sager saying, "I give him a lot of credit." Sager continued, "Without the backing of a major news organization, he went to jail to stand up for a principle that should be important for all reporters."

In interviews given following his release, Wolf said that he plans to lobby Congress for federal shield legislation granting bloggers protection and work with other online projects.

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"I give him a lot of credit. Without the backing of a major news organization, he went to jail to stand up for a principle that should be important for all reporters."

– Kelli Sager  
Media Attorney

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– SCOTT SCHRAUT

SILHA RESEARCH ASSISTANT

# Reporter's Privilege News

## Washington State Enacts Reporter Shield Law

In February 2007, the Washington state House of Representatives unanimously (with two lawmakers not voting) passed a shield law granting reporters an absolute privilege for protecting confidential sources, and in March, the state's Senate followed suit with a 41-7 vote (with one lawmaker not voting) on a similar version of the law. By mid-April, the House agreed to changes in the bill made by the Senate to narrow its definition of "news media" and sent the bill on to Gov. Christine Gregoire (D), who signed the bill into law on April 27.

The votes came one year after the House passed a similar measure that never reached the full Senate floor. Washington has had no shield law until now, although courts had interpreted a qualified First Amendment privilege for journalists in case law.

As amended, the law provides an absolute shield for reporters wanting to protect a confidential source's identity, similar to existing privileges for clergy, doctors and spouses. The privilege is more limited for "news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public, including, but not limited to, any notes, outtakes, photographs, video or sound tapes, film, or other data of whatever sort in any medium now known or hereafter devised."

The law allows a court to compel disclosure of that information if it finds by clear and convincing evidence that the party seeking the information has exhausted all other alternative means to obtain it, there is a compelling interest in public disclosure, the information is critical to the maintenance of the claim, and there are reasonable grounds to believe a crime has occurred in criminal cases or that there appears to be a cause of action in civil cases.

The Associated Press (AP) reported that during debate in the Senate, Sen. Mike Carrell (R-Lakewood), tried to amend the measure to give courts the power to compel disclosure of a source's identity under certain circumstances, but failed.

The AP quoted the bill's main Senate sponsor, Sen. Adam Kline (D-Seattle), who said the bill was "for the benefit of voters." He said it would give the public "greater opportunity to know what's going on in this world, because somebody out there who may have some very sensitive information is now going to be more willing to come forward with it."

House sponsor and Majority Leader Lynn Kessler (D- Hoquiam) told the AP, "It is really important in a democratic society that we have a free press, that we as citizens know what is going on in our society, that the people in power who have an interest in keeping information from us shouldn't be allowed to bury that information."

The law grants a privilege to "members of the news media," which it defines as any entity engaged "in the regular business of news gathering and disseminating news or information to the public by any means." Analysis of the statute by several state newspapers seemed to concur that the bill would probably not protect bloggers.

### Shield Laws on Agendas in Other States and at the Federal Level

Thirty-two states and the District of Columbia already have shield laws, and Washington is one of several states considering a shield law this year. In April, the Texas Senate Jurisprudence Committee unanimously moved a shield law out of committee. On April 20, the bill fell two votes short of the requisite 2/3 needed to bring it to a full floor vote, but after being reintroduced on April 27 with an amendment added, it passed. The amendment alleviated some of the Senators' concerns that the bill would hinder criminal prosecutions by creating additional exceptions which could require journalists to testify.

In introducing the bill, S. 966, sponsor Sen. Rodney Ellis (D-Houston) said, "The press plays a vitally important role in our democracy and must be protected from government intimidation. With the face of journalism and law enforcement rapidly changing in the 21st century, it is time for Texas to pass the Free Flow of Information Act to ensure journalists and their sources are protected in their jobs of keeping the public informed."

Unlike Washington's bill, the Texas measure provides only a qualified privilege against compelled disclosure, meaning reporters' testimony could be compelled under certain circumstances, including when a judge finds nondisclosure contrary to the public interest and all reasonable efforts to obtain the information by other means have been exhausted. The bill does provide protection for both sources of information and unpublished information itself.

The Texas bill defines a journalist as "a person who for financial gain, for a substantial portion of the person's livelihood, or for subscription purposes gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider"

Missouri is also currently considering a state shield law, and there has been some movement on the issue in Utah and Massachusetts as well.

In February 2007, the *San Francisco Chronicle* reported that Democrats in the United States House of Representatives were prepared to "fast-track" federal shield legislation which has long stagnated in

"It is really important in a democratic society that we have a free press, that we as citizens know what is going on in our society, that the people in power who have an interest in keeping information from us shouldn't be allowed to bury that information."

– Rep. Lynn Kessler  
House sponsor of  
the Washington  
state shield bill

# Reporter's Privilege News

## *The New York Times* Refuses Opportunity to Discuss Reporter's Role in Conspiracy to Publish Sealed Documents

In February 2007, *The New York Times* declined an invitation offering their reporter Alex Berenson an opportunity to explain his role in what Senior District Court Judge Jack B. Weinstein described as a "conspiracy" to defy a protective order in a recently-settled class action lawsuit that was, at the time of the alleged conspiracy, pending before United States District Court for Eastern New York.

In an opinion filed on Feb. 13, 2007, Weinstein wrote that the court wanted to "allow [the reporter] to appear and confront the evidence of conspiracy offered against him" at a hearing held by District Judge Brian M. Cogan on Dec. 19, 2006. At the initial hearing, Cogan was presented with evidence that Berenson and two other individuals plotted to disseminate internal documents from Eli Lilly & Co. that were sealed by court order on Aug. 9, 2004 as part of ongoing discovery in litigation against the pharmaceutical manufacturer. *In re Zyprexa Prods. Liab. Litg.*, No. 04-MD-1596, 2006 WL 3877528 (E.D.N.Y. Dec. 19, 2006). In order to consider whether to issue a permanent injunction, Weinstein wrote, the court wanted to afford the reporter an opportunity to present evidence that the allegations of conspiracy were unfounded.

*The Times* responded by letter on Feb. 5, 2007, thanking the court for the opportunity but stating that it would be "inappropriate for any of [the newspaper's] journalists voluntarily to testify about news gathering at *The Times*."

"We guard quite zealously our role as a member of a free and independent press and believe quite passionately that, consistent with the principles embodied in the First Amendment, it is not the role of the newspaper or its reporters to submit to cross-examination about such matters even where it may otherwise serve our particular interests in a particular case to do so," *The Times*' Assistant General Counsel George Freeman wrote to the court.

On Feb. 13, 2007 Weinstein ordered the return of any remaining documents that individuals, government officials, and others had received and to refrain from further disseminating the materials. Berenson, *The New York Times* and five Web sites that were originally bound by Cogan's temporary order were not a party to the injunction.

However, Weinstein scolded Berenson for his role in the series of events that led to the widespread publication of the sealed documents, conduct that the judge claimed ran afoul of even *The Times*' own code of ethical conduct. "Staff members must obey the law in pursuit of news. They may not break into buildings, homes, apartments, or offices. They may not purloin data, documents or other property. ...

In short, they may not commit illegal acts of any sort," Weinstein wrote, quoting *The Times*' editorial policy.

According to Weinstein's opinion, Berenson, a medical expert and an Alaska attorney devised a plan to circumvent the court's original decision to seal the documents that Eli Lilly disclosed to the Lanier Law Firm during discovery.

Lanier, which represented individuals in a lawsuit against Eli Lilly for failing to disclose health risks associated with the antipsychotic *Zyprexa*, retained David Egilman as a medical expert in October 2006. On Nov. 10, 2006, Egilman agreed to the terms of the protective order issued in 2004 and gained access to internal documents that had been turned over to the Lanier Law Firm by Eli Lilly during discovery.

According to the court, at about that time, Egilman began discussing publicizing the *Zyprexa* documents with Berenson. The men later discovered that the terms of the protective order allowed an individual in possession of the sealed documents to be subpoenaed by any court or administrative agency so long as Eli Lilly or the opposing parties were notified in writing of a subpoena seeking confidential information. "In no event shall confidential documents be produced prior to receipt of written notice by the designating party and a reasonable opportunity to object," the order read.

Unaware of any pending cases that offered an opportunity to subpoena the documents, Berenson suggested that Egilman contact Alaska attorney James Gottstein, director of the Law Project for Psychiatric Rights. Gottstein agreed to subpoena the documents and assist Egilman in distributing the sealed documents to government officials, a number of Web sites, and the media. Although he was not involved in any litigation that would require Gottstein to issue a subpoena, Gottstein persuaded an Alaska superior court to issue a deposition subpoena in a challenge to a state guardianship proceeding. The guardianship, according to Weinstein, involved the public guardian's power to approve administration of psychotropic medication to the individual, although the administration of *Zyprexa* was not at issue.

The Alaska court issued a subpoena to Egilman on Dec. 5, 2006, ordering the expert to participate in deposition over the phone. Egilman forwarded the subpoena to Eli Lilly's general counsel. However, after Gottstein amended the subpoena to require that Egilman deliver documents to Gottstein prior to the telephone conversation on Dec. 11, 2006, Egilman failed to alert Eli Lilly of the change. Attorneys at Lanier were not notified of either subpoena.

On Dec. 13, 2006, Eli Lilly contacted Lanier to  
*New York Times, continued on page 6*

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"We guard quite zealously our role as a member of a free and independent press and believe quite passionately that ... it is not the role of the newspaper or its reporters to submit to cross-examination about such matters even where it may otherwise serve our particular interests in a particular case to do so."

– George Freeman  
Assistant  
General Counsel,  
*The New York Times*

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**Shield Laws**, *continued from page 4*

committee every time it has been introduced in recent years. (See “Congress Hears More Testimony on Federal Shield Law” in the Fall 2006 issue of the *Silha Bulletin*; “New Federal Shield Bill Introduced” in the Spring 2006 issue; “Shield Law Update” in the Fall 2005 issue; “Federal Shield Law Debated in Hearings Before Senate” in the Summer 2005 issue; and “Federal Shield Law Introduced in 109th Congress” in the Winter 2005 issue.)

On May 2, the “Free Flow of Information Act of 2007” was introduced in the U.S. House of Representatives. In introducing the measure, co-sponsor Rep. Mike Pence (R.-Ind.) told the members, “Unfortunately, last year almost a dozen reporters were served or threatened with jail sentences in at least three different federal jurisdictions for refusing to reveal confidential sources.”

Rep. Rick Boucher (D-Va.) was the bill’s other sponsor.

– ASHLEY EWALD  
SILHA FELLOW AND *BULLETIN* EDITOR

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*New York Times*, *continued from page 5*

discuss the subpoena issued by the Alaska court. After discovering that Eli Lilly planned to file a motion in the Alaska court to quash the first subpoena, attorneys at Lanier instructed Egilman to delay answering the subpoena. Although Egilman agreed to delay his response, he had already begun transferring the files on Dec. 12, 2006.

Learning that Egilman had transferred the documents to Gottstein, Eli Lilly contacted the attorney, demanding that he identify the protected material or individuals to whom he sent the documents, return the documents and refrain from disseminating the documents further.

Lanier later discharged Egilman as an expert and requested the return of any sealed documents still in his possession. However, Gottstein had already distributed the documents to Berenson, *The Times*, government officials, and a number of Web sites. At Berenson’s request, Gottstein had not distributed the documents to other media organizations, allowing *The Times* to scoop the story. The newspaper began publishing front page articles about information contained in the confidential Lilly documents on Dec. 17, 2006.

On December 19, Cogan issued the temporary injunction, requiring some of the individuals to whom Gottstein had provided the documents return them. On December 29, Lilly learned that some of the recipients refused to comply with the order and continued their attempts to distribute the documents.

When the matter later came before Weinstein, the judge defended the importance of protective orders issued during complex litigation. Protective orders sealing certain documents during discovery under Federal Rule of Civil Procedure 26, Weinstein wrote, are “not the kind of classic prior restraint that require exacting First Amendment scrutiny,” as the parties against which the injunction was being sought argued. Under *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 25 (1984), a litigant does not necessarily have the right to disseminate information that is obtained by discovery because it falls within a class of speech that is typically not protected under the First Amendment. In a unanimous decision, the Supreme Court decided in *Seattle Times Co.* that information obtained by a litigant through discovery was made available only for purposes of trying the litigant’s suit. A litigant has no First Amendment right of access to information made available only for these purposes, Weinstein wrote. A right of public access did not attach to the documents once produced by Eli Lilly in discovery.

Because the court order sealing the documents provided procedures for parties and non-parties to submit motions to amend the order and provided a practicable means of restricting access during discovery, the court held that the protective orders imposed only a “minimal burden on speech.” By restricting access to the documents through the discovery process, the court is able to protect the “privacy and property rights of litigants appearing before it.”

In balancing the harm to the public, Eli Lilly and others involved, the court held that the documents should be returned and the protective order upheld against individuals and organizations possessing the documents. *The Times*, Snigdha Prakash of National Public Radio, and others, including Berenson, were not included in the injunction. The five Web sites listed in Cogan’s temporary injunction and against which a permanent injunction was sought were also not included in Weinstein’s order.

“Prohibiting five of the Internet’s millions of websites from posting the documents will not substantially lower the risk of harm posed to Lilly,” Weinstein wrote. “Websites are primarily fora for speech. Limiting the fora available to would-be disseminators by such an infinitesimal percentage [of the millions of Web sites on the World Wide Web] would be a fruitless exercise of the court’s equitable power.”

– CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

# Reporter's Privilege News

## Judge Orders Mankato Reporter to Disclose Notes from Interview with Man who Took his own Life After Standoff

A state district judge in Blue Earth County, Minn. has ordered a reporter for *The (Mankato) Free Press* to disclose his notes about a telephone conversation he had with a man during a police standoff that ended in the man's death and the wounding of two police officers. *The Free Press* published a story the day after the incident including information received during the telephone conversation, and the county attorney subpoenaed *The Press* and all the notes of its reporter, Dan Nienaber, who spoke with Skjervold. Judge Norb Smith denied *The Press'* motion to quash the subpoena on Feb. 13, 2007, and the paper has decided to appeal the ruling.

The conflict between Skjervold and the police took place on Dec. 23, 2006, in Amboy, Minn., and the exact nature of it is in dispute. According to the (Minneapolis) *Star-Tribune*, Skjervold spoke with family members and Nienaber before killing himself. He told them that two policemen entered his home around 4:00 p.m. while he was quarreling with his wife. Skjervold further contended he did not know the men entering his home were police officers, and they exchanged gunfire before the police tasered him in the stomach. Mark Peterson, a spokesman for the Minnesota Department of Public Safety, disputed Skjervold's account, and said that the two officers retreated and called back-up after realizing Skjervold was armed. A tactical-response unit then entered the home and exchanged fire, and Skjervold shot two officers in the head before they retreated. Both officers survived the shooting. It is undisputed that the situation ended when Skjervold took his own life by shooting himself.

Skjervold's contact with Nienaber began after Nienaber began calling homes around the area surrounded by the police to report on the standoff with Skjervold. At the time of the call, Nienaber was unaware of the reason for the police activity. According to a Community Newspapers Holdings, Inc. (CNHI) story, Skjervold answered Nienaber's call, and the two spoke for a few minutes approximately three hours into the seven-hour standoff. During that conversation, Skjervold described the standoff to Nienaber, including information about the shootout with the officers, and then hung up. Nienaber reported the conversation the following day in the print and Web version of *The Free Press*.

The Blue Earth County Attorney sought Nienaber's notes as part of its investigation into the death of Skjervold. The attorney subpoenaed Nienaber's notes about his conversation with Skjervold to determine whether Skjervold said anything that was not reported in Nienaber's story. *The Free*

*Press* moved to quash the subpoena, and Judge Smith denied the paper's motion after a February 2 hearing. *The Press* argued it was protected under the Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021-595.025 (2006), which prohibits any court from compelling a person who was gathering information for the purpose of disseminating that information to disclose unpublished information to the court. There is an exception to the shield law if the material is clearly relevant to the prosecution of a gross misdemeanor or felony, but Skjervold's death precludes the county attorney from bringing any charges against him. At the time the subpoena was issued, no crime was being prosecuted or potentially prosecuted by the Blue Earth County Attorney's office, but rather an investigation into Skjervold's death was taking place. The county attorney has not disclosed specifics about whom he is investigating or why he wants to see all of Nienaber's notes.

Smith rejected the paper's argument that the shield law's exception can only apply when a crime is being prosecuted, and ruled that there was probable cause to believe the information being sought is clearly relevant to a gross misdemeanor or felony, despite the lack of prosecution of one. Smith continued, "Freedom of the press is not quite as sacrosanct or absolute as the *Free Press* would like it to be. That is especially true where the actions of a reporter interfere with the efforts of police negotiators to entice a distraught man out of his barricaded house while he is still alive. The right claimed by the *Free Press* to seek the truth must never be allowed to take precedent over the compelling and overriding interest of law enforcement authority to maintain human life." Also in his opinion, Smith said it is "safe to infer that the call exacerbated Skjervold's mental state, which in turn contributed to his taking his own life."

Mark Anfinson, attorney for *The Press*, expressed concern that Smith's ruling represents a flawed interpretation of how the shield law is supposed to work. Anfinson said that under this ruling, the protections granted by the shield law would be dramatically reduced because subpoenas could be used in a much broader range of situations than just prosecutions for felonies or gross misdemeanors.

The Associated Press reported on February 23 that *The Free Press* has decided to appeal Smith's ruling. Managing Editor of *The Press* Joe Spear said that the paper is "asking that prosecutors follow the law in requesting our notes. We're asking the appeals court to require that of the prosecutors."

— SCOTT SCHRAUT  
SILHA RESEARCH ASSISTANT

# Endangered Journalists

## International Roundup

### **Egyptian Blogger Sentenced to Four Years in Prison**

A former Egyptian law student was sentenced to four years in jail after being found guilty of inciting hatred of Islam and insulting Egyptian President Hosni Mubarak in articles that the student posted online under an assumed name. The sentence drew criticism and concern from around the world.

The Egyptian government has refused to comment on the case, which marked the first time that an individual had been formally prosecuted in the country for posting opinions online. But, according to an article published by *The (London) Independent* on Feb. 23, 2007, many people in the mostly conservative, Muslim society believe that Abdel Kareem Nabil Suleiman “went too far” in expressing his beliefs.

“This is a dark day for all who are interested in freedom of expression and belief in Egypt,” Gamal Eid, an attorney for Suleiman, told reporters from *The Independent*.

Suleiman, who published articles and commentary on his weblog under the pseudonym Kareem Amer, was arrested in November 2006 after the university where he studied, al-Azhar University in Alexandria, Egypt, filed a complaint against him. According to the prosecutors, Suleiman had referred to companions of the Prophet Mohamed as “terrorists,” to the university as a “university of terrorism” and to President Mubarak as the “symbol of dictatorship” in eight articles he had posted to his weblog.

Suleiman also wrote of his interest in becoming a human rights lawyer and helping women in Arabic societies, and posted criticism of attacks by Muslims on the nation’s Christian populations.

On March 3, 2007, *The (Ontario, Canada) Hamilton Spectator* reported that Egyptian prosecutor Mohammed Dawoud told reporters from the Associated Press that Suleiman’s postings had injured Muslims across the world. “I want him to get the toughest punishment. I am on a jihad here ... If we leave the likes of him without punishment, it will be like a fire that consumes everything,” Dawoud said.

The sentence drew condemnation from the international human rights organization Amnesty International, which called for the immediate and unconditional release of Suleiman after the sentence was handed down on Feb. 22, 2007.

“This sentence is yet another slap in the face of freedom of expression in Egypt,” Hassiba Hadj Sahroui, Amnesty International’s deputy program director for the Middle East and North Africa, said. “The Egyptian authorities must protect the peaceful exercise of freedom and expression, even if the views expressed might be perceived by some as offensive.”

A press release published by Amnesty International and available online at <http://news.amnesty.org/index/ENGMDE120062007>, called for Egyptian authorities to repeal legislation that permits Egyptian courts to imprison individuals for acts “which constitute nothing more than the peaceful exercise of the rights of freedom of expression, thought, conscience and religion.”

The U.S. State Department also expressed its concern over the four-year sentence, condemning the Egyptian court for infringing on Suleiman’s right to express his opinion. “While we have great respect for all religions, including certainly Islam, the role of freedom of expression is critical for the development of a democratic and prosperous society,” State Department spokesperson Tom Casey said on February 22.

On February 23, *The Independent* reported that Suleiman’s lawyers were preparing his appeal. Muslims who were personally offended by Suleiman’s weblog postings but contend that Suleiman had a right to express his opinion have established a Web site, FreeKareem.org, to campaign for his release.

### **Deadly Decade for Journalists, Survey Finds**

A survey conducted by the Brussels-based International News Safety Institute (INSI) found that more than 1,000 journalists were killed while reporting the news over the past 10 years, averaging almost two deaths every week.

The survey was conducted by INSI, a coalition of international media organizations and human rights advocates, between January 1996 and June 2006, and provides “the world’s most comprehensive inquiry into the deaths of journalists and other news media professionals,” according to the organization’s Web site. BBC global news director Richard Sambrook chaired the special inquiry.

The results of the study were reported on March 6, 2007, and detailed the deaths of journalists, media personnel, and other individuals who work with reporters to cover the news, such as interpreters.

The report found that casualties among journalists have reached record levels each year since 2004 and have increased steadily since 2000. It attributed the rising death toll to the increasingly popular tactic of silencing reporters by killing them.

“The figures show that killing a journalist is virtually risk-free,” Sambrook said. “Ongoing impunity for the killers of journalists, who put themselves in harm’s way to keep world society informed, shames not only the governments who are responsible but also the democracies that stand aside in silence.”

Although Iraq was found to be the deadliest country for journalists to work during the past decade, the INSI found that “most media workers killed in recent years died in their own countries,” often as a result of circumstances other than war or political strife. According to the report, reporters who lost their lives in peacetime were typically working on articles about corruption, drug trafficking and other criminal activities.



Over the last decade, the INSI estimates that 657 journalists were killed during peacetime, with the death tolls in Russia and Columbia being surpassed only by the death toll in Iraq.

A copy of the report is available online at the organization's Web site, [www.newssafety.com](http://www.newssafety.com).

During March 2007, other international media organizations and advocacy groups, including Reporters Sans Frontieres (Reporters Without Borders) and the Committee to Protect Journalists (CPJ), released studies covering the risks faced by reporters across the globe.

While the INSI found that the majority of victims over the last decade had been men, other news organizations and advocacy groups voiced concern for women journalists. On March 6, 2007, Reporters Sans Frontieres (Reporters Without Borders) said that more and more women journalists are falling victim to violence. "Women journalists are the victims of murder, arrest, threats or intimidation," a press release on the organization's Web site said. "This increase is due to the fact that more and more women are working as journalists, holding riskier jobs in the media and doing investigative reporting likely to upset someone."

On March 15, 2007, the CPJ issued a press release that coincided with the fourth anniversary of the U.S.-led invasion of Iraq. Research by the CPJ showed that 134 media workers were killed since the start of the war, making it the deadliest conflict in the organization's 25-year history.

Finding that 80 percent of the journalists killed in Iraq since 2003 have been Iraqi citizens, CPJ Executive Director Joel Simon called the statistics "a reminder of the enormous dangers our colleagues face in trying to report one of the biggest stories of our time."

The press releases issued by Reporters Without Borders and the Committee to Protect Journalists can be found on the organizations' Web sites, [www.rsf.org](http://www.rsf.org) and [www.cpj.org](http://www.cpj.org).

### **BBC Reporter Alive Despite Extremists' Claims**

On April 20, 2007, *The Times* (London) reported that BBC reporter Alan Johnston, who was kidnapped in Gaza on March 12, 2007, was alive despite an extremist group's claims that it was responsible for the journalist's death. Johnston was the only Western reporter permanently based in Palestinian territory.

Palestinian President Mahmoud Abbas announced on April 19, 2007 that Johnston was alive and that efforts to secure his release were ongoing. The announcement contradicted statements made by Kataeb al-Jihad al-Tawheed, or the Brigades of Holy War and Unity, in a statement sent by the group to international news organizations claiming to have killed Johnston to support demands for the release of Palestinian prisoners in Israeli captivity.

After the claims surfaced, Palestinian interior minister Hani Kawasmeh held a press conference to question the claims made by the group. "This party that issued the statement about the so-called killing is unknown to the security services," Kawasmeh told reporters.

According to an article published by the *Irish News* on April 16, 2007, however, the group's name has been used elsewhere by organizations linked to al-Qaeda. Nevertheless, Kawasmeh told reporters that same day, "There is no information to confirm the killing of Johnston until now."

Following the statement claiming Johnston had been killed, the BBC expressed concern over the e-mail message it received from the group claiming responsibility. According to reports on the Al-Jazeera news network, later reported by the BBC on April 16, the BBC and Palestinian officials could not verify the authenticity of the reports at that time.

Later that day, approximately 200 reporters and journalists attempted to enter the parliament building in Gaza, demanding that lawmakers release any information that the government possessed about Johnston.

The following day, on April 17, the London-based *Al-Sharq al-Awsat* reported that kidnappers claiming to have taken Johnston were demanding a \$5 million dollar ransom for the journalist's return. At the time the *Silha Bulletin* went to press, neither the BBC nor the family of Johnston had responded to the demand for ransom.

President Abbas, speaking during a visit to Sweden on April 19, claimed to know which extremist group was responsible for the kidnapping. "I believe he is still alive. Our intelligence services have confirmed to me that he's alive," Abbas said. But Abbas declined to provide any additional details.

Days later, a multi-faith service was held in London, at which BBC deputy director general Mark Byford told the congregation that "[f]or the last 75 years the BBC has relied on an extraordinary group of people who go into the world's trouble spots, often just as everyone else is getting out." He continued, "No one is braver or has faced more hardship than Alan Johnston." A similar vigil was also held in Pakistan and attended by both local journalists and foreign correspondents.

Meanwhile London Mayor Ken Livingstone appeared on Arab TV to appeal for information. He called Johnston's abduction, "a catastrophe" according to a BBC report.

### **Russian Reporter's Fall Leads to Demands for Investigation**

The *Kommersant*, a Russian daily, reported on March 6, 2007 that a military affairs reporter working for the newspaper was reporting on a highly-sensitive story about Russia's plan to sell missiles to Syria and Iran in the days and weeks before falling to his death on March 2, 2007.

The reporter, Ivan Safronov, had told his editors shortly before his death of Russian plans to sell

# International News

## Danish Editor wins Free Press Award

Flemming Rose, the editor of the Danish newspaper *Jyllands-Posten* who was at the center of the 2005 controversy over his newspaper's publication of a controversial series of political cartoons depicting the prophet Mohammed, has been honored with an award from the Danish Free Press Society.

In 2005, Rose invited 25 newspaper cartoonists to submit drawings of the prophet Mohammed "as they saw him." Only 12 agreed, and all of the cartoons submitted to *Jyllands-Posten* were subsequently published. As Rose told the *London Telegraph*, the cartoons were run as a "test of self-censorship in Denmark."

Though objections to the cartoons arose immediately in Denmark, it was not until early 2006 that outrage over the cartoons broke out worldwide. A group of Muslim clerics, angered by the initial publication of the cartoons and the refusal of the Danish government to penalize *Jyllands-Posten*, publicized the cartoons during a tour of predominantly Muslim nations, and they were subsequently republished in newspapers throughout the Middle East, Europe and the rest of the world. Boycotts of Danish products, riots and violence that claimed over a dozen lives, and the trashing and burning of Danish and other European Embassies in Muslim nations followed.

Rose and the *Jyllands-Posten* refused to apologize for the publication. The paper issued a statement apologizing for any "offense," but not for the cartoons themselves. Rose also responded by writing a piece entitled "Why I Chose to Publish Those Cartoons."

He was placed on leave by the paper, a move that some members of the Muslim community in Denmark applauded. The *Jyllands-Posten* and Rose characterized the leave as a "chance to recover" during a "crisis." The Danish Prime Minister defended the paper in a public statement.

Rose was subsequently reinstated as editor. The Danish Free Press Society, established in 2004 to respond to threats to free expression "by religious and ideological interests and international pressure groups," awarded Rose the Sappho Prize in a ceremony on March 27. Rose received a prize of 20,000 Danish Kroner, along with a statue of the poet Sappho, which the Free Press Society considers "a symbol of unconventionality, the love of freedom and human equality." The Free Press Society says it awards the prize to persons who "combine journalistic skill with courage and a refusal to compromise."

The *Jyllands-Posten* won a lawsuit levied against it because of the cartoons in Danish court in late 2006. (See "Danish Court Rules Mohammed Cartoons Are 'Not Offensive,'" in the Fall 2006 issue of the *Silha Bulletin*.) In March 2007, a French newspaper won a similar lawsuit. (See "French Editor Wins Lawsuit Over Publication of Cartoons," on page 11 of this issue of the *Silha Bulletin*.)

For complete background on this story, see "Controversial Cartoons Lead to Worldwide Concern for Speech, Press Freedom, and Religious Values," in the Winter 2006 issue of the *Silha Bulletin*.

— SARA CANNON  
SILHA CENTER STAFF

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### International Roundup, continued from page 9

sophisticated missile technology to Iran and Syria through Belarus, straining Russian relations with the United States and Israel. The *Kommersant* also reported that Safronov had told colleagues that he could face criminal investigations for releasing state secrets if he continued his reporting.

Safronov was later found dead outside his apartment building, after the reporter fell from a fifth-floor stairwell window. On March 7, the Voice of America news service reported that Russian police had ruled out any criminal activity, declaring the death either an accident or suicide.

Although prosecutors have demanded an inquest into the circumstances surrounding Safronov's death, Russian officials have yet to respond.

The International Press Institute (IPI) expressed concern over Safronov's death and called on Russia to conduct a thorough investigation into the reporter's death, the third high-profile death of a Russian journalist in the last year. An editorial which appeared in *The Globe and Mail* (Canada) also expressed doubts over the police investigator's claims, "particularly as he lived on the second floor and was returning from a shopping trip with a bag of groceries at the time [of his death]."

Voice of America reported that Johann Fritz, the IPI's director, expressed concern over "the deaths of many other Russian journalists and the impunity which accompanies these deaths," referring to several highly-publicized deaths of Russian journalists, including internationally-renowned human rights reporter Anna Politkovskaya and American-born *Forbes Russia* editor Paul Klebnikov. (See "Russian Spy May Have Been Poisoned for Investigating Journalist's Death" in the Winter 2007 issue of the *Silha Bulletin*; "Famed Russian Reporter Murdered in Contract Killing" and "Russia's Supreme Court Overturns Acquittals in Klebnikov Case" in the Fall 2006 issue).

— CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

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*Jyllands-Posten*  
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censorship in  
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# International News

## French Editor wins Lawsuit over Publication of Cartoons

On March 22, 2007, Phillipe Val, editor of the French satirical newspaper *Charlie Hebodo*, was acquitted of charges brought against him in a Paris court by Muslim groups for publishing cartoons depicting the prophet Mohammed in his paper. According to Agence France Press (AFP), the Paris Grand Mosque and the Union of Islamic Organisations sued Val for “publicly offending a group of persons on the basis of their religion.”

The cartoons were part of *Charlie Hebodo*’s report on the controversy surrounding the cartoons published in the Danish newspaper *Jyllands-Posten* in late 2005. (See “Controversial Cartoons Lead to Worldwide Concern for Speech, Press Freedom, and Religious Values,” in the Winter 2006 issue of the *Silha Bulletin*). *Charlie Hebodo* printed two cartoons from the *Jyllands-Posten* and another by a French artist that depicted Mohammed with his head in his hands, saying, “It is hard to be loved by fools,” alongside cartoons poking fun at other religions.

Other French papers, including *Le Monde*, *France Soir*, and *Liberation* also published some or all of the original cartoons published by *Jyllands-Posten*. The editor of *France Soir* was dismissed two days after he chose to publish the cartoons. *Liberation* reprinted them again when the lawsuit against *Charlie Hebodo* was announced.

The plaintiffs in the lawsuit alleged that the images were printed as part of a “considered plan of provocation aimed against the Islamic community,” motivated by “Islamophobia and purely commercial interests.” In court, the plaintiffs’ counsel compared the cartoons to those drawn of Jews during the Holocaust and of black Africans during the civil war in Algeria in the 1990s, saying they were “in the traditional hateful vein of blacks with big lips and Jews with hooked noses.” They sought damages of 30,000 euros from the newspaper.

According to AFP, the court ruled that two of the cartoons were “absolutely not offensive,” and that “acceptable limits of freedom of the press had not been crossed” with them. The AFP further reported that the court called the third cartoon, an infamous depiction of Mohammed with a bomb nested in his turban, “potentially insulting” but explained that “the context of its publication” in *Charlie Hebodo* “made it clear that there was no intention to offend.” The Union of Islamic Organizations in France announced that it would appeal the verdict, but the Paris Grande

Mosque accepted it as “balanced.”

The *Charlie Hebodo* case became a political issue in France, as it went to trial during the French Presidential campaign. Then-French president Jacques Chirac criticized the paper for publishing the cartoons, saying “freedom of expression must be exercised in a spirit of responsibility.” But Francis Bayrou, the centrist Presidential candidate, testified in court on the paper’s behalf, stating that all religions should tolerate criticism. The center-right Presidential candidate, Nicolas Sarkozy, embraced the paper’s cause and the issue of free speech in a move that *The Irish Times* called an effort to “distance himself from Chirac and ingratiate himself with left-wing voters.”

The French public took an interest in the trial as well. Crowds gathered outside the courthouse and cheered and booed attorneys as they came and went from their arguments. A group of 50 French intellectuals wrote an open letter in support of *Charlie Hebodo* at the beginning of the trial, which was subsequently published in *Liberation*. The group included many prominent French Muslims and described the case against the paper as “a test case for free speech” in France. In the letter, the group wrote that “democrats all over the world and especially Muslims hope to see in Europe, and above all in France, a secular haven where their words are not blocked by dictators or fundamentalists.” As Val exited the courthouse on the day the verdict was announced, the crowds outside greeted him with cheers.

Carsten Juste, publisher of the *Jyllands-Posten*, praised the trial’s outcome, saying “anything less than a total acquittal would have been a catastrophe for free debate and the entire foundation of our democratic society.” The *Jyllands-Posten* won a similar case in a Danish court in 2006 (See “Danish Court Rules Mohammed Cartoons Are ‘Not Offensive,’” in the Fall 2006 issue of the *Silha Bulletin*). Flemming Rose, editor of the *Jyllands-Posten*, won an award in March 2007 for his commitment to free press during the controversy and violence that followed his paper’s publication of the Mohammed cartoons. (See “Danish Editor Wins Free Press Award” on page 10 of this issue of the *Silha Bulletin*.)

– SARA CANNON  
SILHA CENTER STAFF

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“[A]nything less than a total acquittal would have been a catastrophe for free debate and the entire foundation of our democratic society.”

– Carsten Juste  
Publisher,  
*Jyllands-Posten*

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# International News

## Rome II Proceedings Could Decide Venue for Suits

Efforts by the European Union to facilitate civil litigation between citizens of different member states were frustrated by proposed regulations that would require EU countries to apply the law of other member states when resolving legal claims against the press. In January 2007, the latest proposals considered by the EU's parliamentary body drew pleas from publishers and journalists to exclude the media from the regulations.

Under existing standards, international legal disputes between citizens of member states are governed by the law of the country in which an individual incurs damages, not necessarily where the event giving rise to the litigation took place. Therefore, under current regulations, a car accident which causes personal injuries would require courts to apply the law of the victim's country of citizenship, where a victim would presumably incur costs related to medical expenses, rather than the country where the accident took place.

The regulations were first proposed on July 22, 2003 by the European Commission of Ministers, the executive body of the European Union. The initiative, commonly referred to as the "Rome II" agreements, focused on the question of civil liability for transnational damages caused by citizens of the EU's 27 member states. Although a Jan. 18, 2007 press release from the European Parliament reported that car accidents represent the majority of cross-border disputes, the European Commission's initial proposal also governed legal claims arising from violations of privacy or defamation.

On June 27, 2005, the European Parliament issued the Draft European Parliament Legislative Resolution on the Commission's earlier proposals in a report issued by Rapporteur Diana Wallis, a member of the European Parliament serving on the Committee on Legal Affairs. Included in its amendments to the Commission's proposal, the report changed the proposed regulation's treatment of legal disputes related to invasion of privacy and defamation.

After the Commission's proposal was introduced in the European Parliament in July 2003, the parliamentary body of the European Union amended the Commission's proposal to read:

"As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable, but a manifestly closer connection with a particular country may be deemed to exist."

Under the proposed parliamentary regulations, a court would be required to consider whether a publication or broadcast is principally directed at a country other than the country in which the damage

occurred or whether the language of a publication or broadcast is a language spoken by an audience in a given country. If a "manifestly closer connection exists" with another country and its laws conflict with the law of the country in which the elements of damage occurred, the law of the country to which the publication or broadcast is directed, rather than where the harm occurs, would apply.

Following public hearings on the matter, the Commission adopted a modified proposal in light of the parliamentary report on Feb. 21, 2006. The amended proposals did not include the changes to the specific rules governing privacy and rights related to the individual but instead excluded the application of Rome II from such disputes altogether.

"It is incredibly disappointing that the Commission has decided to withdraw the provision relating to defamation from Rome II," Wallis wrote on her Web site in 2006. "It is inconceivable that we should regulate Private International Law at European level without including the media because this is an area which is so much cross border."

A second reading of the Rome II regulations was presented to the European Parliament on Jan. 18, 2007, and Wallis insisted on reinserting the provisions on defamation and privacy. According to a Jan. 19, 2007 article published by the *European Report*, European Union Justice, Freedom and Security Commissioner Franco Frattini told deputies that the Council would never agree to such terms.

The *European Report* also reported that members of the media had contacted members of the European Parliament before the second reading and demanded that the Rome II regulation exclude any reference to violations of privacy or defamation.

"[I]t has been recognised by academics and lawyers that an absence of a rule in the Rome II Regulation does not seem to present difficulties for practitioners," European Publishers Council ("EPC") Executive Director Angela Mills Wade said, referring to a letter cosigned by the EPC, the European Newspaper Publishers Association, and the European Federation of Journalists. "Indeed, in practice, media and journalists are quite familiar with their national law, which provides legal certainty for their daily work."

Despite the media's pleas and concerns that the inclusion of the provisions would "open the floodgates for lawsuits" across the EU, the European Parliament voted on Jan. 18, 2007 to reinsert the clause.

Under European Union procedures, because the European Parliament's second reading of the regulation's text differs substantially from the revised position proposed by the Council of Ministers, a conciliation committee will be convened to forge an agreement.

— CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

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Under the proposed parliamentary regulations, defamation could be litigated outside of the country where the allegedly defamatory statements were first published.

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# Defamation/Libel

## Tenth Circuit Declines to Strike Down Colorado's Criminal Libel Law After Finding Student's Challenge Moot

In a disappointing decision for criminal libel law opponents, the United States Court of Appeals (Tenth Circuit) in Denver declined to rule on the constitutionality of Colorado's criminal libel law in an opinion handed down in April 2007, *Mink v. Suthers*, 2007 WL 1113951 (10th Cir. Apr. 16, 2007) (formerly titled *Mink v. Salazar*, 344 F. Supp. 2d 1231 (D. Colo. 2004)).

The case centered upon University of Northern Colorado (UNC) student Thomas Mink's Internet-based, student-run journal, *The Howling Pig*, and Mink's parody columns in the journal about UNC Professor Junius Peake. In the fall of 2003, Mink began writing columns under the pseudonym "Junius Puke." The columns featured a photograph of Peake with a Photoshopped Hitler-style mustache and dark sunglasses. In court filings, Mink said the purpose of the column was to "spoof[] and parod[y] Professor Peake by addressing subjects on which the real professor would be unlikely to write, or through the assertion of views diametrically opposed to those of Professor Peake."

Upon learning of the columns, Peake contacted a local District Attorney and filed a complaint alleging that he was the victim of criminal libel. Colorado's criminal libel statute makes it "criminal libel" to knowingly publish any statement tending to "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Colo. Rev. Stat. § 18-13-105.

After receiving the complaint, the Greeley (Colo.) Police Department began an investigation, during which they sought a search warrant for Mink's residence and property, including his computer. Deputy District Attorney Susan Knox read and approved the Police Department's search warrant affidavit, and the warrant was later approved by a magistrate judge.

On Dec. 12, 2003, Mink's home was searched and his computer and some of his writings were confiscated. He also claims police told him he was in "big trouble" and warned him that resuming publication of the *Howling Pig* would "only make things worse" for him.

Mink obtained counsel, and on Dec. 23, 2003, his lawyer was told a criminal libel charge would be filed against Mink. His counsel immediately sent the District Attorney a letter arguing the libel law could not be constitutionally applied against Mink and demanded return of Mink's possessions. When the letter went unanswered, Mink filed suit in federal district court on Jan. 8, 2004, seeking a declaration that the law be declared unconstitutional. He also sought damages for the search and seizure and requested a temporary restraining order.

The next day, the district court ordered Mink's possessions returned to him immediately. It later convened a conference with the District Attorney, who informed the court that the office had decided it could not constitutionally prosecute Mink under the libel statute and planned to close the file.

On Feb. 19, 2004, Mink filed an amended complaint, realleging that the Colorado criminal libel statute was unconstitutional and adding the Colorado Attorney General, the local District Attorney, and Deputy District Attorney Knox as defendants.

On Oct. 26, 2004, the District Court dismissed Mink's suit in its entirety, finding that he lacked standing to challenge the constitutionality of the statute and that his claims against Knox were barred by the doctrine of absolute prosecutorial immunity.

Mink appealed to the Tenth Circuit, and numerous media advocates, including the Silha Center and the Student Press Law Center, among others, filed *amicus* briefs. The Silha Center and Student Press Law Center's joint brief urged the court to strike the criminal libel law as unconstitutional and inconsistent with the First Amendment, contending that civil defamation laws can adequately protect plaintiffs without causing as much harm to free speech.

"If this court does not find that a student arrested solely for his speech has standing to challenge the unconstitutionality of the underlying statute he supposedly violated, it will be giving a green light to police and prosecutors who use these statutes to intimidate speakers who are young and politically powerless but who have exercised their constitutional right to criticize government employees," the Centers argued. "By the expedient of dropping a matter before a person is charged, prosecutors can perpetuate the use of criminal libel statutes as tools to harass and intimidate speakers into silence even when the statutes themselves are unconstitutional." (The Centers' brief in its entirety can be viewed at <http://www.silha.umn.edu/resources.htm>. For further information, see "Silha Center Joins Student Press Law Center in *Amicus* Brief" in the Winter 2005 issue of the *Silha Bulletin*).

The case was argued in January 2006. Thirteen months later, the Tenth Circuit declined to rule on the constitutionality of Mink's claims, instead finding that because the District Attorney had decided not to prosecute Mink and had closed the file, Mink no longer had standing to sue.

Judge Timothy M. Tymkovich, writing for the three-judge panel of the court, wrote, "Without a live, concrete controversy, we lack jurisdiction to consider claims no matter how meritorious." He continued, "Because we conclude Mink faces 'no credible threat of prosecution' under the criminal libel statute, he lacks standing to pursue his claims for prospective relief." For the same reasons, he also found Mink's claims to be moot and thus the court could not reach the merits of Mink's constitutional claim.

The court also held that Mink's damages claims under the Privacy Protection Act, 42 U.S.C. § 1983, against Knox failed because the Act makes it unlawful to search for or seize any work product materials made by a person with intent to disseminate the information to the public. It held that in this case, Knox only approved the search warrant; she did not herself do

Colorado Libel, continued on page 14

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"Without a live, concrete controversy, we lack jurisdiction to consider claims no matter how meritorious."

– Judge Timothy M. Tymkovich  
U. S. Court of Appeals  
(10th Circuit)

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# Defamation/Libel

## Iowa Supreme Court Permits Defamation-by-Implication Suit

In a March 2007 decision, the Iowa Supreme Court allowed a defamation action against a newspaper to proceed despite finding the allegedly libelous statements to be true. Justice Jerry Larson's opinion for the Court in *Stevens v. Iowa Newspapers, Inc.*, 2007 Iowa Sup. LEXIS 34 (Iowa 2007) explicitly recognized "defamation-by-implication" actions in the state, permitting a suit by former *The (Ames) Tribune* columnist Todd Stevens to continue to trial.

The case arises from an incident in 2002 involving the resignation of Iowa State University's associate athletic director Elaine Hieber. *The Tribune* published a column about Hieber's resignation by its reporter Susan Harman that Stevens believed was too complimentary of Hieber. Stevens wrote a rebuttal column expressing this view. At the time, Stevens had been a freelance journalist who submitted columns to *The Tribune* for three years. The paper refused to publish Stevens' original column because it considered the column's tone too critical of its reporting of Hieber's resignation. Stevens revised that column and read it on a local radio station. Stevens then chose to stop writing for *The Tribune*, and his "farewell" column was published alongside a response written by Harman.

Stevens brought his libel action in August 2002 in an Iowa District Court alleging three statements in Harman's response column were defamatory. Harman's column states that Stevens "rarely attended events upon which he wrote columns," that his original column about Hieber's resignation "contained numerous factual errors and unsubstantiated claims," and that the revised column "continued to include fatal factual errors and near libelous characterizations." The district court granted *The Tribune's* motion for summary judgment after a hearing in March 2004. The appellate court affirmed in part and reversed in part in January 2006, granting summary judgment to dismiss the libel claims for the second and third statements, but ruling a trial was appropriate to determine whether the first statement was in fact defamatory. Stevens then appealed to the state Supreme Court.

The Court found that Stevens himself admitted he was a public figure, and therefore had the burden to show by clear and convincing evidence that the challenged statements were false and made with "actual malice." Actual malice requires a showing that the defendant made the statements knowing they were false, or with reckless disregard for the truth.

The Court then observed that the three statements Stevens alleged were defamatory were all essentially true. Stevens did attend only about 18% of the games about which he wrote, and there were factual errors in his columns. However, the Court cited to an authoritative treatise, *Prosser & Keeton on the Law of Torts* §§ 116 and 117, which states that a cause of action arises when a series of facts are juxtaposed to imply a defamatory connection between them, or if omitted facts create a defamatory implication. This cause of action had not previously been recognized in Iowa, but the Court interpreted statements from prior state case law as sufficient to justify expanding state law to include defamation-by-implication. The Court said this was necessary because, "[o]therwise, by a careful choice of words in juxtaposition of statements in a publication, a potential defendant may make statements that are true yet just as damaging as if they were actually false."

The Court also ruled that public figures and officials could bring a defamation-by-implication action. After weighing various authorities, the Court concluded it would be unfair to limit the cause of action only to private individuals. In making this conclusion, the Court cited a law review article that argued the contrary result would create a loophole that media defendants could exploit to defame high profile individuals by using facially neutral statements with a defamatory insinuation. The Court cited further authority from federal circuit opinions recognizing defamation-by-implication actions by public figures.

Finally, the Court applied the legal principles to facts of this case, affirming the Court of Appeals' decision to permit the action to continue for the first statement. Stevens claims that Harman's assertion about his lack of attendance implied that he fabricated his columns, and therefore was defamatory. The Court observed that Harman knew attendance at these games was unnecessary for Stevens to write his columns and found Harman's failure to acknowledge this in her column could lead a reasonable juror to find an implied defamatory falsehood made with actual malice. The Court affirmed the Court of Appeal's decision to uphold summary judgment for the other two statements and remanded the case for trial.

In an Associated Press article, *The Tribune's* editor, Joseph Craig, said, "We're pretty happy that the court ruled in our favor on two of the three counts and disappointed in the third." He said they would have discussions with their attorney before taking any further action.

— SCOTT SCHRAUT

SILHA RESEARCH ASSISTANT

**Colorado Libel**, continued from page 13

any searching or seizing.

The court did overturn the district court in one aspect of the case. It found that Mink's damages claims against Knox based on her review of the search warrant could not be denied on the basis of prosecutorial immunity. The court ruled that prosecutors do receive absolute immunity when working in their role as advocates; however, they could not receive immunity in their role as administrators or investigative officers. Because the court found Knox was acting in the latter capacity when she approved the search warrant, the court remanded the case to the district court with instructions to consider Knox's qualified immunity claims under their elaborated framework.

As the *Bulletin* went to press, there was no word on whether either party would appeal.

— ASHLEY EWALD

SILHA FELLOW AND BULLETIN EDITOR

The Court determined it was necessary to expand defamation to include true statements because "[o]therwise, by a careful choice of words in juxtaposition of statements in a publication, a potential defendant may make statements that are true yet just as damaging as if they were actually false."

# Privacy

## California Supreme Court Permits Invasion of Privacy Suit to Continue Against College Professor

The California Supreme Court has permitted one claim in an invasion of privacy suit to proceed against a college professor who allegedly misrepresented herself to the plaintiff's former foster mother in order to acquire information about the plaintiff. The Court denied the defendants' motion to strike the suit entirely in February 2007, and remanded it to the lower court for further proceedings to determine whether the defendant's alleged actions constitute highly offensive conduct that would give rise to tort liability for intrusion.

The case arises from an article written by Drs. David Corwin and Ema Olafson in May 1997 about the supposed spontaneous return of previously unrecalable memories by the plaintiff Nicole Taus. Corwin's and Olafson's article was published in *Child Maltreatment* magazine, a scientific journal published by the American Professional Society on the Abuse of Children. Corwin and Olafson claimed Taus was unable to remember alleging that her mother abused her as a child in 1984 while being treated by Corwin, until those memories returned to her in 1995 during additional discussions with Corwin. The magazine also contained five shorter articles reviewing Corwin and Olafson's article, all of which praised their work. None of the articles identified Taus by name, and all other names and places were changed except for Dr. Corwin's.

Despite the praise for Corwin and Olafson's work by the other writers in *Child Maltreatment* magazine, Dr. Elizabeth Loftus and Dr. Melvin Guyer conducted their own research to determine the validity of the article. Loftus' and Guyer's article was published in two parts in the summer of 2002 in *Skeptical Inquirer* magazine and disputed many of Corwin's claims about Taus' allegations and supposedly "recovered" memories. While researching their article, Loftus and Guyer interviewed Taus' biological mother, foster mother, and stepmother. Their article did not disclose Taus' identity, but did include information about her history not included in the *Child Maltreatment* articles.

On Feb. 13, 2003, Taus filed her initial complaint in the Superior Court of Salerno County, Calif. against Loftus, Guyer, another individual who wrote an article for *Skeptical Inquirer* about Loftus and Guyer named Carol Tavriss, the *Skeptical Inquirer*, Loftus' employer the University of Washington, and an investigation company Loftus and Guyer hired. Taus amended her complaint approximately one month later to add the publisher of *Skeptical Inquirer* magazine and an affiliate of that publisher. The amended complaint included causes of action for negligent infliction of emotional distress, invasion of privacy, fraud, and defamation.

The defendants asked the district court to strike the complaint pursuant to California's anti-SLAPP statute, a law designed to protect expressive activities in connection with a public issue from frivolous lawsuits. The district court denied the motion to

strike the causes of action for negligent infliction of emotional distress for all defendants; granted the motion to strike the fraud claim against Loftus but denied it for the University of Washington; and granted the motion to strike the defamation action against Tavriss but not for Loftus. All defendants whose motions to strike were denied by the district court appealed to the state court of appeals, except for the University of Washington.

The state Court of Appeals entered its order on April 1, 2005 affirming in part and reversing in part in *Taus v. Loftus*, 2005 Cal. App. LEXIS 3048 (Cal. Ct. App. 2005). This court struck additional causes of action, leaving only claims for invasion of privacy for public disclosure of private facts, invasion of privacy for intrusion, and defamation for review by the state Supreme Court. The remaining defendants appealed asking that all the remaining counts be struck.

The state Supreme Court considered the defendants' appeal and then ruled on the claims left intact by the appellate court in *Taus v. Loftus*, 151 P.3d 1185 (Cal. 2007). The public disclosure of private facts claim was based on two separate incidents: statements by Loftus at a 2002 professional seminar that Taus' has engaged in allegedly destructive behavior that affected her ability to serve in the Navy, and Loftus' disclosure of Taus' initials in a deposition unrelated to the present lawsuit. The defamation claim arises from Loftus' same statements from the 2002 seminar. The intrusion into private matters claim arises from two separate incidents as well: the defendants' collection of information from court records, and Loftus' alleged misrepresentations to Taus' foster mother that Loftus was a colleague or supervisor of Dr. Corwin as a way of acquiring personal information about Taus.

Chief Justice Ronald George's opinion for the Court initially explained the two part process when a defendant moves to strike pursuant to California anti-SLAPP law, Cal. Civ. Pr. Code § 425.16 (2006). A defendant must make a threshold showing that the challenged cause of action arises from protected expressive activity, and then the burden shifts back to the plaintiff to demonstrate a possibility of prevailing on the claim. The Court found the defendants' activities to be protected activity related to a substantial controversy in the mental health field, making it a newsworthy and public issue. Therefore, the burden then shifted to the plaintiff to establish a probability of success on the claims.

The Court first considered Loftus' statements at the 2002 seminar and held those statements did not constitute either a public disclosure of private facts or defamation. The Court expressed doubts that these disclosures were sensitive or intimate private facts offensive to a reasonable person, but found that irrelevant because the facts were nonetheless newsworthy, precluding a public disclosure action.

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The Court reasoned that cases involving such offensive misrepresentations will not have an impact on journalists because such actions go well beyond normal newsgathering techniques.

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*Taus v. Loftus*, continued on page 16

It also ruled those statements could not give rise to a defamation action, as they were protected by Cal. Civ. Code § 47(c)(1) (2006), which grants a common-interest privilege to statements such as these, as they were made by a psychology professor at a conference of other mental health professionals that related to the conference.

The Court summarily dismissed the disclosure of private facts action related to disclosure of Taus' initials at a deposition unrelated to this lawsuit because that deposition took place after Taus filed her complaint in this lawsuit, revealing her full name.

The Court also found that the private investigation company Loftus hired demonstrated that all the records were open to the public without any being confidential, and therefore could not be subject to an intrusion claim.

But the Court permitted one claim to go forward: an additional intrusion claim related to Loftus obtaining personal information from Taus' former foster mother Maggie Cantrell. In a declaration filed as part of the record for this lawsuit, Cantrell claimed that Loftus told her that Loftus was working with Dr. Corwin as his supervisor, whom Cantrell knew had a prior relationship with Taus. Cantrell says she relied on this representation in disclosing extensive information about Taus. Loftus denies ever making any such representations.

The Court acknowledged that a person generally cannot maintain an action for intrusion against an individual who speaks to a relative or friend of the plaintiff that reveals personal information about that plaintiff, but permitted the lawsuit to proceed in this case because a person's preservation of privacy could be substantially undermined if investigators could use any means to extract that information from the plaintiff's friends and family. The Court believed a jury could find the plaintiff reasonably expected an investigator would not obtain access to personal information from a friend or relative by posing as a supervisor of a professional with whom the plaintiff had confided. The Court further noted the information obtained about Taus from Cantrell was deeply personal, relating to Taus' drug use and sexual relationships.

The Court addressed an *amicus* brief filed by several media organizations concerned about implications the case may have on journalists and their relationship with sources. The brief urged the Court to strike this cause of action because a source unhappy with a reporter's final article that involved the source may claim the reporter was not forthright with that source. The brief further explained that permitting causes of action for intrusion based on alleged misrepresentations by a journalist would have a chilling effect on the gathering and publication of news.

The Court conceded the the concerns of the *amicus* parties were reasonable, but found that some misrepresentations, such as those alleged in this case where a person feigns a relationship with an individual's therapist, are so egregious and offensive that causes of action based on those misrepresentations should be allowed to proceed to a jury. It used an example of an investigator posing as an emergency room physician and contacting an individual's family member to determine if that person has a certain medical condition as something a reasonable person could find highly offensive. The Court reasoned that cases involving such offensive misrepresentations will not have an impact on journalists because they are well beyond normal newsgathering techniques of shading or withholding information about one's motives while speaking with a source.

Justice Carlos Moreno, joined by Justice Marvin Baxter, dissented in part, stating his belief that the Court should strike the intrusion action. In Moreno's view, Taus had no reasonable expectation that Cantrell's observations would remain private.

Attorneys for both the plaintiff and defendants reacted to the Court's opinion. A February 2007 Associated Press article quoted both of them, with Taus' attorney saying he will fight for the "vindication of [Taus'] right of privacy," while Loftus' attorney, Thomas Burke, said his client never misrepresented herself. Burke also stated his belief that the case will not have a broad impact on journalists, as he believes "the vast majority of working journalists don't do the sort of things that Dr. Loftus is accused of."

– SCOTT SCHRAUT  
SILHA RESEARCH ASSISTANT

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## Media Access

### Minnesota Media Organizations Petition State Supreme Court to Create Presumption of Camera Access to Trials

A consortium of media organizations in Minnesota has petitioned the state Supreme Court for increased electronic access to trials in its state courts. The petition was filed as part of “Sunshine Week,” an effort led by the American Society of Newspaper Editors since 2002 to raise public awareness about the importance of open government. As the *Bulletin* went to press, the Supreme Court had not yet responded to the petition.

The petition, filed March 12, 2007, was signed by the Minnesota Joint Media Committee (MJMC), the Minnesota Newspaper Association, Minnesota Broadcasters Association, and the Minnesota Chapter of the Society of Professional Journalists. The MJMC is a nonprofit corporation whose members include representatives of most of the state’s major media organizations organized to encourage exchange among Minnesota’s news media and seek improvement in law and policy. The petition seeks a change in the state’s Code of Judicial Conduct that currently prohibits audio and video coverage of trials unless the judge and all parties approve such coverage. It was filed with the Minnesota Supreme Court, which promulgates general rules of decorum and regulates the administration of justice for each of the state’s courts.

Minnesota’s Supreme Court last addressed this issue in 1989 in *In Re Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct*, 441 N.W.2d 452 (Minn. 1989), which involved a similar petition. At the time, a four-year experimental period permitting audio and visual coverage of trial proceedings with the consent of all parties had lapsed. The Court denied the MJMC’s request, holding that the petitioners had failed to demonstrate that expanded audio and video coverage of trials would improve the administration of justice. The Court justified its denial of the petition by citing an assortment of negative effects that could result from increased access to trial courts such as reluctance of individuals to testify, invasion of privacy of witnesses, and distraction caused by the audio and visual equipment. Justice Alexander Keith concurred, noting that he would have granted authority to the district judges alone to allow audio and visual coverage of some trial proceedings.

Current rules permit audio and visual recording equipment in the Minnesota Supreme Court, provided notice is given to the Court 24 hours in advance and the individuals recording do not impair the dignity of the Court or distract from its proceedings.

In its 2007 petition, the MJMC notes the inadequacy of the current policy. It states that the stringent requirements will “rarely be satisfied,” and observes that “Minnesota’s trial courts have remained overwhelmingly closed to audio and visual coverage.”

This latest petition would modify the Minnesota Canon of Judicial Conduct 3A(11) and Minnesota General Rule of Practice 4 to presumptively permit audio and video recordings of trial proceedings. The proposed changes are designed to minimize the intrusiveness of equipment and personnel by limiting

their number, placement, and movement about the courtroom. The proposal also grants the trial judge the authority to ban audio and video coverage from civil or criminal trials, but only in cases where the proceedings would be adversely affected “because of technological factors unique to the electronic media.”

The petition addresses the concerns raised by the Supreme Court in 1989 by stating that experiences in other jurisdictions permitting coverage in courts have shown those concerns to be unfounded and “largely lacking in substance.” It also points out that technological advances in recording equipment means that it is “almost undetectable in the courtroom.”

The petition further identifies for the Court the experiences of the multitude of other jurisdictions that allow greater electronic access for the media to courts. The Radio-Television News Directors Association (RTNDA) classifies Minnesota as a “Tier III” state, among the 16 most restrictive. Neighboring states Wisconsin and North Dakota fall within “Tier I,” with both states vesting broad authority in the trial judge to make determinations about extended media access to courts. The petition includes an appendix containing the RTNDA’s summary of each state’s access laws.

The petition concludes by noting the petitioners’ willingness to address any concerns of the Court in whatever way it desires. The petition, letter to the court, and proposed changes are available online at <http://www.mnsj.org/2007/03/07/cameras-in-the-courts>.

The MJMC’s petition has the support of some media experts in Minnesota, including Jane Kirtley, director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota. Kirtley noted on a KARE-11 (Television) Extra segment that “[t]he best way for the public to know what’s going on in our courts...is to see and hear what’s going on in the courts.”

Mark Anfinson, the attorney of record for the petitioners, believes increased audio and visual access to Minnesota courts is essential to fully learn about courtroom proceedings. When asked about the petition for this article, he said that “a lot about the court system, especially what judges do, is misunderstood and underappreciated by the public.” He believes cameras in the courtroom can help remedy this problem.

Minnesota’s Chief Justice Russell Anderson declined to comment on the petition for a March 10 Associated Press article. However, the article quotes others who were in favor of and opposed to the petition. Hennepin County Judge Jack Nordby stated, “I think it’s a bad idea in that it would have some effect on lawyers and witnesses and judges tending to perform.” But other judges, like Norman Yackel of Superior, Wis. (the judge who presided over the highly publicized murder trial of Chai Vang, the man convicted of killing six hunters and wounding two others in Wisconsin), described media organizations in his courtroom as “very, very accommodating” and not at all disruptive.

– SCOTT SCHRAUT

SILHA RESEARCH ASSISTANT

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“The best way for the public to know what’s going on in our courts...is to see and hear what’s going on in the courts.”

– Jane Kirtley  
Silha Center Director  
& Silha Professor of  
Media Ethics and Law

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## Media Access

### Pentagon Bars Reporters from Attending Guantanamo Hearings

Days before the United States was to conduct “combatant status review tribunals” to determine whether prisoners being held at detention facilities in Guantanamo Bay, Cuba were properly classified as “enemy combatants,” the Pentagon announced that reporters would be barred from the hearings. The announcement was made on March 6, 2007, three days before the hearings were scheduled to begin for 14 detainees who were transferred from secret CIA-operated prisons in September 2006.

On March 7, 2007, the Associated Press (AP) reported that Pentagon spokesman Bryan Whitman provided few details about the hearings when making the announcement, declining to comment on which of the 14 individuals would appear first before the hearing officers or how long the process would take. According to the AP, details of the hearings will be made public when the government releases an edited transcript of the proceedings. Portions of the transcript determined to be damaging to national security, including the name of the detainee, would be withheld.

The 14 men who faced tribunals beginning in March were alleged to have ties with al-Qaeda, and among them was the suspected mastermind of Sept. 11, 2001 attacks, Khalid Sheikh Mohammed.

If an individual is determined to be an “enemy combatant” after a hearing at which they are represented by military officials rather than their own lawyers, he or she is eligible to stand trial before a military tribunal at the direction of President George W. Bush. Similar hearings to determine detainees’ eligibility for military trial were held between July 2004 and March 2005, but were open to reporters.

Although the Pentagon imposed some restrictions on reporters at that time, Whitman told the AP that the March 2007 hearings were closed because of national security interests that could be compromised by publication of the detainee’s testimony.

“Because of the nature of their capture, the fact that they are high-value detainees and based on the information that they possess and are likely to present in a combatant status review tribunal ...we’re going to need an opportunity to redact things for security purposes before providing that in a public forum,” Whitman said.

The Pentagon previously expelled reporters from the Guantanamo Bay detention facilities in the interest of national security last summer. In June 2006, reporters from the *Miami Herald* and the *Los Angeles Times* were removed from the base after three detainees committed suicide at the facility.

These reporters were scheduled to report on similar hearings before they were cancelled as a result of the suicides. The Defense Department also said it wanted to launch a formal inquiry into whether its officers allowed Michael Gordon of *The Charlotte Observer* to report on classified information exchanged during a staff meeting which Gordon attended the morning of the suicide. (See “Reporters Forced to Leave Guantanamo Bay” in the Summer 2006 issue of the *Silha Bulletin* for more details.)

A New York-based human rights group that represents one of the detainees who appeared before the hearing officers in March accused the Pentagon of designing sham tribunals and denying him access to his lawyers in the months leading up to the hearing, “solely to prevent his torture and abuse from becoming public,” the AP reported.

— CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

“Because of the nature of [the detainees’] capture, the fact that they are high-value detainees and based on the information that they possess and are likely to present in a combatant status review tribunal ...we’re going to need an opportunity to redact things for security purposes before providing that in a public forum.”

— Bryan Whitman  
Pentagon spokesman

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## Media Access

### Judge Rules Classified Evidence in AIPAC Trial Cannot be Kept Secret from Press and Public

A United States District Court Judge for the Eastern District of Virginia has vetoed a government prosecution proposal that he said would have effectively walled off the public from the espionage trial of two former lobbyists.

In an April 16 hearing, Judge T.S. Ellis III said that the government's proposed use of the so-called "Silent Witness Rule," which would allow lawyers, the jury and judge to see classified evidence, but not journalists or the public, would be unconstitutional, violating the defendants' Sixth Amendment right and the public's Fifth Amendment right to an open trial.

Ellis also said the system of codes the government suggested to discuss classified evidence in open court would probably confuse jurors and "shackle" the defendants' ability to cross-examine witnesses.

"It's always true that justice must not only be done, it must be seen to be done," said Judge Ellis.

Steven J. Rosen and Keith Weismann, two former lobbyists for the American-Israeli Public Affairs Committee (AIPAC), have been accused under the 1917 Espionage Act of conspiring to obtain national defense information and passing it along to journalists and Israeli officials.

In its motion proposing that the court use the "Silent Witness Rule," the government relied on the Classified Information Procedures Act, which allows unclassified substitutions to be disseminated to the public in the place of classified evidence raised in a trial.

Prosecutors had also suggested that, in lieu of using classified names of people and places during testimony, lawyers and witnesses could use codes such as "Foreign Person X" or "Country A." The code would change periodically so journalists and members of the public in the courtroom could not decipher its meaning.

The defense responded that the proposal would render the ability to cross-examine government witnesses meaningless, and would "send a continuous message to the jury that the information at issue is [national defense information] deserving of protection -- the very issue that the jury must itself decide."

Ellis said in the April 16 hearing that although some precedent exists for limited use of the "Silent Witness Rule," the government's broad and "novel" proposal would effectively wall off the public from evidence that is "the heart of the case." Ellis further pointed out that the proposal even treated some news reports and other information already in the public domain as classified.

Rosen and Weisman are the first two civilians to ever be prosecuted under the Espionage Act, according to the Associated Press. Their indictment alleges that the two conspired to obtain and share classified reports on American policy issues, including the al-Qaeda network, the deadly Air Force dormitory bombing in Saudi Arabia, and U.S. policy in Iran. The trial is scheduled to begin June 4, 2007.

According to the *New York Sun's* Josh Gerstein, the case has raised concern among press advocates, who contend that "there is little functional difference between what the lobbyists allegedly did and what many journalists do on a daily basis."

On April 19, Judge Ellis gave government prosecutors until early May to decide how they would like to proceed. According to *The Washington Post*, they may wish to propose a different procedure for the discussion of classified information in open court, or they may drop the charges against Rosen and Weisman rather than allow the classified information to be revealed.

— PATRICK FILE

SILHA RESEARCH ASSISTANT

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"It's always true that justice must not only be done, it must be seen to be done."

— Judge T.S. Ellis III  
U.S. District Court  
Judge

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## Media Access

### Judge Rules Toledo Mayor Cannot ban Reporter from News Conferences Because he is “Not Objective”

A federal judge has prohibited the mayor of Toledo from barring a radio reporter from city news conferences. U.S. District Judge James Carr ruled in favor of Kevin Milliken and his radio station WSPD-AM, a talk station in Toledo, in their suit alleging Mayor Carty Finkbeiner and his spokesman Brian Schwartz engaged in discriminatory practices and violated Milliken’s constitutional rights by prohibiting him from attending news conferences. Carr originally issued a temporary restraining order against Finkbeiner’s actions on Jan. 16, 2007, and later made the order permanent on January 31 in *Citicasters Co. v. Carleton Finkbeiner*, 07-CV-00117 (W.D. Ohio 2007).

On January 10, an ongoing conflict between Finkbeiner and WSPD resulted in an incident at one of the mayor’s news conferences when Milliken and seven other individuals from WSPD tried to force their way into the event. Schwartz tried to keep the members of WSPD out of the news conference by holding a door closed, but eventually relented when the door began to break. According to the *Toledo Blade*, the day before the incident at this news conference, Schwartz had prohibited Milliken from attending a different event at the University of Toledo on the grounds that he was not an “objective reporter.”

Schwartz eventually canceled the news conference after his interactions with WSPD, but invited reporters to meet individually with the mayor, an invitation not extended to Milliken. *The Toledo Blade* quoted Schwartz’s reason for cancelling the conference as “the boorishness and unprofessional behavior exhibited by WSPD.”

The incidents in January were the latest in a series of events involving Finkbeiner’s office and WSPD. Last summer the mayor’s office removed the station from its list of media entities provided e-mail notification of news conferences. According to *The Toledo Blade*, Finkbeiner and WSPD employees have also been openly critical of each other in the past, with the WSPD program director Brian Wilson calling the mayor “a bold-faced unequivocal liar,” and Finkbeiner calling Milliken “a stand-up comedian.”

In its complaint, WSPD alleges that it is prohibited from attending public news conferences that other outlets are permitted to cover. It also alleges that

the mayor’s policy of prohibiting their reporters from attending the mayor’s news conferences “chills the speech of all members of the press who disagree with the Mayor or his administration’s actions, denies the public access to information to which it is entitled, and opens the door for these Defendants or any public official to retaliate against any member of the media whose viewpoint differs from that of the government.” The full complaint is available online at <http://wspd.com/pages/images/cccomplaint.pdf>.

WSPD also sought legal fees from the city, claiming it provided no legal justification for barring the station from the news conferences.

Carr’s January 16 temporary order required Finkbeiner to allow Milliken to attend the mayor’s news conferences, and ordered Finkbeiner to notify WSPD about upcoming news conferences. On January 31, Carr issued his permanent injunction stating that, “[a] press conference is a public event. And to pick and choose who can attend seems to me clearly to violate the First Amendment.” Carr further explained that “the purpose of a restraining order is to make clear to a public official that you disregard the First Amendment at your risk and peril. That’s the whole point.” The full court opinion is available online at [http://www.wspd.com/cc-common/mlib/1258/02/1258\\_1172073209.DOC](http://www.wspd.com/cc-common/mlib/1258/02/1258_1172073209.DOC).

This incident is not the first time an Ohio mayor’s office has been accused of violating the First Amendment in his relationship with local reporters. In June 2006, the U.S. Court of Appeals for the Sixth Circuit decided a suit brought against Youngstown Mayor George M. McKelvey when he prohibited city employees from speaking to newspaper reporters. (See “Ohio Mayor’s Restrictions on Employees’ Speech Does Not Violate Media’s First Amendment Rights” in the Summer 2006 Issue of the *Silha Bulletin*.)

Despite the injunction, tensions between Finkbeiner’s office and WSPD remain high. At a forum on the First Amendment prompted by the mayor’s banishment of WSPD, Schwartz and Wilson reportedly engaged in a shouting match. *The Toledo Blade* reported that Schwartz questioned Wilson’s reasons for repeatedly asking Schwartz questions from the back row, while Wilson said that Schwartz was “doing that mistruth, half-truth, and outright lie thing your boss is so famous for.”

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“[T]he purpose of a restraining order is to make clear to a public official that you disregard the First Amendment at your risk and peril. That’s the whole point.”

– Judge James Carr  
U.S. District Court  
(W.D. Ohio)

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– SCOTT SCHRAUT  
SILHA RESEARCH ASSISTANT

## Media Access

### Massachusetts High Court Rules Public has no Right of Access to Show-Cause Hearings; Adopts Balancing Test

The Massachusetts Supreme Judicial Court held in March 2007 that the media and public have no First Amendment right to attend a Massachusetts show-cause hearing in *Eagle-Tribune Publishing Co. v. Clerk-Magistrate of the Lawrence Division of the District Court Dept.*, Mass., No. SJC-09665 (Mass. 2007).

The ruling came after *The* (North Andover, Mass.) *Eagle-Tribune* sought access to a show-cause hearing involving the corporate owner of a nightclub that served alcohol to a minor who was later stabbed and killed. The case attracted a significant amount of publicity, and the clerk-magistrate ordered that the hearing be closed.

The newspaper's publisher, The Eagle-Tribune Publishing Company, filed a motion to open the hearing, which the magistrate denied. The magistrate later denied the Company's motion for reconsideration. The Company then sought relief from a single justice of the state's Supreme Judicial Court, which was opposed by the state's Attorney General and later denied, and which it appealed to the full Court before being denied once again.

The show-cause hearing at issue is a mechanism in Massachusetts for prosecutors to seek criminal process against a person who is not under arrest. It provides the accused with "an opportunity to be heard personally or by counsel in opposition to the issuance of any process." Mass. General Laws c. 218, § 35A. The hearing is held before a clerk-magistrate and is used to determine whether there is probable cause to issue criminal process against the accused.

The Supreme Judicial Court, which is Massachusetts' highest court, limited its opinion to whether a First Amendment qualified right of access to the proceeding exists. It noted that the U.S. Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) had ruled that a qualified right did exist to certain judicial proceedings that satisfied a two-part test of "experience" and "logic."

According to *Press Enterprise II*, the type of proceeding must have (1) a historic tradition of openness, and (2) public access must "play . . . a significant positive role in the functioning of the particular process in question." If both requirements are met, the proceeding may only be closed if it "is essential to preserve higher values and is narrowly tailored to serve that interest."

The Massachusetts court found that the show-cause hearings fail the experience requirement because there was no history of public access to

them. The Eagle-Tribune Company had argued that show-cause hearings were analogous to other preliminary criminal hearings allowed access by the *Press Enterprise* cases, but the Supreme Judicial Court ruled that the hearings are different because the hearings at issue in the *Press Enterprise* cases happen after a defendant has been charged with a crime and bear a much closer resemblance to a trial than the show-cause hearings.

The court also determined that the show-cause hearings fail to meet the logic test because it found that the hearings would not be aided by public access and would in fact be harmed. According to the court, a show-cause hearing "allows the clerk-magistrate to screen out baseless complaints with minimal harm to the accused's reputation; this purpose would be frustrated by public access to the hearings. Furthermore, the ability of clerk-magistrates to resolve commonplace disputes without the need for criminal prosecution could be compromised by hearings open to the public, which may inflame the animosities involved."

The court did observe that in some cases, public access may be appropriate, especially because "[w]here an incident has already attracted public attention prior to a show-cause hearing, the interest in shielding the participants from publicity is necessarily diminished, while the public's legitimate interest in access is correspondingly stronger." It cautioned clerk-magistrates to consider "not only the potential drawbacks of public access, but its considerable benefits" as well.

It also noted that "[t]he transparency that open proceedings afford may be especially important if a well-publicized show-cause hearing results in a decision not to bring criminal charges, thereby ending the matter. In such cases, the public may question whether justice has been done behind the closed doors of the hearing room."

However, it found that in this instance, the need for public access did not outweigh the need to protect the accused's privacy and therefore ordered the previous denials be upheld.

Peter Caruso, an attorney who represented the newspaper, was quoted in a Reporters Committee for Freedom of the Press article stating, "This will allow people of influence and affluence to argue their differences behind closed doors, which will further erode the public's confidence in [the] judicial system." The article is available online at <http://www.rcfp.org/news/2007/0329-sct-highco.html>.

— ASHLEY EWALD  
SILHA FELLOW AND BULLETIN EDITOR

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"This will allow people of influence and affluence to argue their differences behind closed doors, which will further erode the public's confidence in [the] judicial system."

— Peter Caruso  
*Eagle-Tribune's*  
attorney

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## Media Access

### Charges Dropped Against Photographer who Took Pictures of Voters

Charges have been dropped against a journalist arrested for photographing voters in 2004. James S. Henry, a journalist, lawyer and author from Sag Harbor, N.Y., was chased, tackled, arrested and charged with three misdemeanors following the incident: disorderly conduct, resisting arrest without violence and unlawful solicitation of voters, according to the *Palm Beach Post*.

Henry was photographing a line of about 600 people waiting outside the West Palm Beach, Fla. main election office, a designated early voting site, on Oct. 31, 2004 when a sheriff's deputy grabbed for his camera, according to the newspaper. Henry then ran about 100 feet and fell, when, according to witnesses, he was tackled and handcuffed.

Sheriff's officials told the *Post* that the deputy was enforcing the new rule from then-Elections Supervisor Theresa LePore that banned journalists from interviewing voters or photographing them from closer than 50 feet away.

Henry has told the newspaper that he was about 125 feet from the voter line when he took the two photographs leading to his arrest.

According to the *Post*, an arrest document said Henry took "unauthorized photos" that were "of a compromising matter of these elections."

The disorderly conduct charge was dismissed on Feb. 5, 2007, and Henry waived his right to sue and agreed to serve 15 hours of community service as a condition of the state attorney dropping the two remaining charges, according to the *Post*.

Criminal defense attorney Richard Lubin had represented Henry for free, arguing that the unlawful solicitation of voters charge was unconstitutional under the First Amendment because Henry was standing in public taking photographs.

Lubin told the *Post* that he thought banning photography in a public place did little to advance the rule's goal of protecting voters from harassment at voting precincts, especially when powerful telephoto lenses can capture images from great distances.

Henry told the newspaper, "I would have liked to have seen an outcome more supportive of the First Amendment as I understand it, but I'm delighted the case has been resolved."

According to the *Post*, Henry was at the voting office doing research for a book on the state of U.S. elections.

Henry, according to a Web site he edits called Submerging Markets (found at <http://www.submergingmarkets.com>), is an investigative journalist, economist, and lawyer whose work has appeared in publications including *The Nation*, *The New York Times*, *The Wall Street Journal*, *Newsweek*, *El Financiero*, and *Slate*. He has written several books on international economy and banking.

– PATRICK FILE

SILHA RESEARCH ASSISTANT

"I would have liked to have seen an outcome more supportive of the First Amendment as I understand it, but I'm delighted the case has been resolved."

– James S. Henry  
Journalist, lawyer &  
author

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## Prior Restraint

### Missouri Newspapers win Prior Restraint Victory After Articles Initially Censored

*The articles concerned a confidential memo detailing major EPA violations by three power plants*

In March 2007, Presiding Missouri Court of Appeals Judge Patricia Breckenridge overturned a district court order that had required two newspapers to remove articles from their Web sites and prevented them from publishing further information about a confidential attorney-client memo they had obtained regarding the Kansas City (Mo.) Board of Public Utilities (BPU). In her four-paragraph order, Breckenridge said that the lower court's restraining order "causes irreparable harm to [the newspapers] from which they have no adequate remedy by appeal." *State v. The Honorable Kelly J. Moorhouse*, WD 68104 (Mo. Ct. App. 2007).

The two newspapers involved, the (Kansas City) *Pitch* and *The Kansas City Star*, had each published articles on March 2, 2007, on their Web sites covering a confidential memo they had obtained through the mail from an anonymous source. The memo, written by attorney Stanley A. Reigel in 2004, was addressed to the BPU and contained a liability analysis of 73 repair and upgrade projects the Board had undertaken at its three power plants since 1980. Reigel determined that in light of Environmental Protection Agency (EPA) clean air standards, 41 of the projects were "probably defensible," 15 were "questionable" and 15 were "probably not defensible." He concluded that "the presence of a single 'Questionable' or 'Probably Not Defensible' project puts BPU at risk" of an enforcement action by the EPA or the state, or a complaint by a concerned citizens' group, and could result in having to retrofit equipment or payment of penalties.

After learning that the newspapers obtained copies of the memo, BPU notified each on March 2 of their intent to bring a temporary restraining order against them preventing publication. The alternative weekly *Pitch* quickly published its first story about the memo that afternoon, before the judge had ruled, and *The Star* soon followed with its own story. By that evening, Jackson County Circuit Court Judge Kelly Moorhouse had ordered the stories be taken down and barred the papers from distributing the memo, saying the BPU would be "irreparably harmed" if the articles remained available to the public and that "monetary damages which might result from a publication of such information would be difficult or impossible to measure in money." *Kansas City Board of Public Utilities v. The Kansas City Star and The Pitch Newspaper*, No. 0716CV04986 (Mo. Dist. Ct. 2007).

By Monday, March 5, attorneys for the two newspapers had filed an appeal arguing that "the order violated the most fundamental principle of

constitutional law -- the prohibition against prior restraints against publication in any but the most extraordinary situations." Among other precedent, they cited *New York Times v. United States*, 403 U.S. 713 (1971), also known as the "Pentagon Papers" case, *Near v. Minnesota*, 283 U.S. 697 (1931), and *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), three U.S. Supreme Court cases that held prior restraint on the press to be unconstitutional. In *Nebraska Press Association*, the Court said prior restraint is "the most serious and the least tolerable infringement on First Amendment rights."

Reacting to the restraining order, Kansas City Press Club Vice President Jack "Miles" Ventimiglia told *The Star*, "How Moorhouse can look at the milestone Pentagon Papers case, then rule for prior restraint, is mind-boggling."

*Star* attorney Sam Colville was quoted by the paper stating, "Every moment *The Star* is restrained constitutes further damage to the constitutional rights of each of us."

The newspapers also argued to the Court of Appeals that "[t]he Circuit Court's prior restraint and mandatory removal order was based on a total misunderstanding of constitutional law . . . The order did not even serve its stated purpose because one cannot reconfidentialize information that has already been disclosed beyond the core group."

Indeed, during the time period that the newspapers were censored, at least one blog, "BradBlog.com," made both articles available online.

The newspapers further argued that the duty to maintain confidentiality rests with the owner of information and that "[w]here that information has been revealed to the news media, and its confidentiality lost, the prior restraint doctrine prohibits courts from reaching into newsrooms [and] taking back the information that has already lost its confidentiality and prohibiting journalists from publishing newsworthy articles."

But BPU countered that "[t]he issue in this case is so important that one of the very essential instruments for the administration of justice is at stake; the ability of a client to communicate with her lawyer without fear of disclosure." It said that the newspapers had "already damaged BPU by their short-term publication about the memorandum. BPU wants to stop any more harm or damage."

Breckenridge and concurring Judge Paul Spinden sided with the newspapers and ordered Moorhouse to set aside her order. The newspapers then quickly republished their stories.

— ASHLEY EWALD

SILHA FELLOW AND *BULLETIN* EDITOR

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The newspapers' attorneys argued that the lower court's order "violated the most fundamental principle of constitutional law -- the prohibition against prior restraints against publication in any but the most extraordinary situations."

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# Plagiarism

## CBS News Producer Fired over “Omission”

A CBS News producer was fired after it was discovered that a segment she had written for the “Katie Couric’s Notebook” video blog was largely copied from a *Wall Street Journal* column.

Couric discussed children’s fading interest in libraries in the Internet age in the April 4, 2007 segment, posted in the “Couric & Co.” section of the CBS News Web site and sent to CBS radio and television affiliates. “I still remember when I got my first library card,” began Couric in the minute-long commentary.

According to the Associated Press, an editor from *The Wall Street Journal* contacted CBS News about similarities between the April 4 “Notebook” segment and a *Journal* column by Jeffrey Zaslow from March 15, 2007.

Much of the segment’s script mimicked the Zaslow article. Both said of children, “The library is more removed from their lives. It’s a last-ditch place to go if they need to find something out.” Couric’s commentary said, “Sure, children still like libraries, but books aren’t the draw.” In March Zaslow wrote, “Sure, there are still library-loving children, but books aren’t necessarily the draw.”

Couric also cited the same statistics as Zaslow, and repeated some of the same quotes from the Zaslow article.

CBS News removed the video from the Web site and posted a correction on April 9. It described the April 4 “Notebook” segment as “based on” the Zaslow piece. “We should have acknowledged that at the top of our piece,” the note said. “We offer our sincere apologies for the omission.”

CBS News spokeswoman Sandy Genelius told *The Washington Post* that the producer who wrote the segment was fired, but declined to provide that person’s name.

On April 12, *The New York Sun*’s David Blum reported that sources at CBS News said the fired producer was Melissa McNamara, a CBS News Web producer and blogger. McNamara’s biographical information on the CBS News Web site says she has degrees from Wesleyan University and Columbia and writing credits from *The New York Times*, Oxygen.com and CNN.com.

According to *The New York Times*, CBS News announced that it was reviewing other commentaries the producer had written for Couric, as well as applying another level of editorial oversight to its Web site’s content.

Genelius told *The Washington Post* that Couric and others at CBS News were “horrified” to learn the April 4 piece had been copied. Genelius said that although Couric participates in weekly topic selection meetings for the “Notebook” segments, it is “very common” for the first-person commentaries to be written by producers.

Critics challenged CBS News’ response to the incident as well as the format for the commentaries.

Blum wrote in *The New York Sun* that for CBS News to call the response posted on the web site a correction was dishonest.

“Why wasn’t the network straight with its Web site readers in describing what happened? It should have admitted the deception rather than pretend -- by calling it a correction -- that it was a mistake,” said Blum.

Timothy Noah, in an article published by online magazine *Slate*’s “Chatterbox” section, said, “CBS News wronged visitors to its Web site by inviting them to think that the opinions Couric expressed in these commentaries were her own.”

Noah said that although news anchors have had commentaries written for them for many years, among them Dan Rather and Walter Cronkite, “the deception was a little more conspicuous in this instance” because the commentary began with Couric remembering her own experience getting a library card.

“That sentence was not lifted from the Zaslow column, but it’s actually more fake than anything else in the commentary because it purports to be a personal recollection,” Noah wrote.

This is not the first time Couric and CBS News have made headlines. In July 2006 Couric was criticized for a six-city “listening tour” of closed, invitation-only meetings. (See “Closed Meetings Precede Katie Couric’s Ascent to Anchor of CBS ‘Evening News’” in the Summer 2006 issue of the *Silha Bulletin*.)

— PATRICK FILE  
SILHA RESEARCH ASSISTANT

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CBS News spokeswoman Sandy Genelius said the network was “horrified” to learn that the piece written for “Katie Couric’s Notebook” had been copied.

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# Plagiarism

## Boston *Globe* Suspends Reporter Accused of Plagiarism

Shortly after allegations surfaced on the Internet that veteran sportswriter Ron Borges had plagiarized passages of another reporter's work in his weekly football column, *The Boston Globe* suspended Borges without pay for two months and barred the reporter from appearing on television and radio broadcasts during his suspension.

Allegations that Borges had lifted material from an article first published on Feb. 26, 2007 in *The News Tribune*, a Tacoma, Wash., daily, were first raised by the Web site [www.coldhardfootballfacts.com](http://www.coldhardfootballfacts.com). The Web site, which has criticized Borges' journalistic credibility in the past, posted passages from Borges' March 4 article and Mike Sando's earlier article for *The News Tribune* and called on editors at the *Globe* to look into the matter.

After an investigation, the *Globe* discovered that Borges included material written by Sando in his weekly column featuring news and notes on the National Football League (NFL). Several passages of Borges' column -- a commentary on the potential trade of Seattle Seahawks wide receiver Darrell Jackson to the New England Patriots -- were taken directly from Sando's article. A comparison of the two articles can be found online at <http://www1.poynter.org/column.asp?id=45&aid=119393>.

On March 6, the Associated Press (AP) reported that Borges used the material, without attribution, after it was posted on an online notes exchange frequented by sportswriters. According to *Globe* sports editor Joe Sullivan, the notes exchange is subscribed to by NFL reporters who share information and statistics with one another in advance of Sunday "notebook" columns that are published by many newspapers during the football season. But, Sullivan said, the exchanges are typically used by reporters to find background materials, not to directly copy the work of other reporters.

Passages from Sando's article were posted to the online notes exchange and accessible to subscribers. According to an article written on March 6, 2007 by *Globe* reporter Michael Paulson, Borges was not aware that the material had previously been published and copied Sando's article largely verbatim.

Although Borges acknowledged in his column that "material from personal interviews, wire services, other beat writers, and league and team sources" were used in the report, *Globe* editor Martin Baron viewed Borges' failure to properly attribute the material as plagiarism and suspended the reporter on March 5. News of the suspension appeared on the newspaper's Web site, [www.boston.com](http://www.boston.com), later that day.

"The *Globe* does not tolerate plagiarism," Baron said in the statement appearing on the newspaper's Web site. "Extensive passages written by the Tacoma reporter were used verbatim in the column by Borges, and that is prohibited."

Following the announcement, allegations arose that Borges may have plagiarized passages of a January 28 column from a column written by Alex Marvez of the *South Florida Sun-Sentinel* on January 21. The *Globe* dismissed the accusation, stating that the two

articles were "substantially different." In an e-mail to *The Boston Herald* reporter Jessica Heslam, *Globe* spokesman Alfred Larkin stated that the newspaper "believe[s] that the brief similarities between the two columns, much of which is comprised of quotes, is covered by the disclaimer that runs at the bottom of the notes column."

Kelly McBride, an ethics group leader at the Poynter Institute, disagreed. "It's another case of plagiarism because if you look at that passage in question, more than 75 percent of it is identical," McBride told Heslam.

Although Borges declined to comment on the suspension when asked by AP reporters and has not responded to further allegations of plagiarism, the Boston Newspaper Guild's president, Dan Totten, told reporters that the union would stand by Borges.

"Ron Borges is a talented veteran of *The Boston Globe* sports pages whose work is of the highest caliber. Ron's work is widely appreciated and respected within the sports journalism world. The Boston Newspaper Guild stands with Ron and we will defend him and see that justice prevails," Totten said.

Totten later told the *Boston Phoenix*, an alternative newsweekly, that the suspension "seems far in excess [of] anything that's been levied in similar cases." However, Totten gave no indication that Borges would be challenging the suspension.

According to the *Phoenix*, that may be because Totten is "overstating" Borges' case, noting that *Globe* columnists Mike Barnicle and Jeff Jacoby were suspended after plagiarizing material in 1998 and 2000.

Unlike earlier cases, Borges' suspension has prompted some media analysts and commentators to question the practice of notes exchanges among reporters. "At the heart of Ron Borges' two month suspension from [*The Boston Globe*] for plagiarism is the shadowy world of the "notes exchange," sports media blogger Dan Shanoff wrote on March 6 in response to the suspension.

"And shame on the reporters who can't do their own research -- and, perhaps even more, on the failure of leadership by sports editors whose inconsistent application of attribution in columns like these (and, more generally, whose lenient standards towards these 'notes exchanges') have allowed this system to reach its inevitable spot at the bottom of what has always been a slippery slope," Shanoff concluded.

According to an article that appeared in the *Phoenix* on March 8, Sullivan told reporter Adam Reilly that, although it may not be prohibited, the use of notes-sharing systems at the *Globe* is being reassessed.

"We're going to be discussing the whole idea of that, and we're in the process," Sullivan said. In light of Borges' plagiarizing, Sullivan said, editors at the *Globe* are having "second thoughts about the way [they] do things."

— CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

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"It's another case of plagiarism because if you look at that passage in question, more than 75 percent of it is identical."

— Kelly McBride  
Ethics group leader  
Poynter Institute

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# Misrepresentation

## Award-winning Photojournalist Digitally Altered 79 Photos Submitted to Newspapers, Wire Services

In April 2007, *The Toledo* (Oh.) *Blade* announced that one of its former photographers had altered 79 of the 947 photos he had submitted, 58 of which the paper published before discovering the alterations. *The Blade* investigated all of the photos Allan Detrich had submitted since Jan. 1, 2007 after being tipped off that a front page photo of a team of baseball players had been changed when photos taken by other photographers all showed a pair of legs behind a sign which were absent from Detrich's photo.

The paper immediately published a retraction of the altered photograph and included copies of both the altered and unaltered versions for readers to compare. It noted, "*The Blade's* policy is to never alter photographs, and the newspaper regrets the incident and apologizes to readers."

The issue became national news, and the newspaper announced an investigation into Detrich's previous work. The same day, Detrich wrote on his blog that the publication of the altered photo was an "accident." He claimed he had been following the story of the Bluffton University baseball players for three weeks, ever since five of their players had died in a bus crash, and that he had an "emotional bond" with the story. Detrich wrote that he had created the altered version because he wanted to hang a blown-up version of the photo in his office.

"While transmitting on deadline, I sent the wrong photo, plain and simple," Detrich wrote. "I made a huge mistake, and I have expressed my regrets to my editors at the *Blade*. It is something that will never happen again."

He also wrote, "My friends know me and my ethics, and they have no doubt this was nothing more than a stupid mistake. I have been in the business since I was 17-years-old and learned by experience. I am not about to give up this hard work for an altered photograph."

The next day, however, Detrich resigned, and a week later *The Blade* announced the results of its investigation in a column written by Vice President and Executive Editor Ron Royhab. Royhab apologized to readers and wrote, "It is impossible to make sense of why this happened, and we are embarrassed by it."

The alterations ranged from removing utility poles and electrical wires and outlets from photos to adding a basketball and hockey puck to two sports photos, though neither of the sports photos was published.

Detrich joined *The Blade* in 1989 and had won many newspaper photography awards over the years. He was a Pulitzer finalist in 1998. Royhab said the paper had no reason to suspect Detrich was digitally altering photographs, but noted, "Journalism, whether by using words or pictures, must be an accurate representation of the truth."

The baseball photograph had also been published in *The Cincinnati Enquirer* and *The Atlanta Journal-Constitution*, and it was not known how many of Detrich's altered photos had been published elsewhere. Many had been available to the Associated Press (AP) wire service, though following the discovery of the alterations, both the AP and *The Blade* removed all of Detrich's photos from their Web sites and services.

The incident was reminiscent of other recent photo alteration scandals. Last summer, bloggers discovered that Reuters photographer Adnan Hajj had used Photoshop to alter at least two photographs. Reuters immediately cut ties with Hajj. (See "Bloggers Uncover Altered Reuters Photos" in the Fall 2006 issue of the *Silha Bulletin*.) And in 2003, award-winning photographer Brian Walski was fired from the *Los Angeles Times* after the paper discovered he submitted a composite photo created from two separate pictures he had taken in Iraq. (See *Los Angeles Times* Photographer Loses Job over Manipulated Photo" in the Spring 2003 *Silha Bulletin*.)

— ASHLEY EWALD  
SILHA FELLOW AND *BULLETIN* EDITOR

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"Journalism, whether by using words or pictures, must be an accurate representation of the truth."

— Ron Royhab  
Vice President and  
Executive Editor  
*The Toledo Blade*

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# Misrepresentation

## Writer Amends Apology, Admits Fabricating Entire ‘Monkeyfishing’ Story

Jay Forman, author of an article about fishing for monkeys off Florida’s Lois Key that was published on *Slate.com* in June 2001, has changed his story for a third time, saying he made it all up. According to *The New York Times*, journalism graduate students at Columbia University contacted Forman in early February 2007, asking about the story and his admission that parts of it were fabricated. This prompted Forman to contact his former editor at *Slate*, admit the entire story was fabricated, and apologize.

Jack Shafer was then-deputy editor for *Slate* online magazine and is now the editor at large and media critic. On February 6, Shafer said in his *Slate* “Press Box” column that Forman had called and later sent him a note to confess that the story was “a complete lie.”

“In a note to me, Forman apologized for betraying *Slate*’s trust and for taking so long to come clean,” said Shafer. “I, in turn, apologize to *Slate* readers for publishing the story.”

The original story, which appeared on June 8, 2001, in *Slate*’s “Vice” section, recounted a 1996 boating excursion Forman took with a journalist friend to Lois Key, where, until 1999, rhesus monkeys were kept by a pharmaceutical company to be sold for medical research.

The story explained that a fisherman had taken the two reporters to the island to demonstrate the local practice of “monkeyfishing:” baiting hooked fishing lines with fruit, casting them into trees from the boat and pulling the monkeys down into the water before releasing them.

Skeptical *Slate* readers responded with postings to message boards, as well as other Web sites like TransparencyNow.com and Inside.com. On *The Wall Street Journal*’s OpinionJournal Web site, Editor James Taranto called the story “preposterous” and chided *Slate*’s editors for falling victim to “an obvious hoax.”

An article published on June 25, 2001 in *The New York Times* challenged key details of the story, and said that the hooking of monkeys and pulling them from trees never took place. *Times* reporter Alex Kuczynski quoted Fraser’s friend from the trip, Marc Caputo, a reporter for the *Palm Beach Post*, who said that although lines were baited and cast, no monkeys were actually hooked.

Kuczynski also spoke with the local fisherman who, speaking on condition of anonymity, said he remembered taking the reporters on the trip but described the trip to Lois Key as “a crazy one-time drunken thing,” not the local tradition Forman had described.

*Slate* editor Michael Kinsley wrote the same day as *The Times* article was published that, while the fishing trip had taken place, Kuczynski’s article “establishes beyond all reasonable challenge” that key details of the story were false.

That was where the scandal had been left until Forman broke his long silence in February, telling Shafer and the Columbia University graduate students that there had been no boating trip at all.

Asked about any lessons he learned from the episode, Shafer told *The Times*, “any publication can be duped by a writer who is prepared to lie in a suicidal fashion and commit career suicide.”

The original Forman story and the related editorial notes, discussion and links can be found at <http://www.slate.com/> by conducting a search for the term “monkeyfishing.”

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“[A]ny publication can be duped by a writer who is prepared to lie in a suicidal fashion and commit career suicide.”

– Jack Shafer  
Editor at large  
*Slate*

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– PATRICK FILE  
SILHA RESEARCH ASSISTANT

SILHA CENTER RESOURCES  
FOR RESEARCH ON MEDIA ETHICS AND LAW  
ARE AVAILABLE ON OUR WEB SITE,  
AT [WWW.SILHA.UMN.EDU/RESOURCES](http://WWW.SILHA.UMN.EDU/RESOURCES)

## Media Ethics

### Imus Scandal Sparks a Discussion on Media's Willingness to 'Play Along' with 'Unconscionable' Remarks

A week-long scandal that ended in the firing of radio personality Don Imus prompted a wide-ranging debate about whether journalists and reporters who frequented his show condoned outrageous behavior in order to be part of an elite media "in crowd."

Many news organizations, including the Associated Press (AP) and *Newsweek*, attributed the public upheaval to the Internet's ability to fan a "digital brush fire." In particular, they cite Ryan Chiachiere, a Washington, D.C. researcher for the liberal nonprofit watchdog group Media Matters for America.

In the early morning of Wednesday, April 4, 2007, Chiachiere watched the MSNBC simulcast of "Imus in the Morning." At about 6 a.m., Imus, producer Bernie McGuirk and a call-in guest made remarks including racial and sexual slurs about the Rutgers University women's basketball team. Chiachiere clipped the segment, posted it to YouTube, and wrote a blog post for the Media Matters Web site, [www.mediamatters.org](http://www.mediamatters.org), which appeared later that day.

On April 6, the National Association of Black Journalists (NABJ) condemned Imus' remarks and called for his removal, as did the Reverend Al Sharpton. Rutgers President Richard L. McCormick and National Collegiate Athletic Association (NCAA) President Myles Brand, in a joint statement, called the comments "unconscionable." That morning Imus apologized on his show.

By Monday, April 9, it was clear that the apologies issued by Imus, CBS (whose affiliates broadcast his radio show) and MSNBC (which simulcast the program on its cable television network), were not quieting the controversy.

Imus appeared on Sharpton's radio show that morning. The interview, which was also televised, included more apologies, but also an awkward moment as Imus referred to Sharpton and African American Congresswoman Carolyn Cheeks Kilpatrick as "you people."

Later that day, Imus was suspended for two weeks by CBS and MSNBC.

On Wednesday, however, MSNBC cancelled the show altogether. CBS followed suit on Thursday.

According to *The Washington Post*, although the controversy caught mainstream attention thanks to a blog posting, it was pressure from inside and outside the organizations of CBS and MSNBC that led executives from disassociation to suspension and finally dismissal.

CBS President and CEO Leslie Moonves said "meetings with concerned groups" from "all segments of society" weighed heavily in the decision to fire Imus.

*The Washington Post* and AP said NBC News President Steve Capus and MSNBC General Manager Dan Abrams held a two-hour meeting on April 11 at the network headquarters at Rockefeller Plaza in New York with two dozen black NBC employees.

NBC Today show weatherman Al Roker and News Correspondent Ron Allen had called for Imus to be fired in separate blog posts on the network's website.

The decision by major advertisers to pull advertising also played a role in the eventual firing of Imus, according to the *Los Angeles Times*. Procter & Gamble, Staples, Inc., General Motors, and Sprint Nextel were among those companies that withdrew.

According to Fortune.com, Imus is planning to sue CBS for \$40 million, the balance left on his contract, because he did not receive a warning before he was fired. Fortune.com reported that according to an anonymous source, language in Imus' contract stipulated that he could not be fired without first receiving a warning.

Coverage of the fallout focused on introspection by well-known journalists associated with Imus and his edgy show.

*Newsweek* reporter Evan Thomas, in an interview for *Newsweek*, said he rationalized his regular appearances on "Imus in the Morning" by "pointing to other prominent journalists and politicians who did it, too. I was eager to sell books, and I liked being in the in crowd."

Howard Kurtz, a *Washington Post* reporter and another frequent Imus guest, told *Newsweek* that he considered Imus' antics, which at least once included calling Kurtz a "boner-nosed, beanie-wearing Jew boy," part of the game. Kurtz also credits Imus with turning one of his books into a best seller.

NBC chief White House correspondent David Gregory, another Imus regular, said in *Newsweek*, "He was living in two worlds. There was the risqué, sexually offensive, sometimes racially offensive, satire, and then there was this political salon about politics and books. Some of us tuned in to one part and tuned out the other. Whether I was numb to the humor that offended people or in denial, I don't know."

Prior to the announcement of Imus' firing, Ana Marie Cox, a former political blogger under the pseudonym "Wonkette" and now Washington Editor for "Time.com" announced in a column on that Web site that she would not return as a guest on "Imus in the Morning."

"I'm embarrassed to admit that it took Imus' saying something so devastatingly crass to make me realize that there just was no reason beyond ego to play along," said Cox. "I did the show almost solely to earn my media-elite merit badge."

In an April 10 *New York Times* Op-Ed, Gwen Ifill, a prominent black reporter and senior correspondent for PBS' "The NewsHour With Jim Lehrer," recalled Imus referring to her as "the cleaning lady" in her role as *The Times*' White House correspondent in the early 1990s.

"Why do my journalistic colleagues appear on Mr.

"I'm embarrassed to admit that it took Imus' saying something so devastatingly crass to make me realize that there just was no reason beyond ego to play along. I did the show almost solely to earn my media-elite merit badge."

— Ana Marie Cox  
Former Imus guest  
and  
Washington editor for  
Time.com

# Media Ethics

## Controversy over *Los Angeles Times* Editor's Resignation Following Alleged Conflict of Interest Played out Online

**L**os Angeles Times editorial page editor Andrés Martínez resigned on March 22, 2007, saying the newspaper overreacted to a "perception of a conflict of interest."

Thanks to the Internet, what began as an internal discussion over conflicts of interest quickly spun into a public debate, played out online and in real time, about the separation of news and editorial sections and the quality of the *Times*' leadership, leading to what *The New York Times* described as a "circular firing squad."

The catalyst for Martínez's resignation was *L.A. Times* publisher David Hiller's decision to kill the March 25 edition of the Sunday opinion section, called "Current," which was guest-edited by Hollywood producer Brian Grazer. At issue was Martínez's romantic relationship with Kelly Mullen, a publicist who works for Grazer. Citing concerns that Martínez's relationship with the publicist may appear to have influenced the choice of Grazer as guest editor, Hiller decided to kill the section four days before it was set to run.

According to *The New York Times*, when Martínez learned of Hiller's decision March 22, he resigned, making an announcement on the *L.A. Times*' Opinion L.A. blog. In the announcement, Martínez said, "I accept responsibility for creating this appearance problem, though I also maintain that the newspaper is overreacting."

According to Martínez, the guest editor project began in May 2006 as an attempt to inject fresh perspectives into the *L.A. Times*' opinion section. The names suggested included Jimmy Buffett, Steve Jobs and Donald Rumsfeld.

Martínez contacted Mullen's boss, Alan Mayer of public relations firm 42West, to inquire whether Steven Spielberg would be interested in participating. Spielberg could not do the project, but Mayer suggested Grazer, and the editors agreed that he would be the first of a quarterly series of guest editors. Martínez, posting March 21 on the Opinion L.A. blog, said that at the time of the decision to make Grazer guest editor, he had no contact with Mullen.

According to *The New York Times*' David Carr, Hiller was made aware of Martínez's relationship with Mullen and the possible conflict of interest a few days before the section was to run. In fact, the *L.A. Times* was preparing a story on the relationship. Hiller still supported publishing Grazer's "Current" section, which would include articles about fashion, psychotherapy and the paparazzi, along with a note disclosing the editor's relationship.

On the morning of March 22, however, Hiller had apparently changed his mind.

"We believe that this relationship did not influence the selection of [Grazer] as guest editor," Hiller said in a statement. "Nonetheless, in order to avoid even the appearance of conflict, we felt the best course of action was not to publish the section."

In the resignation announcement on the Opinion L.A. blog, later e-mails to media blog LA Observed, and comments to *The New York Times* and *The New York Observer*, Martínez called Hiller's reaction a "pathetic cave," and blamed the decision on internal pressure from the newsroom.

"What changed between Wednesday morning and Wednesday evening was a couple of blog posts," he said. "It was a weapon that the newsroom used to ratchet up the pressure on Hiller. It was fascinating in its transparency, but it was also very disruptive."

Martínez also said in a post on LA Observed that the leadership at the *L.A. Times*, including former editor John Carroll, current editor James O'Shea, and Hiller, all demonstrated a casual attitude toward news coverage influencing the editorial sections, "behavior that would be deemed wildly inappropriate at newspapers like the *Wall Street Journal* or *New York Times*."

"I accept my share of the responsibility for placing the *Times* in this predicament, but I will not be lectured on ethics by some ostensibly objective news reporters and editors who lobby for editorials to be written on certain subjects, or who have suggested that our editorial page coordinate more closely with the newsroom's agenda," Martínez said in his resignation announcement.

O'Shea later fired back in an e-mail sent to *L.A. Times* staff and LA Observed.

"It is true that we have journalists in the newsroom who don't agree with [Martínez's] views on the ethical problems that led to his resignation. I count myself among them," said O'Shea. "But these are legitimate, genuine differences of opinion held by people with a passion for the news and this newspaper. To suggest otherwise is pitiful."

O'Shea also defended news editors who had alerted editorial board members about stories the newsroom was covering, saying they "did nothing wrong."

One of the reporters Martínez named as active in raising the specter of a conflict of interest and challenging the separation of news and editorial content was Tim Rutten, who writes a media column for the *L.A. Times* called "Regarding Media."

In his March 24 column, Rutten responded. "I've never exchanged a word with Andrés Martínez nor even met him. Similarly, I don't think I know a single editorial writer, nor could I name one. That seems fairly 'separate' to me."

"Martínez's difficulties were entirely volitional and had nothing whatsoever to do with the *Times*' structural problems -- real or imagined," said Rutten.

A number of journalists and media critics responded to the *L.A. Times*' debacle. Most pointed out the extraordinary fact that it played out so publicly in the blogosphere; others suggested broader

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– Andrés Martínez  
Former *Los Angeles Times*  
Editorial page editor

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## Media Ethics

### Former *New York Times* Reporter Admits Making Payment to Subject of Story

Revelations that former *New York Times* reporter Kurt Eichenwald gave the subject of one of his articles \$2000 has caused controversy within the journalism community. Eichenwald's award-winning December 2005 piece focused on the trials and tribulations of Justin Berry, a young man who had extensive involvement in the child pornography industry. The original piece garnered significant attention when it was first released because of Eichenwald's involvement with Berry, as the reporter helped Berry complete drug rehab and to break away from his previous life. However, neither *The Times* nor Eichenwald disclosed the payment until March 2007, and the disclosure sparked renewed controversy about Eichenwald's article, a possible defamation suit by Eichenwald, and prompted a note from *The Times*' public editor responding to the criticism. It is against the policy of *The Times* and most other media organizations to pay sources or subjects of stories.

Eichenwald's original article was a 6500-word piece about Berry and his involvement with child pornography. It explained how Berry set up a webcam at age 13 to meet friends, but quickly began fulfilling the wishes of various Internet users by removing clothes or performing sexual acts in exchange for money or gifts. It discussed how he began meeting his admirers in real life, eventually getting molested and beaten, and later becoming addicted to different drugs. It suggested Berry's father physically abused him, and accused the father of assisting Berry with his burgeoning Web site. It concluded with a discussion about Eichenwald's contact with Berry, and how Berry began assisting the government in tracking down online pedophiles. After the article's publication, Berry and Eichenwald appeared on "The Today Show," "The Oprah Winfrey Show," and at a congressional hearing.

When it originally published the article, *The Times* ran a sidebar next to it penned by Eichenwald explaining the sequence of events that led to his meeting with Berry. In the sidebar, Eichenwald said he did not follow the standard practice of telling Berry up front that he was a reporter. Instead, Eichenwald and Berry chatted online about Eichenwald's hobbies, and Eichenwald eventually convinced Berry to meet him in real life in Los Angeles. It was at this meeting that Eichenwald disclosed he worked for *The Times*. A few days later, Berry called Eichenwald and was upset about a visit from a man Eichenwald believed molested Berry. After this call, editors for *The Times* flew Berry to Dallas to be interviewed by Eichenwald, and after these interviews Eichenwald examined Berry's computer hard drives in California as a means of verifying his stories. The sidebar also described how Eichenwald connected Berry with an attorney and Berry's work with the government as an informant.

Absent from Eichenwald's sidebar is any mention of the \$2000 he gave to Berry. In a letter posted on the Romenesko blog at the Poynter Institute's Web site,

Eichenwald explained that he sent Berry the check in June 2005 as a way of gathering more information about an individual Eichenwald knew only through online conversations. He further explained that he should have told his editors but the money "just slipped away amid the 18 hour days, seven days a week of turmoil and chaos." He emphasized that "the money was not provided for information, and was not provided to be a source" and that there was "no financial relationship between us of any kind during my reporting." Berry eventually repaid Eichenwald with borrowed money from his grandmother. The full text of Eichenwald's letter is available online at [http://poynter.org/forum/view\\_post.asp?id=12365](http://poynter.org/forum/view_post.asp?id=12365).

The transaction first became public in March 2007 during the trial of a man accused of criminal sexual misconduct in Michigan. *The Times* subsequently published a note in the corrections section of the paper, and added that same note to the online version of Eichenwald's sidebar. Included in the correction is a statement from *The Times* saying "[t]he check should have been disclosed to editors and readers, like the other actions on the youth's behalf that Mr. Eichenwald, who left *The Times* last fall, described in his article and essay."

Eichenwald left *The Times* in October 2006 to begin working for *Portfolio* magazine, a business magazine set to begin publication in April 2007. Eichenwald claims that his departure from *The Times* is unrelated to the controversy over his Berry story, according to another letter posted on Romenesko's site, in which he states that working for *Portfolio* is "the most thrilling opportunity I could imagine -- the chance to conduct long-form journalism in a magazine that had the full backing of Conde Nast..."

*The Times*' public editor Byron Calame wrote an article in response to the controversy surrounding the transaction's disclosure. Calame acknowledged that mistakes were made but stressed that no facts within the story require correction, that the article has led to the prosecution of at least three men, and that Eichenwald received a 2006 Payne Award for Ethics in Journalism from the University of Oregon's School of Journalism and Communications. Calame's article also defended *The Times*' editors.

Since news of his check emerged, Eichenwald has participated in numerous media interviews. In an interview with Jon Friedman of Marketwatch.com, Eichenwald further explained his failure to disclose this information to his editors. He stated, "There's nothing that happened out of any malice. I was presented with circumstances beyond anything I had ever encountered. I was overwhelmed." He also noted his regret for failing to disclose the check earlier stating, "I don't think it's an ethical failing... it was failure... it was procedural. I should have informed my editors."

Eichenwald has said that he intends to file a libel lawsuit against Debbie Nathan, a freelance journalist

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"There's nothing that happened out of any malice. I was presented with circumstances beyond anything I had ever encountered. I was overwhelmed."

– Kurt Eichenwald  
Former *New York Times* reporter

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Reporter Pays Subject, continued on page 31

*Imus, continued from page 28*

Imus's program? That's for them to defend, and others to argue about. I certainly don't know any black journalists who will," Ifill said.

On Sunday, April 15, Ifill appeared on NBC's "Meet the Press," and moderator Tim Russert asked her to comment on the *Times* Op-Ed. Ifill said that she was troubled that prominent journalists who had been frequent Imus guests, including Russert and fellow guest *Times* columnist David Brooks, had failed to speak out against the offensive remarks.

"There has been radio silence from a lot of people who have done this program who could have spoken up and said, 'I find this offensive' or 'I didn't know.' These people didn't speak up. Tim, we didn't hear from you. David, we didn't hear from you," Ifill said. "A lot of people did know and a lot of people were listening and they just decided it was okay."

— PATRICK FILE  
SILHA RESEARCH ASSISTANT

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*L.A. Times, continued from page 29*

problems in the *L.A. Times*' management.

According to *The New York Times*, the scandal over a special section was evocative to many of a previous controversy.

In 1999, the *L.A. Times* was criticized for a special Sunday magazine section on the new Staples Center arena. Unbeknownst to most readers and many of the newspaper's staff, advertising revenue from the special section was shared with the Staples Center.

Both Rutten and Martinez suggested that editors and staff had worried that this more recent conflict of interest concern might remind *L.A. Times* readers of the Staples Center controversy.

Meanwhile, Nikki Finke, a columnist for *L.A. Weekly*, reported in her Deadline Hollywood blog on March 25 that Martinez might not be the only *L.A. Times* staff member with a conflict of interest in the "Current" guest editor series.

Former U.S. Secretary of Defense Donald Rumsfeld had been named by both Martinez and in an *L.A. Times* article as a likely candidate for being next in line to edit the section after Grazer.

According to Finke, Hiller has had a longstanding personal relationship with Rumsfeld, citing a 2001 *Chicago Tribune* article about then-Tribune Interactive Editor Hiller and then-Tribune Co. Board Member Rumsfeld, in which Hiller talked glowingly about playing squash with Rumsfeld.

Then in November 2006, as Rumsfeld resigned as U.S. Secretary of Defense, Finke said Hiller "used the occasion ... to personally pen a worshipful Op-Ed piece for [the] *L.A. Times* rehashing those late 1990s squash games in Chicago."

On March 26, Hiller announced the *L.A. Times* would abandon the guest editor program, saying in a statement, "although the [g]uest [e]ditor program for the Current section was an innovative concept to bring more voices and diversity to *Times*' readers, we have concluded we will not be moving forward with the program."

Travis Armstrong, editorial page editor of the Santa Barbara *News-Press*, said that amid the dust-up in Los Angeles, Martinez raised a fundamental newspaper ethics question.

Armstrong called the interjection of newsroom agendas into the editorial pages a "common problem in American newspapers," and said former editors and reporters at his newspaper protested attempts by the publisher to limit bias and nepotism.

"Why are local papers and the newspaper industry in general afraid to address this head-on and make changes?" asked Armstrong.

(Links to Martinez and others' comments can be found on the *L.A. Times* Opinion L.A. blog "scandal roundup" at [http://opinion.latimes.com/opinionla/2007/03/scandal\\_roundup.html](http://opinion.latimes.com/opinionla/2007/03/scandal_roundup.html), and at the L.A. Observed blog, at [http://www.laobserved.com/archive/2007/03/email\\_from\\_andres\\_martine.php](http://www.laobserved.com/archive/2007/03/email_from_andres_martine.php))

— PATRICK FILE  
SILHA RESEARCH ASSISTANT

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**Reporter Pays Subject, continued from page 30**

and board member of the National Center for Reason and Justice, a non-profit group that works to educate the public about the continuing problem of people falsely charged with abusing children. Eichenwald claims that Nathan defamed him on two separate occasions, once in an article on Salon.com about Eichenwald's research of child pornography sites, and again in a *New York* magazine article about Eichenwald's check to Berry. Eichenwald claims the piece in *New York* magazine accuses him of "bidding" on Berry. The Salon.com piece has been removed from the Web site and its archives. Eichenwald told the *New York Post* he will not be suing either Salon.com or *New York* magazine and is instead suing only Nathan.

He told the *Post*, "I'm fine with being criticized for what happened." He continued, "What I'm not fine about is being criticized for what people want to fantasize, make up or snicker about."

— SCOTT SCHRAUT  
SILHA RESEARCH ASSISTANT

# Media Ethics

## *Pioneer Press Sues Star Tribune After Publisher's Defection*

The two largest newspapers in Minnesota are embroiled in litigation after the former publisher of the *St. Paul Pioneer Press* Paul Anthony "Par" Ridder left the *Press* to take the same job at the (Minneapolis) *Star Tribune* in March 2007. The *Press* filed its 13-count complaint in Ramsey County District Court on April 12, 2007, and prevailed on its first motion seeking access to computers used by Ridder and other *Tribune* employees on April 20.

Par Ridder is the son of former Knight Ridder CEO Tony Ridder. Knight Ridder owned the *Press* from 1927 until 2006 when the McClatchy Company purchased it. Ridder began working as president and publisher of the *Press* in March 2004. He took over as CEO and publisher of the *Tribune* on March 5, and noted the irony of doing so in an article in the *Tribune* in which he stated, "Since 1927 my family has been trying to chase the *Star Tribune* out of St. Paul."

After the initial surprise at Ridder's decision to switch alliances wore off, the *Press* filed its suit seeking to enjoin Ridder and two other former employees of the *Press* from working for the *Tribune* for one year. The *Press* is also seeking an order prohibiting the *Tribune* from using any computer data taken by Ridder and those employees. The data allegedly taken included the *Press*'s budgets, profit and loss data, lists of advertisers, lists of the revenue derived from those advertisers, advertising rates, and reports on expenses for different departments. The complaint describes Ridder's actions as "both devastating and irreparable."

The *Press* claims that Ridder was subject to a non-compete agreement prohibiting him from competing with the *Press* or soliciting its employees after voluntary termination of his service to the *Press*. The suit further claims that Ridder stole the file containing his and others' non-compete agreements. In an affidavit filed with the court, Ridder claims he was no longer subject to that agreement because a Knight Ridder executive gave Ridder permission to remove the non-compete agreement from the files of *Press* executives in the fall of 2005. An affidavit filed by Ridder's former secretary, Barb Cartalucca, says she held the agreements at her desk for about a year before Ridder took them home with him on March 1. The *Press* counters that the purported release is ineffective and the agreements are still in effect.

The suit also alleges that Ridder had planned to leave the *Press* for the *Tribune* since September. The *Press* claims that Ridder prepared a speech on his company-supplied laptop announcing his acceptance of a position at the *Tribune*, and encrypted the document. The timing of Ridder's decision is important because he had continuous access to the *Press*'s proprietary information from September until his eventual resignation in March. Also during this time, Ridder was involved with the *Press*'s plans for expanding readership in the suburban Twin Cities area, activities done in direct competition with the *Tribune*.

Further allegations in the *Press*'s complaint describe Ridder's actions after he began working for the *Tribune*, specifically that he brought his laptop full of confidential information to the *Tribune* and began copying files to his new computer. A computer expert hired by the *Press* examined Ridder's laptop and determined that almost all of its data were transferred to an external hard drive. The *Press* asked Ridder for that hard drive, but he claims it is lost. In addition to copying the information, the *Press* complains that Ridder has shared the information with executives at the *Tribune*. The complaint lists Ridder's actions involving his use of the *Press*'s information in great detail, providing the dates and times Ridder allegedly distributed the *Press*'s confidential information.

Jane Kirtley, director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota, commented on the *Press*'s claims in a *Pioneer Press* article stating that if the *Press*'s allegations are proven true, "a case could be made that this is very damaging."

The parties have already had one day in court, with Ramsey County District Judge David Higgs temporarily enjoining one former *Press* employee from working for the *Tribune*, and ordering the *Tribune* to turn over many of its computers to the *Press*. The temporary restraining order requested by the *Press* is intended to avert the harms the *Press* anticipates being most damaging. Higgs ruled that Jennifer Parratt was subject to a confidentiality and non-compete agreement with the *Press*, and that the *Press* would suffer irreparable harm if she were to continue working for the *Tribune*. Higgs further found that the non-compete agreement appears valid and enforceable, so the *Press* would be likely to succeed on the merits of its claim against Parratt. Higgs ordered the *Tribune* to turn over to the *Press*'s computer forensic expert Ridder's external hard drive, his three *Tribune* computers, and other computers where the *Press*'s information is located. Higgs had previously prohibited both papers from destroying any information relevant to the lawsuit. Higgs concluded by ordering expedited discovery for both parties. The full text of his order is available online at [http://extras.twincities.com/pdfs/strib\\_decision.pdf](http://extras.twincities.com/pdfs/strib_decision.pdf).

The *Press* quoted *Tribune* spokesman Ben Taylor after Higgs' order stating, "We understand the judge's decision to preserve the status quo until all the evidence can be gathered and heard, and we will fully comply with the order." Taylor continued, "We're anxious to get a full hearing on the merits and look forward to presenting our case as soon as possible."

A temporary injunction hearing is scheduled for June 18, by which time substantial discovery will have already taken place.

— SCOTT SCHRAUT  
SILHA RESEARCH ASSISTANT



# Internet Updates

## Popular Web Site YouTube Faces Challenges in U.S. and Abroad

The popular video Web site YouTube is facing a \$1 billion copyright lawsuit from a major media corporation and was blocked in two countries for content that was called insulting to national leaders.

### Viacom Sues

On March 13, 2007 Viacom International Inc., owner of such brands as Comedy Central, Nickelodeon, MTV and Paramount Pictures, sued YouTube and its owners Google Inc. for \$1 billion, alleging willful copyright infringement on “a huge scale.”

The lawsuit, filed in U.S. District Court for the Southern District of New York, accuses YouTube of “brazen disregard of the intellectual property laws” and says that while YouTube has pledged to comply with “takedown orders” and monitor the Web site for videos that infringe copyright, the means it employs to do so have been ineffectual, “shifting the entire burden – and high cost – of monitoring YouTube’s infringement onto the victims.”

Alexander Macgillivray, associate general counsel for products and intellectual property at Google, told the Associated Press (AP) that YouTube was protected under the 1998 Digital Millennium Copyright Act (DMCA), which gives online service providers protection from copyright lawsuits so long as they comply with requests to remove unauthorized material.

Viacom’s suit says YouTube deliberately adopted a “hands-off policy” of monitoring for infringement because the company relies on copyrighted video clips to increase the Web site’s popularity and thus increase advertising revenue for its owners.

Viacom says it found over 150,000 unauthorized copyrighted clips or entire episodes of popular programs on YouTube, like Comedy Central’s “The Colbert Report,” Nickelodeon’s “Dora the Explorer,” and MTV’s “Jackass,” in addition to films like “An Inconvenient Truth” and “Mean Girls,” which had been viewed “an astounding 1.5 billion times.”

Prior to Viacom’s suit, YouTube had been able to avoid copyright lawsuits by striking licensing arrangements with major media companies in which they shared advertising revenue generated by the copyrighted content. According to the AP, NBC, the BBC and Universal Music Group, a unit of France’s Vivendi SA, all provide content to YouTube under such arrangements.

But pressure had been mounting on Google, which acquired YouTube for \$1.65 billion in October 2006, to bring monitoring of copyright infringement in line with monitoring the video site does for pornography and hate speech. On February

7, the *Financial Times* quoted new NBC Universal CEO Jeff Zucker saying, “YouTube needs to prove that it will implement its filtering technology across its online platform. It’s proven it can do it when it wants to.”

NBC Universal and News Corp. announced March 22 that they plan to work together to launch a video site in a bid to control how their shows are watched online and compete with Google and YouTube.

According to the *Christian Science Monitor*, experts say the Viacom suit will help define the future of digital media for online video sites by clarifying the rules of the DMCA.

Google and YouTube say they comply with copyright law under the “safe harbor” provision of the DMCA. That provision exempts neutral hosting companies such as YouTube from liability for infringing copyright if the Web site takes copyrighted material down once it has been asked to do so by the copyright holder.

Glenn Brown, product counsel for YouTube and Google, told the *Christian Science Monitor* that they “go above and beyond the DMCA law.” Brown said YouTube’s measures include an automated takedown tool that can provide a quick search for copyrighted content, which YouTube offers to anyone who asks, a three-strikes provision that cancels the account of any three-time rule breaker, and a digital “hashing” feature that records when a file has been taken down to help prevent reuploading of the same or similar material.

According to the *Christian Science Monitor*, experts disagree on whether Viacom or Google and YouTube have a stronger case.

Larry Iser, an intellectual property lawyer and partner at Kinsella, Weitzman, Iser, Kump & Aldisert in Santa Monica, Calif., told the *Christian Science Monitor* that with the DMCA, “Congress chose to balance the rights of intellectual property holders with the rights of an Internet service provider to run a business.” Under the DMCA, Iser said, YouTube cannot be held liable for copyright infringement unless it refuses to remove content after being asked to do so.

But David Axtell, intellectual property lawyer at the law firm Leonard, Street, and Deinard in Minneapolis, told the *Christian Science Monitor* that YouTube probably violates the DMCA “safe harbor” provision because that portion of the Act prohibits financial benefit from video posting. YouTube makes money from advertising alongside copyrighted videos.

Meanwhile, at least one group was prompted to sue Viacom for asking YouTube to remove a

**YouTube**, continued on page 34

video that it says does not violate copyright. On March 23, *The San Francisco Chronicle* reported that MoveOn.org, an Internet-driven progressive political and civic action collective, had worked with entertainment distributor Brave New Films to produce a parody film of the Comedy Central Show, “The Colbert Report,” which it had posted on YouTube.

In YouTube’s attempt to comply with Viacom’s massive removal requests following the March 13 lawsuit, however, the Colbert parody film, which contained clips from the real show, was taken down. MoveOn.org’s lawsuit argues that the “mash-up” of Colbert Show snippets and original material is protected under the DMCA.

*The San Francisco Chronicle* reported that Viacom responded by sending a letter to the Electronic Freedom Foundation (EFF), which is representing MoveOn.org in the suit, saying that Viacom had no knowledge of the parody film and that it “should go back up” online.

According to the March 23 story, the EFF said it would continue with the lawsuit. MoveOn.org Civic Action campaign spokesman Adam Green said he worries critical political speech could be getting lost in this legal fight between corporate content creators and individual users. As the *Bulletin* went to press, the video was back on YouTube at <http://www.youtube.com/watch?v=sNHqX27hlz8>.

A study by Vidmeter.com, which tracks, ranks and reports on 11 of the Internet’s most popular video-sharing networks, may challenge the Viacom suit’s allegation that YouTube “profits handsomely from the presence of the infringing works on its site.”

The Vidmeter study, conducted from December 2006 to March 2007, concluded that unauthorized copyrighted videos “make up a relatively small portion of YouTube’s most popular videos and an even smaller portion of views to YouTube’s most popular videos.”

The full study can be found at [www.vidmeter.com/i/vidmeter\\_copyright\\_report.pdf](http://www.vidmeter.com/i/vidmeter_copyright_report.pdf).

#### **Turkey, Thailand block access**

In two separate but similar episodes, government authorities in Turkey and Thailand blocked access to YouTube over videos that were called insulting to national leaders.

The AP reported that a Turkish court ruled on March 7 that access to YouTube must be blocked because a video insulted founding father Mustafa Kemal Ataturk, saying he and all Turks were

homosexuals. In Turkey, it is illegal to insult Ataturk, an iconic figure who died in 1938 and appears on every denomination of Turkish currency.

Several prominent Turkish journalists and writers have been tried for allegedly insulting Ataturk or for the crime of insulting “Turkishness,” according to the AP.

Turk Telekom, which provides Internet access to most of the country, complied with court’s ban, blocking the Web site on March 7. The ban was lifted two days later, Ahter Kutadgu, head of corporate communications for Turk Telekom, told the Anatolia news agency.

YouTube said it removed the video when it was informed about the ban.

According to the AP, a Turkish parliamentary commission approved a proposal on April 5 that would allow Turkey to block any Web sites that are deemed similarly insulting. A date for a parliamentary vote has not been set.

On April 4, officials in Thailand also ordered YouTube blocked, citing complaints about a video that insulted 79-year-old King Bhumibol Adulyadej, showing graffiti-like elements painted over a slideshow of photographs of the King while the Thai national anthem played.

“People who create these (Web sites) are abusing their rights and clearly don’t mean well for the country,” said Sithichai Pookaiyaudom, the Thai minister of information and technology, in an AP story. “We have closed many and will continue to.”

Sithichai said he had ordered Internet service providers to block fewer than 10 sites since taking office late last year, either because the site was insulting to the monarchy, was pornographic or called for public political protests, which are illegal under martial law proclaimed after last year’s coup.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told National Public Radio’s *Future Tense* on March 9 that although governments seek to restrict free speech on the Internet just as they have in more traditional media, tech-savvy citizens make it more difficult for them to do so.

“The question is really at what point will [censoring governments] finally give up and recognize that this is a medium that just doesn’t lend itself to the kind of traditional censorship that they’ve used in old forms of communication.”

— PATRICK FILE

SILHA RESEARCH ASSISTANT

“The question is really at what point will [censoring governments] finally give up and recognize that this is a medium that just doesn’t lend itself to the kind of traditional censorship that they’ve used in old forms of communication.”

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

# Internet Updates

## Coroner Charged with Conspiring with Reporters to Gain Access to Confidential Information

On March 26, 2007, a Lancaster County, Penn. coroner faced charges of unlawfully using a computer and conspiring with local reporters to gain access to confidential police information. Following an opportunity to hear testimony from some of the reporters who used County Coroner Dr. G. Gary Kirchner's password to access a restricted county Web site, Manheim (Penn.) Magisterial District Judge John Winters ordered Kirchner to stand trial on felony charges brought by the Pennsylvania Attorney General's office on Feb. 5, 2007.

Although Kirchner denied accusations that he had shared his password with reporters from the (Lancaster) *Intelligencer Journal*, Attorney General Tom Corbett charged Kirchner with distributing his username and password to at least five reporters after what the *Lancaster New Era* described in a Feb. 5, 2007 article as a "lengthy statewide investigative grand jury" was convened.

The grand jury investigated the matter after an online information-sharing system between county officials, police and the coroner was apparently breached in 2005, when articles in the *Intelligencer Journal* published information only available on the Web site. Investigators later gained access to the newspaper's computers after Pennsylvania's highest court upheld a February 2006 subpoena against the newspaper's First Amendment challenges. Despite the newspaper's need to protect its sources, the Pennsylvania Supreme Court wrote, investigators could seize the computer hard drives of named reporters and search them for relevant information. (See "Pennsylvania Supreme Court Rules Paper Does Not Have to Turn Over its Hard Drives" in the Fall 2006 issue of the *Silha Bulletin* and "Pennsylvania's *Intelligence Journal's* Hard Drives Seized" in the Summer 2006 issue.)

"Contrary to the assertions of Lancaster Newspapers in repeated legal challenges that the grand jury was seeking newspaper source information, it is clear that the evidence sought was solely forensic in nature," Corbett said, reading from a prepared statement at a press conference in Lancaster on Feb. 5, 2007.

After the newspaper's legal attempts to protect their computers failed, the grand jury investigation revealed that the newspaper's computers had been used to gain access to the secure section of the county Web site using Kirchner's password and username 57 times, and had also been used to attempt to gain access to the Web site 33 times after the county terminated Kirchner's access to it.

Evidence obtained from the newspaper's computers supported the grand jury testimony of five reporters who were subpoenaed to testify. Although all five reporters initially refused to answer the subpoena, asserting their Fifth Amendment rights against self-incrimination, the reporters later testified after being granted immunity from prosecution for crimes discussed in their testimony.

According to an article published by the *Lancaster New Era* on Feb. 5, 2007, a grand jury report released by the Attorney General's office considered the testimony of reporter Brett Lovelace as less than credible because of inconsistencies between his sworn testimony and other evidence. The testimony of the remaining reporters, according to a Feb. 6, 2007 article published in the *New Era*, indicated that Kirchner may have provided the reporters access to his username and password in 2004 so that reporters could "check the Web site instead of calling him."

According to the *New Era*, Kirchner said that, "It could be a fluke, it could be anything. But I have no recollection of doing that in 2004, and it wouldn't have happened in 2005."

An attorney for Lancaster Newspapers Inc., George C. Werner, told reporters from the *New Era* that the charges brought against Kirchner confirmed the company's stance that its employees had done nothing wrong. "Throughout this process, we have never believed there was any criminal conduct on the part of Lancaster Newspapers or any of the [*Intelligencer Journal*] reporters," Werner said.

An editorial that appeared on the front page of the *Intelligencer Journal* on Feb. 6, 2007 stated that Kirchner "freely provided his password to the coroner's section of the 911 Web site" to a staff member at the *Intelligencer Journal*. "He clearly was aware several staff members then accessed the site over a period of many months," the newspaper said.

An article published by the *New Era* on the same day reported that Kirchner sent e-mails to colleagues, friends and the media, accusing the *Intelligencer Journal* reporters of violating "all journalistic ethics" in agreeing to testify against him.

The newspaper refuted such claims in its editorial. "There was no agreement of confidentiality with Kirchner in this matter and, indeed, the [*Intelligencer Journal*] had no knowledge whether Kirchner had provided the password to other news media," the newspaper said. It denied any wrongdoing by the reporters, despite a grand jury finding that staff members violated the security of the Web site to gain a tactical advantage over competing newspapers.

— CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

## Internet Updates

### Former NJ Councilman Files Lawsuit After Being Outed as Anonymous Blogger

*Case may prove to be key legal decision for ISPs*

One year after Michael Gallucci was exposed as an anonymous and often-incendiary commentator on a Web site hosted by a New Jersey Internet service provider (“ISP”) with ties to 14 newspapers in the state, the former Teaneck, N.J., councilman filed a lawsuit in a Superior Court of New Jersey. The complaint, dated Feb. 5, 2007, claimed that the ISP’s release of his identifying information was unlawful under New Jersey law and in breach of the user agreement entered into by Gallucci when he first subscribed to the service provided by New Jersey-Online, LLC (“NJ.com”).

As the *Bulletin* went to press, the ISP had not yet filed an answer to Gallucci’s complaint, but the case was being closely watched by free speech advocates around the nation and in New Jersey. The *New Jersey Law Journal* described the lawsuit as a “test case of a landmark ruling that [could] set standards for piercing Internet anonymity” across the nation.

The case may play a key role in the development of New Jersey law as well. In 2001, the state’s appellate court established procedures that ISPs should follow when third parties attempt to discover the identities of anonymous posters. *Dendrite International Inc. v. Doe*, 42 N.J. Super. 134 (App. Div. 2001). In *Dendrite*, a Morristown, N.J. company attempted to subpoena Yahoo!, Inc. to discover the identity of an anonymous poster that had used the company’s online bulletin board to post comments that the company believed to be defamatory. The trial court refused to issue the subpoena without further proof that the statements were defamatory or that the company was actually harmed.

The state appellate court in *Dendrite* found that, upon receiving a request for an anonymous user’s personal information, the ISP should inform the user of the request. Moreover, the court found, a third party must actually show proof of a valid cause of action before an Internet company can be compelled to reveal a user’s identity. The value of anonymous speech on the Internet, according to the *Dendrite* court, merited “higher standards” of protection.

The lawsuit filed by Gallucci in February is expected to address the issue of whether an ISP can be held liable for failing to follow the procedures established by *Dendrite* in 2001. “[T]he Gallucci case may be the first time an ISP—and a news organization, at that—has actually been in the dock,” *New Jersey Lawyer* reported on Feb. 26, 2007. “While *Dendrite* established the process plaintiffs must use to force an ISP to disclose a person’s identity, this case may show whether the courts will force an ISP to protect that identity until ordered to give it up.”

The lawsuit stems from comments that were posted to online message boards accessible through NJ.com’s Web site. At the time, the Web site featured news and events related to communities in New Jersey and offered community members an opportunity to voice

their opinions anonymously on the site’s message boards.

According to the complaint, in the weeks before Dec. 15, 2005, a NJ.com message board devoted to Teaneck contained “numerous anonymous postings that were critical of both the Teaneck fire department and [firefighter William J.] Brennan.” Earlier in the year, the Fire Department had left the scene of an emergency call hours before the house erupted in flame. Although it was ultimately discovered that the circumstances leading to the call were attributable to a malfunctioning boiler, whereas the fire was caused by an overloaded circuit breaker, the fire department received heavy criticism for failing to prevent the fire.

Brennan, a former Teaneck firefighter, was also the subject of criticism for his frequent involvement in litigation against the township. By mid-December 2005, Brennan was involved in ten lawsuits against Teaneck and individual members of the Teaneck Council. According to the *New Jersey Law Journal*, Brennan has been locked in civil rights litigation against the township, receiving a \$1 million verdict in one of the ten cases Brennan filed over the last decade. The verdict was later reduced to approximately \$382,000. *Brennan v. Norton*, 350 F.3d 399 (3rd Cir. 2003).

From Dec. 16, 2005 to Dec. 21, 2005, Gallucci anonymously posted comments to NJ.com’s Web site using the moniker “AntiBrennan.” According to the complaint, the comments posted by Gallucci were “extremely critical” of Brennan, describing the firefighter as a “litigation terrorist,” “Billy the Baby,” a “pathetic psychopath,” and a “paranoid—delusional-over-paid-under-worked-sicko.” Several of Gallucci’s comments were directed at the Teaneck Fire Department as well.

Brennan then subpoenaed NJ.com, seeking the identity of “AntiBrennan” and other anonymous posters using the message boards hosted by NJ.com. According to the *New Jersey Law Journal*, Brennan’s attorney, Jonathan Nirenberg, filed the subpoena on Brennan’s behalf in order to discover if the identities of “AntiBrennan” or other online posters would support the firefighter’s claims in a pending lawsuit against Teaneck, its town council, and individual council members.

According to the same report, Nirenberg said NJ.com responded quickly to the subpoena, providing Brennan’s counsel with a list of e-mail addresses associated with monikers used by anonymous posters on the message boards. Brennan was provided with a list of e-mails associated with the pseudonyms but met resistance from NJ.com when he attempted to learn the identity of the individual using the e-mail addresses given to Brennan. Gallucci, however, was readily identifiable because the e-mail address associated with

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The *New Jersey Law Journal* described the lawsuit as a “test case of a landmark ruling that [could] set standards for piercing Internet anonymity” across the nation.

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# Internet Updates

## Influential Blogger Proposes Code of Conduct for Blogging

In April 2007, Tim O'Reilly, an influential blogger, book publisher, and conference promoter, who the *San Francisco Chronicle* called a "central figure in the Web 2.0 world," proposed a blogger's code of conduct after another blogger made headlines because of receiving death threats online.

On his Web site, <http://radar.oreilly.com>, O'Reilly listed seven proposals for conducting oneself as a blogger, including, "Take responsibility not just for your own words, but for the comments you allow on your blog"; "Consider eliminating anonymous comments"; and "Don't say anything online that you wouldn't say in person."

He wrote, "We celebrate the blogosphere because it embraces frank and open conversation in ways that were long missing from mainstream media and marketing-dominated corporate websites. But frankness does not have to mean lack of civility."

O'Reilly posted the ideas, which he said were a collaborative effort from attendees at O'Reilly's ETech conference, after blogger Kathy Sierra, also a Web developer and author, became the target of numerous death threats in comments on her blog, [http://headrush.typepad.com/creating\\_passionate\\_users](http://headrush.typepad.com/creating_passionate_users), and on other blogs. Sierra was so alarmed by the threats that she called police, cancelled all of her public appearances, including one scheduled at the ETech conference, and also wrote about them on her site before suspending blogging.

After the threats made headlines around the globe, Sierra told the BBC that she had received around 300 hundred e-mails of support and estimated that 70 percent of them say the author had experienced something similar.

"I think there is a culture of looking the other way. When other prominent people look the other way it is creating an environment that allows this type of behavior," she said.

Many in the blogosphere, however, criticized O'Reilly's proposed code, saying it would stifle free expression. The *Chronicle* quoted Jeff Jarvis, a professor and director of the interactive journalism program at the City University of New York, and author of the blog BuzzMachine, who said, "I'm rather resentful of someone who has the temerity to tell me how they think I should behave." Jarvis continued, "The miscreants who need their meds aren't going to sign the code, let alone adhere to it."

Others voiced concern about creating a code that could become a legal requirement. The BBC quoted a U.S. lawyer and blogger, Denise Howell, saying, "The tools of the Live Web have made it easier than ever for ordinary people to communicate and express views in their individual capacities, and to provide platforms, e.g. on their blogs, for others to do so." She continued, "I think anyone who enjoys any aspect of the Live Web would celebrate this fact, and agree its vitality would be impaired if the law expected or required these ordinary people to envelop themselves and their sites in elaborate legal provisos and conditions if they hope to be shielded from potential responsibility for the bad acts of others."

But O'Reilly told the BBC that he opposed legally codified rules of conduct for bloggers. "I do think we need some code of conduct around what is acceptable behavior, [but] I would hope that it doesn't come through any kind of [legal/government] regulation [and would prefer if] it would come through self-regulation," he said.

Days after making his proposal, O'Reilly and others created <http://blogging.wikia.com/wiki/BCC>, a Web site with a draft code of conduct where visitors can contribute to a community discussion about the various proposals and can also make counterproposals. One of the additions to this version of the code is a provision that bloggers "reserve the right to keep our sources private" and pledge to divulge such information only upon order of the court.

— ASHLEY EWALD

SILHA FELLOW AND *BULLETIN* EDITOR

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### **Blogger Anonymity**, *continued from page 36*

the online identity included his name.

Gallucci, who first discovered that his name had been disclosed after Brennan posted a message on the NJ.com Web site identifying Gallucci as "AntiBrennan," apologized for his role in the online exchange later that day. Despite posting his apology, Teaneck Mayor Jacqueline Kates publicly requested Gallucci's resignation. After weeks of pressure from the public and town officials, Gallucci resigned on Jan. 23.

Once unmasked, Gallucci states in the complaint, he was publicly humiliated and scorned. "[U]nable to conduct his day-to-day business or maintain social ties in Teaneck without being subject to harassment and ridicule," Gallucci later moved from the town, selling his home at a loss, and allegedly suffered from anxiety and insomnia.

As a result, Gallucci is seeking damages against NJ.com for emotional distress, economic loss and "reputational harm," claiming that the ISP failed to follow procedures established in *Dendrite* to protect his identity.

According to the complaint, NJ.com acted recklessly, failing to notify Gallucci that the company had been subpoenaed. As a result, Gallucci claims, he was denied an opportunity to challenge the subpoena and Brennan was able to obtain his identity without having to show proof of an actionable cause.

Moreover, Gallucci claims, NJ.com had an obligation under its "User Agreement" to disclose a customer's confidential identifying information "only when it was in his [or her] best interest, unless it followed the procedures set forth in New Jersey law."

— CHRISTOPHER GORMAN

SILHA RESEARCH ASSISTANT

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"We celebrate the blogosphere because it embraces frank and open conversation in ways that were long missing from mainstream media and marketing-dominated corporate websites. But frankness does not have to mean lack of civility."

— Tim O'Reilly  
Blogger,  
book publisher,  
conference convenor

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# Silha Events

## Silha Forum Examines Media Coverage of Tragedies

Linda Walker, the mother of the late Dru Sjodin, a University of North Dakota college student murdered in 2003, joined members of the media and the executive director of the Jacob Wetterling Foundation at the Silha Spring Forum, “When Tragedy Strikes, What is the Media’s Role?” The forum, which was co-sponsored by the Minnesota Pro Chapter of the Society of Professional Journalists (SPJ) and the national SPJ, was held on April 24, 2007 at the University of Minnesota’s McNamara Alumni Center. It was scheduled to coincide with Ethics Week 2007, a week-long event sponsored by the SPJ to raise awareness of the media’s responsibility to minimize harm while reporting the news.

Walker and her family were thrust into the national spotlight when media organizations from around the country reported on the 2003 abduction and murder of Sjodin by convicted sex offender Alfonso Rodriguez Jr. Since her daughter’s death, she has worked with other parents of missing, abducted or murdered children to pass federal laws directed at sex offenders, leading to the creation of the Dru Sjodin National Sex Offender Public Registry Website, a national, searchable online directory of convicted sex offenders.

Walker spoke to the audience of 60 about her experiences as the mother of an abducted child and the role the media played throughout the investigation into her daughter’s abduction and the prosecution of Sjodin’s killer. “When the media came into our lives, we were like most Americans,” Walker said. What followed was a “surrealistic experience,” a time when Walker felt the overwhelming glare of the camera.

“We finally realized that we had the ability to take our time and form the message we were trying to get across,” she said, adding later that “victims are in such a numb state” after a tragedy occurs that it is hard for them to respond to the overwhelming attention from the press. Too often, families, communities and the media fail to focus on the victims, Walker said.

She was joined by panelists Amy Forliti of the Associated Press, Molly Miron of *The Bemidji Pioneer*, and Sue Turner of WCCO-TV in Minneapolis. Nancy Sabin, executive director of the Jacob Wetterling Foundation, a national organization that works with the families of children who have disappeared or who have been sexually exploited, also took part.

Silha Director and Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley moderated the discussion about the media’s role in reporting on tragedy. Kirtley reflected on the unfortunate timeliness of the event in light of the shooting at Virginia Tech that killed 32 people in Blacksburg, Va. on April 16, 2007. (See “Media Coverage of Virginia Tech Shootings Sparks Controversy and Scrutiny” on page 1 of this issue of the *Silha Bulletin* for more information on media coverage of the shootings.)

“Sadly,” Kirtley said, events like the Virginia Tech shootings are “part of our daily lives, our daily fare, and something that journalists deal with on a daily basis.”

The journalists, who have all had first-hand experience in reporting on high profile events such as the Red Lake school shooting in Red Lake, Minn., Hurricane Katrina and the 2003 nightclub fire in Rhode Island

that killed more than 100 people, discussed the role and responsibilities of the media in covering tragic events.

As a reporter for *The Bemidji Pioneer*, Miron shared her experiences reporting on the close-knit communities of northern Minnesota. While covering the 2005 shooting at Red Lake High School and the disappearance of Tristan Anthony White and Avery Lee Stately in November 2006, Miron attended funerals and wakes alongside community members whom she had come to know personally. At times, she said, her relationships with victims, their families and sources required her to walk a fine line.

In the wake of the Red Lake High School shooting, for example, Miron made a difficult decision to publish the picture of two students consoling one another shortly after the incident. After the picture was published, tribal chairman Buck Jordain contacted the journalist and expressed his anger at her decision to publish the photograph. “I never want to see my people in grief,” Jordain told Miron. Although she depended on Jordain as a source, publishing was the “right decision,” she said.

Turner characterized conflicts such as Miron’s as inevitable in covering tragedies. Journalists have an obligation to report the story as well as to protect the community, she said, and defended the media coverage that follows many tragedies. Although it may have been difficult for victims or community members, she said, the aggressive role of the press in the hours after the Virginia Tech shooting brought awareness to issues that deserve coverage. Although she challenged MSNBC’s decision to repeatedly air footage sent to the media organization by shooter Seung Hui Cho, she said that coverage facilitated a national debate about gun safety, emergency response and other important issues to surface.

Others on the panel questioned whether the media’s role in Blacksburg, Va. helped to spur a national debate or simply sensationalized a senseless tragedy.

“He got exactly what he set out to do,” Sabin said, speaking of MSNBC’s decision to air Cho’s video-taped recordings. “There is a different story to tell: 32 amazing people lost their lives.”

Media organizations, Sabin said, are quick to focus on the perpetrator without considering the consequences of doing so. Some tragedies, especially those that involve minorities and the poor, are ignored altogether, Sabin contended.

Forliti emphasized that her primary responsibility “is to the public. But it is important to balance that with how what I report might affect the victims.” She added, “Nobody likes to make the call to a parent who lost a son in a car accident,” Forliti said. But reporters who do, she continued, serve the public by reporting the story in a way that helps put these tragedies in perspective.

Journalists should always consider what the victims are going through, Sabin added. “Do the families a favor by avoiding using the word closure,” she said. “They never have any.”

“A good [phrase] that you could use rather than ‘closure’ would be ‘[putting] this chapter behind [them],’” Walker said.

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

– CHRISTOPHER GORMAN  
SILHA RESEARCH ASSISTANT

Journalists have an obligation to report the story as well as to protect the community.

– Sue Turner,  
WCCO-TV

# Silha Events

## Local Journalists Discuss Commitment to Objectivity

In a forum event titled “Without Fear or Favor: Objectivity Revisited,” journalists, scholars and members of the public met at Minnesota Public Radio’s (MPR) UBS Forum in downtown St. Paul on February 26 to discuss one of journalism’s most challenging topics: objectivity.

The evening’s opening speaker was Stephen Ward, acting director and associate professor of journalism ethics at the University of British Columbia’s Graduate School of Journalism. Ward is author of *The Invention of Journalism Ethics: The Path to Objectivity and Beyond*, which won the 2005-06 Harold Innis Prize from the Canadian Federation for the Humanities and Social Sciences for the best English-language scholarly book in the social sciences.

Local journalists on the panel were Thom Fladung, editor of the *St. Paul Pioneer Press*, Kristin Henning, associate publisher of *Rake* magazine and adjunct professor of journalism at the University of Minnesota, and Matt Thompson, deputy on-line editor at the (Minneapolis) *Star Tribune*. Kerri Miller, host of MPR’s *Midmorning* show, moderated.

Miller started the discussion by citing a promotional flier for the event, which she found to have been altered by an MPR staff member. The word “objectivity” had been crossed out and replaced by “fairness” on the flier. Miller asked Ward about the substitution of words, asking “are they interchangeable?”

Ward responded that this example “makes my point.” Ward argued in his book that many journalists have grown uncomfortable with the traditional concept of objectivity, finding it “too strong” and “impossible to live up to,” choosing instead to opt for terms like “accuracy” and “fairness.”

Fladung said that “a dictionary definition of objectivity is a myth for journalists,” and that he was more interested in journalists who were “skilled” and had “insatiable curiosity.”

With objectivity as a fulcrum for discussion, the panelists and members of audience of about 100 addressed some of the broader implications of Miller’s question: what values should journalists aspire to if not to objectivity, how should those values be achieved, and how does the public know whether they are being achieved?

Discussion often returned to problems presented as journalism seems to evolve away from straight news to the many forms of analysis and discussion consumers can find in newspapers, on television news programs and online.

Gary Gilson, a local broadcast and print reporter and former executive director of the Minnesota News Council, and Eric Black, a reporter for the *Star Tribune* and blogger, both said they believe that blogs have allowed reporters to tell “what they really know,” outside the restraints of objective

news reporting.

Ward said that this move away from traditional objectivity has probably provided “richer” news coverage that includes more personal anecdotes and “back story,” but journalists and newsrooms need to consider all the ethical implications of that kind of reporting.

Other audience members, including Lynda McDonnell, who runs ThreeSixty, a youth journalism program at the University of St. Thomas and Justice Paul H. Anderson of the Minnesota Supreme Court, pointed out increasing problems with how the media are perceived by readers and consumers.

McDonnell cited the recent scandal involving Judith Miller, who “didn’t do her job as a journalist” in not verifying national security information she was given. Anderson pointed out Yale Law Professor Stephen Carter’s notion of an “insufficiency of honesty.” Anderson said readers might find some reporting to be objective but also lacking integrity.

Ward said he agreed, adding that consumers are often cynical because of a perceived lack of integrity in the media, for example when stories are overlooked because they are not “sexy enough” or when journalists “don’t own up to their mistakes.”

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said that she often hears complaints from news consumers who want “just the facts.”

Kirtley said that contemporary journalism has allowed a “cult of personality” to develop, where “it’s who’s telling you what they’re telling you that’s important.” The result, said Kirtley, is that the public who wants only factual news reporting feels alienated from the media.

Along with about 45 minutes of discussion, the forum featured a screening of *EPIC 2015*, an eight-minute Internet film co-produced by Matt Thompson that imagines a future in which *The New York Times* has been reduced to a newsletter for the elite and the media scene is dominated by technology-enabled content tailored to the interests and biases of individual consumers and then dispatched to them via the Internet.

Sponsors for the event included the Minnesota Professional Chapter of the Society of Professional Journalists, the Silha Center for the Study of Media Ethics and Law, the Minnesota Journalism Center, the Associated Press, the Minnesota News Council, the Minnesota Newspaper Association, the Northwest Broadcast News Association and the journalism school at the University of St. Thomas.

The forum was broadcast on MPR’s *Midmorning* show on February 28, and can be downloaded at <http://minnesota.publicradio.org/display/web/2007/02/28/midmorning1/>.

— PATRICK FILE  
SILHA RESEARCH ASSISTANT

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Many journalists find the traditional concept of objectivity “too strong” and “impossible to live up to.”

— Stephen Ward,  
Associate Professor  
of Journalism Ethics  
at the University of  
British Columbia

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2007 ANNUAL SILHA LECTURE

# The Kids Are All Right: Violent Media, Free Expression, and the Drive to Regulate

*Featuring: Robert Corn-Revere*

**October 1, 2007**

7:00 p.m. - 9:00 p.m.

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Robert Corn-Revere is a partner at the law firm of Davis Wright Tremaine in Washington, D.C. He has served as counsel in litigation and regulatory proceedings involving the Communications Decency Act, the Child Online Protection Act, FCC Indecency Rules, Internet content filtering in public libraries, and public broadcasting and cable television regulations. Corn-Revere was the lead counsel in *United States v. Playboy Entertainment Group, Inc.* (2000). He is the co-author of the three-volume treatise, *Modern Communications Law* (West Group, Inc. 1999).



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