THE SILHA Bulletin

A PUBLICATION OF THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW | FALL 2016

Facebook Confronts Questions, Criticisms over News Distribution, Censorship, and "Fake News" Influencing Election

During the autumn of 2016, social media giant Facebook was the target of significant criticism for its role as a distributor of news to the public. In August 2016, Facebook replaced its human editors who curated the site's "Trending" topics section, a feature that provides users with topics and news that are currently popular on Facebook, with an algorithm that would determine which topics should be featured. However, shortly after Facebook deployed the algorithm, a fake news story was promoted in the Trending stories section, prompting significant criticism. Facebook faced more controversy in September after it removed a Pulitzer Prize-winning Vietnam war photograph from a Norwegian newspaper's page. In November, Facebook again found itself in crosshairs as critics accused the social media company of failing to filter out fake news during the tumultuous 2016 Presidential election season.

Observers of the news industry have suggested that these types of controversies are important because social media has become an increasingly import source from which Americans obtain news. In May 2016, the Pew Research Center released the results of a survey indicating that 62 percent of U.S. adults get news from social media, and 44 percent of those surveyed indicated that they specifically used Facebook to get news. As a result, critics have argued that Facebook is becoming a key news information source for much of the American public and urged the social media site to take greater responsibility in its role as a distributor of news.

Facebook "Trending" Topics Promotes Fake News after Human Editors Laid Off

On Aug. 26, 2016, *Quartz* reported that Facebook had fired its team of human editors who curated and wrote descriptions for its "Trending" topics section on the social media site. In an August 26 post on its "Newsroom" blog, Facebook announced that it would use an algorithm to populate the Trending topics section of the site. The algorithm would choose the various topics based on the number of Facebook users' original posts, mentions, and shares of the particular subject. Facebook noted that human individuals would remain involved in the Trending section of the site, but their roles would be reduced to ensuring that the algorithm was working properly.

Quartz reported that Facebook's decision to rely upon an algorithm rather than human editors to choose topics came after the social media site faced criticisms over political bias. In May, *Gizmodo* reported that Facebook's human editors had regularly sought to suppress news topics that might be of interest to conservatives. Although it denied the reports, Facebook faced significant criticisms in conservative news circles, and the news prompted Sen. John Thune (R-S.D.), the chairman of the Senate's Commerce, Science, and Transportation Committee, to send a letter to Facebook CEO Mark Zuckerberg asking him to explain whether the company had sought to suppress conservative viewpoints. Press advocates pushed back against Republicans, noting that the First Amendment allows private companies to choose what types of content they publish.

In its August 26 blog post, Facebook said that it investigated the bias claims but found no evidence that it actually existed. Nevertheless, the social media site maintained that the switch to an algorithm was still necessary. "[M]aking these changes to the product allows our team to make fewer individual decisions about topics," the company wrote. "Facebook is a platform for all ideas, and we're committed to maintaining Trending as a way for people to access a breadth of ideas and commentary about a variety of topics."

On August 29, *The Atlantic* reported that Facebook found itself at the center of controversy when the Trending section featured a topic titled "Megyn Kelly." The topic itself featured a fake news story by a website *Ending the Fed* that claimed that Megyn Kelly had been fired by Fox News after she endorsed Democratic presidential nominee Hillary Clinton. In reality, Fox News had not fired Kelly nor had she endorsed any presidential candidate. *The Atlantic* reported that despite the news being false, more than 200,000 people had liked posts on Facebook related to the fake story following the website's promotion of the story through the Trending section algorithm. The story was featured in the

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Trending section for approximately eight hours, according to *The Atlantic*.

The promotion of a fake news story three days after its decision to terminate human editors was embarrassing for Facebook. CBS News reported on August 29 that the gaffe prompted Facebook Vice President of Global Operations Justin Osofsky to release a statement apologizing and explaining why such a story was promoted in the Trending topics section. "This was a mistake for which we apologize, and it has been corrected," Osofsky said in the statement. "We also want to share a bit more context on how it happened. A topic is eligible for Trending if it meets the criteria for being a real-world news event and there are a sufficient number of relevant articles and posts about that topic. Over the weekend, this topic met those conditions and the Trending review team accepted it thinking it was a real-world topic. We then re-reviewed the topic based on the likelihood that there were inaccuracies in the articles. We determined it was a hoax and it is no longer being shown in Trending. We're working to make our detection of hoax and satirical stories quicker and more accurate."

Despite the apology, critics argued that Facebook's decision to use algorithms, rather than humans, to determine which news stories were important could create serious problems for the presentation of news on its site. In an August 30 interview with *The Atlantic*, Harvard Law School Professor Jonathan Zittrain argued that allowing algorithms to determine what news stories were trending was like a game of roulette. "Even the casino isn't supposed to know what number is going to win when it spins. And so, if there's some issue, at least it isn't intentional manipulation by Facebook," Zittrain said. However, Zittrain noted that problems could arise when programmers design algorithms to evolve and become more efficient over time. "The algorithm gets smart enough that, even if the casino isn't looking to put a thumb on the scale, thumbs will appear," he said. "This isn't just Facebook's problem — this is one of the profound problems of our time."

In an August 30 post on The Poynter Institute's website, Poynter International Fact-Checking Network Director Alexios Mantzarlis argued that Facebook should hire a team of fact checkers to ensure that fake news was not be promoted on its site. "The fact-checkers would steer away from personal posts and pages. Your crazy uncle's tirades would be outside the remit of the Facebook Fact Team (that's your job)," Mantzarlis wrote. "But public pages and posts would be fair game. Priority would be given to the pages categorizing themselves in the 'Media/News/ Publishing sector and any high engagement or high reach posts."

Mantzarlis listed three specific ideas for tasks that the fact checkers could undertake. First, the fact checkers would seek to reduce the reach of Facebook pages that consistently share or link to fake stories on their own sites. Second, the fact checkers could find ways to reduce the reach of specific posts that contain false news items. Alternatively, the fact checkers could ensure that Facebook provides clearer signals to users that a story is fake or misleading. Third, the fact checkers would also look at other fact checking websites that have already vetted stories and then offer a "related fact check" link to such websites underneath posts that contain dubious news. However, Mantzarlis was unsure whether Facebook would be willing to entertain the idea of hiring fact checkers.

"Is Facebook game? [At an August 29 appearance at Luiss University in Rome], Zuckerberg repeated that he did not want Facebook to become a media organization," Mantzarlis wrote. "Regardless of whether that ship has sailed or not, hiring fact-checkers does not have to compromise his vision. It would, in fact, reinforce Facebook's stated 'News Feed Values,' which say the network's experience should be 'informative.' And it would represent a private company responding to concerns from its users about the trustworthiness of the information available on the network. Most importantly, it would have the added benefit of helping reduce misinformation."

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— Jonathan Zittrain, Harvard Law School professor

Facebook Faces Criticism After Censoring "Napalm Girl" Photograph

On Sept. 9, 2016, *The Guardian* reported that Facebook faced new criticisms when Norway's largest newspaper published a front-page open letter addressed to Facebook CEO Mark Zuckerberg that criticized the company's removal of several posts featuring a Pulitzer Prize-winning photograph from the Vietnam War. The controversy initially arose after Norwegian writer Tom Egeland published a post discussing iconic photos that "changed the history of warfare." Egeland include a photo by Nick Ut titled "The Terror of War" that depicts several children running from a napalm attack during the Vietnam War. Among the subjects of the photo was 9-year-old Phan Thi Kim Phúc, who was running toward the camera naked after she was severely burned in the attack. The photograph became an iconic image of the Vietnam War and led to Phúc receiving the nickname "napalm girl."

The Verge reported on September 9 that Facebook removed the photo shortly after Egeland posted it on his user page. Egeland then reposted the photograph along with an interview that he conducted with Phúc, who criticized the social media company's previous decision to remove the photo. Facebook deleted Egeland's new post and also suspended his account for 24 hours. Upon learning of Facebook's actions, Norway's largest paper, *Aftenposten*, wrote a story about Egeland's suspension. *Aftenposten* shared a link to the story on Facebook on September 5 and included the photograph in its post. Shortly thereafter, Facebook deleted *Aftenposten*'s post that included the picture, according to *The Verge*. The social media site also

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sent a warning to *Aftenposten*, stating that "any photographs of people displaying fully nude genitalia or buttocks, or fully nude female breast, will be removed."

In response to Facebook, *Aftenposten* Editor-in-Chief Espen Egil Hansen published an open letter to Zuckerberg on the front page of the September 9 issue of the newspaper. In the letter, Hansen criticized the social media site's decision to delete the famous photo from both Egeland and the newspaper's Facebook pages. "Facebook has become a world-leading platform for spreading information, for debate and for social contact between persons. You have gained this position because you deserve it," Hansen wrote. "But, dear Mark, you are the world's most powerful editor. Even for a major player like *Aftenposten*, Facebook is hard to avoid. In fact we don't really wish to avoid you, because you are offering us a great channel for distributing our content. We want to reach out with our journalism. However, even though I am editor-in-chief of Norway's largest newspaper, I have to realize that you are restricting my room for exercising my editorial responsibility. This is what you and your subordinates are doing in this case. I think you are abusing your power, and I find it hard to believe that you have thought it through thoroughly."

Particularly, Hansen focused on the fact that Facebook appeared to remove the photograph over concerns that other users might consider the picture to be child pornography. The editor also criticized Facebook for strictly applying the same rules to all content regardless of the context. "Facebook's Mission Statement states that your objective is to 'make the world more open and connected.' In reality you are doing this in a totally superficial sense," Hansen wrote. "If you will not distinguish between child pornography and documentary photographs from a war, this will simply promote stupidity and fail to bring human beings closer to each other. To pretend that it is possible to create common, global rules for what may and what may not be published, only throws dust into peoples' eyes."

Hansen concluded his letter by calling on Zuckerberg to consider establishing differentiated guidelines that consider geographic context as well as creating rules that distinguish between news media editors and other Facebook users that would grant the former more discretion when posting on the site. "Today, if it is possible at all to get in touch with a Facebook representative, the best one may hope for are brief, formalistic answers, with rigid references to universal rules and guidelines. If you take the liberty to challenge Facebook's rules, you will be met — as we have seen — with censorship," Hansen wrote. "I could have continued, Mark, but I have to stop at this point. I have written this letter to you because I am worried that the world's most important medium is limiting freedom [instead] of trying to extend it, and that this occasionally happens in an authoritarian way. But I am also writing — and I hope you will understand this — because I take a positive attitude to the possibilities that Facebook has opened up. I only hope that you will utilize the possibilities in a better way."

> "I appreciate the work Facebook and other media do to stop content and pictures showing abuse and violence.. . . But Facebook is wrong when they censor such images. I say no to this form of censorship."
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> **— Norwegian Prime Minister Erna Solberg**

The Guardian reported on September 9 that Norwegian Prime Minister Erna Solberg also criticized Facebook for its decision to delete the napalm girl photo in a post on her public profile page on the website. "I appreciate the work Facebook and other media do to stop content and pictures showing abuse and violence.. . . But Facebook is wrong when they censor such images," Prime Minister Solberg wrote, according to *The Guardian*. "I say no to this form of censorship." Solberg's post also included the iconic photo. Shortly thereafter, Facebook deleted the prime minister's post.

In a second post after the one with the "napalm girl" photo was deleted, Prime Minister Solberg provided further criticism of Facebook. "It is highly regrettable that Facebook has removed a post from my Facebook page. What they achieve by removing such images, good as the intentions may be, is to edit our common history. I wish today's children will also have the opportunity to see and learn from historical mistakes and events. This is important," she wrote, according to *The Guardian*. "I hope Facebook uses this opportunity to review its editing policy, and assumes the responsibility a large company managing a broad communication platform should take."

In defending the decision to continuously delete posts that featured the photograph, a Facebook spokeswoman told *The Guardian* on September 9 that the company was trying to balance several competing interests. "While we recognize that this photo is iconic, it's difficult to create a distinction between allowing a photograph of a nude child in one instance and not others. We try to find the right balance between enabling people to express themselves while maintaining a safe and respectful experience for our global community," the spokeswoman told *The Guardian*. "Our solutions won't always be perfect, but we will continue to try to improve our policies and the ways in which we apply them." *The Guardian* also clarified that the posts containing the photo were not automatically removed by an algorithm. Rather, posts can be flagged by an algorithm or other users as inappropriate, which would then prompt Facebook's community standards team to consider whether the post should be removed.

Later in the day on September 9, *The New York Times* reported that Facebook had reversed course, announcing that it would reinstate all of the posts that contained the "napalm girl" image. "An image of a naked child would normally be presumed to violate our community standards, and in some countries might even qualify as child pornography," Facebook said in a statement, according to *The New York Times*. "In this case, we recognize the history and global importance of this image in document in a particular moment in time."

Despite the change in policy, several commentators continued to criticize Facebook for its decision to block the photo at all. In a September 9 interview with *The Wall Street Journal*, Microsoft Research affiliate and Cornell University Professor Tarleton Gillespie suggested that the number of people involved in Facebook's review process created significant problems. "Facebook has guidelines, but beneath them it has layers and layers of people. At each of these layers, someone could remove something the rules actually allow, or allow something the rules actually prohibit," Gillespie told *The Wall Street Journal*. "The real question is what are the public implications of a review process that must make these decisions, at scale and under pressure, across hundreds of reviewers, thousands of times a day."

Poynter Institute Chief Media Writer James Warren wrote a September 9 commentary on his organization's website agreeing with Hansen's criticisms that Facebook's censorship of the photo would create barriers between people. "Can one really argue? If Zuckerberg cares about matters of justice, he ought be reminded that it is in no small measure through the unadulterated horror of such imagery and reporting that the world gets at basic truth about many human actions, such as war," Warren wrote. "You've got to stare at our handiwork, not censor it."

In a September 9 post on *Slate*, senior technology writer Will Oremus also criticized Facebook for its continued persistence that it was a technology company rather than a media company, referencing Zuckerberg's statements during the question and answer session on August 29 at Luiss University in Rome. "When Mark Zuckerberg says that Facebook isn't a media company, it's not so much of a descriptive claim as a wishful one. Facebook doesn't *want* [*sic*] to be a media company," Oremus wrote. "That's understandable: Editorial judgment is perilous territory, and as much as we cry out when Facebook clumsily enforces a blunt policy, the cries would only grow louder if the company were to take a more activist approach to the types of content it permits and promotes. Yet the company's persistent claims to neutrality, which were philosophically empty from the outset, are further undermined each time it changes its policies in response to public pressure, or makes an exception for 'an iconic image of historic importance,' or offers a rationale such as, 'the value of permitting sharing outweighs the value of protecting the community by removal.'"

On September 12, Reuters reported that Facebook Chief Operating Officer Sheryl Sandberg had sent a letter to Prime Minister Solberg apologizing for how Facebook handled the various posts in Norway with the napalm girl photograph. "These are difficult decisions and we don't always get it right.. . . Even with clear standards, screening millions of posts on a case-by-case basis every week is challenging," Sandberg wrote in the letter, according to Reuters. "Nonetheless, we intend to do better. We are committed to listening to our community and evolving. Thank you for helping us get this right.. . . [T]he global and historical importance of a photo like 'Terror of War' outweighs the importance of keeping nudity off Facebook."

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> **— Sheryl Sandberg, Facebook Chief Operating Officer**

Critics Raise Questions Over Facebook's Approach to Fake News in Wake of 2016 Election

In the wake of the 2016 presidential election, Facebook continued to face criticisms over false and misleading news stories that circulated on its site during the run up to the election. In an October 12 story, *Washington Post* reporter Caitlin Dewey wrote that the newspaper had conducted an informal survey of Facebook's trending topics during the weeks following the social media company's decision to fire human editors. During the three-week period, the *Post* found that Facebook had promoted five trending stories that were "indisputably fake" and three that were "profoundly inaccurate." The false and misleading stories included reports that Clemson University had kicked someone off of campus for praying, a news release from the discredited libertarian medical organization "Association of American Physicians and Surgeons," and a tabloid story that claimed that the terrorist attacks on Sept. 11, 2001 were actually a controlled demolition, among others. Although the survey results appeared troubling, Dewey noted that the *Post* could not draw broad conclusions from its analysis because Facebook personalizes its Trending topics section to individual users. As a result, other Facebook users could have potentially seen either more or fewer fake stories than what the *Post* staff observed.

Buzzfeed News, which conducted extensive reporting on fake political news during the 2016 presidential election, reported on October 20 that an analysis of more than 1,000 posts from six of the largest hyper-partisan pages on Facebook indicated that significant proportions of the posts contained a mixture of true and false, or mostly false, news. Approximately 38 percent of the posts on three conservative pages, "Eagle Rising," "Rightwing News," and "Freedom Daily," contained false information. Combined, approximately 5.3 million Facebook users had liked these three pages. Meanwhile, about 19 percent of the posts on three liberal pages, "The Other 98%," "Addicting Info," and "Occupy Democrats," contained false information. A combination of more than 8.5 million Facebook users had liked these three liberal pages. For comparison, *Buzzfeed News* also examined the posts on the Facebook pages of *Politico*, CNN Politics, and ABC News. Taken together, the mainstream news pages had zero percent of their posts containing mostly false news and only 0.7 percent

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of their posts containing a mixture of true and false news. These mainstream news pages combined had been liked by approximately 3.5 million Facebook users.

"The rapid growth of these pages combines with *BuzzFeed News*' findings to suggest a troubling conclusion: The best way to attract and grow an audience for political content on the world's biggest social network is to eschew factual reporting and instead play to partisan biases using false or misleading information that simply tells people they want to hear," a team of *Buzzfeed News* reporters led by *Buzzfeed Canada* founder Craig Silverman wrote in the October 20 story. "This approach has precursors in partisan print and television media, but has gained a new scale of distribution on Facebook. And while it isn't a solely American phenomenon — the British Labour party found powerful support from a similar voice — these pages are central to understanding a profoundly polarized moment in American life."

On Nov. 3, 2016, *Buzzfeed News* reported that fake news websites were becoming a mainstay of the political debate during the 2016 election. Specifically, the former Yugoslav Republic of Macedonia had become ground zero for fake election news. *Buzzfeed News* reported that domain registration records indicated that at least 140 U.S. political websites that were producing fake news were based in the country's town of Veles. Many of the sites used American-related domain names, such as WorldPolitcus.com, USConservativeToday.com, DonaldTrumpNews.co, and USADailyPolitics.com, among others. Nearly all the websites were being run by teenagers and young men who would publish sensationalist and false content that would generate user traffic toward their site and, in turn, would generate ad revenue through various online advertising networks, according to *Buzzfeed News*.

Many of the operators of the sites, who agreed to speak with *Buzzfeed News* on the condition that they remain anonymous, said that much of the content on their websites targeted Republican presidential candidate Donald Trump's supporters. The domain owners said that they had experimented with producing left-leaning and pro-Bernie Sanders content, but content related to Trump performed much better. *Buzzfeed News* reported that nearly all of the most popular content on the Macedonian websites was false, including headlines suggesting that Democratic presidential candidate Hillary Clinton had said in 2013 that she wanted people like Trump to run for president because they could not be bought by special interests, that the pope had endorsed Trump, and that Republican vice-presidential candidate Mike Pence had called First Lady Michelle Obama vulgar.

The website operators told *Buzzfeed News* that Facebook had been the best avenue to direct traffic toward their fake news sites. For example, the false story about Clinton's 2013 comments had elicited more than 480,000 shares, reactions, and comments on Facebook within a week. For comparison, *Buzzfeed News* reported that *The New York Times*' story revealing that Trump had declared a $916 million loss in his 1995 state income tax returns had received about 175,000 interactions on Facebook over the course of a month. "Yes, the info in the blogs is bad, false, and misleading but the rationale is that 'if it gets the people to click on it and engage, then use it,'" one university student running a fake U.S. political news website told *Buzzfeed News*.

> "Yes, the info in the blogs is bad, false, and misleading but the rationale is that 'if it gets the people to click on it and engage, then use it.'"
>
> **— Unidentified Macedonian student who creates "fake news"**

In the days following the November 8 presidential election, some commentators also argued that availability of false news on Facebook played a significant role in Trump's victory. In a November 9 online commentary, *New York* magazine internet culture writer Max Read argued that Facebook created an environment of false information for the American electorate, which he suggested benefitted Trump's electoral chances. "The most obvious way in which Facebook enabled a Trump victory has been its inability (or refusal) to address the problem of hoax or fake news. Fake news is not a problem unique to Facebook, but Facebook's enormous audience, and the mechanisms of distribution on which the site relies — i.e., the emotionally charged activity of sharing, and the show-me-more-like-this feedback loop of the news feed algorithm — makes it the only site to support a genuinely lucrative market in which shady publishers arbitrage traffic by enticing people off of Facebook and on to ad-festooned websites, using stories that are alternately made up, incorrect, exaggerated beyond all relationship to truth, or all three," Read wrote. "The valiant efforts of *Snopes* [an online fact checking website] and other debunking organizations were insufficient; Facebook's labyrinthine sharing and privacy settings mean that fact-checks get lost in the shuffle. Often, no one would even need to click on and read the story for the headline itself to become a widely distributed talking point, repeated elsewhere online, or, sometimes, in real life."

The Intercept's Sam Biddle also argued in a November 10 commentary that Facebook legitimized questionable news sources during the election and often confirmed what people believed, whether those beliefs were accurate or not. "Confirmation bias doesn't begin to describe what Facebook offers partisans in both directions: a limitless, on-demand narrative fix, occasionally punctuated by articles ground in actual world events, when those suit their preferences.. . . On Facebook, a meme-ified image promising new details of Hillary Clinton's brain disease would appear alongside an advertisement, a *Wall Street Journal* investigation, a video game trailer, a baby picture," Biddle wrote. "Whether or not Facebook is directly culpable, this much can't be overstated: The combination of a media literacy nadir combined with an unstoppable firehose of untrue media gave Donald Trump the ability to say virtually anything during a presidential election, without consequence. There's no reason to believe this won't continue to happen in every election hereafter, to say

nothing of the rest of the world, where Facebook is desperate to plant roots."

Others were more cautious in claiming that Facebook determined the outcome of the election but noted that fake news did play a major role during the campaigns. On November 16, *Buzzfeed News*' Silverman reported that from August 1 to election day, the top 20 false news stories from hyper-partisan blogs and hoax news sites obtained approximately 8.7 million shares, reactions, and comments on Facebook. Comparatively, the top 20 stories on mainstream news generated approximately 7.3 million shares, reactions, and comments on Facebook during the same time period. Prior to August 1, stories on mainstream news pages on Facebook had consistently obtained more shares, reactions, and comments on Facebook than the fake stories on hyper-partisan pages.

Dartmouth College political science professor Brendan Nyhan told *Buzzfeed News* on November 16 that Facebook's lack of effort to police fake stories was a serious problem. "I'm troubled that Facebook is doing so little to combat fake news," Nyhan said. "Even if they did not swing the election, the evidence is clear that bogus stories have incredible reach on the network. Facebook should be fighting misinformation, not amplifying it."

In the weeks following the election, Facebook appeared to be contemplating its role in the election and whether fake news shared on its site exerted any influence. On November 10, *The Verge* reported that Facebook CEO Mark Zuckerberg had pushed back against the notion that fake news on the site had any sway in the election. "Personally I think the idea that fake news on Facebook, which is a very small amount of the content, influenced the election in any way — I think is a pretty crazy idea. Voters make decisions based on their lived experience," Zuckerberg said while speaking at a technology conference, according to *The Verge*. "I do think there is a certain profound lack of empathy in asserting that the only reason someone could have voted the way they did is they saw some fake news. If you believe that, then I don't think you have internalized the message the Trump supporters are trying to send in this election."

In a post on his public Facebook page on November 12, Zuckerberg continued to maintain that misinformation was not a significant problem on Facebook but suggested that the company was considering ways to address critics' concerns. "After the election, many people are asking whether fake news contributed to the result, and what our responsibility is to prevent fake news from spreading. These are very important questions and I care deeply about getting them right. I want to do my best to explain what we know here," Zuckerberg wrote. "Of all the content on Facebook, more than 99% of what people see is authentic. Only a very small amount is fake news and hoaxes. The hoaxes that do exist are not limited to one partisan view, or even to politics. Overall, this makes it extremely unlikely hoaxes changed the outcome of this election in one direction or the other."

> "Confirmation bias doesn't begin to describe what Facebook offers partisans in both directions: a limitless, on-demand narrative fix, occasionally punctuated by articles ground in actual world events, when those suit their preferences."
>
> **— Sam Biddle, *The Intercept* technology journalist**

"That said, we don't want any hoaxes on Facebook. Our goal is to show people the content they will find most meaningful, and people want accurate news. We have already launched work enabling our community to flag hoaxes and fake news, and there is more we can do here. We have made progress, and we will continue to work on this to improve further," Zuckerberg added. "This is an area where I believe we must proceed very carefully though. Identifying the 'truth' is complicated. While some hoaxes can be completely debunked, a greater amount of content, including from mainstream sources, often gets the basic idea right but some details wrong or omitted. An even greater volume of stories express an opinion that many will disagree with and flag as incorrect even when factual. I am confident we can find ways for our community to tell us what content is most meaningful, but I believe we must be extremely cautious about becoming arbiters of truth ourselves."

In a November 17 interview with *MinnPost*, Director of the Silha Center and Professor of Media Ethics and law at the University of Minnesota Jane Kirtley criticized Facebook's denials that it exerted influence in the election and encouraged the company to follow through on a plan to curb fake news. "I get a little impatient with people like Zuckerberg saying this sort of thing 'Couldn't possibly have mattered.' Of course it matters," Kirtley said. "Facebook can only engage so much in this denial of what they are and what they are doing. They have to put editorial practices and ethics in place. The ease with which so many people use something like Facebook brings a tremendous responsibility for ethical controls. And *not* [*sic*] from the government. I am firmly opposed to that. But from within the companies themselves."

On November 18, Zuckerberg published a post on his public Facebook page that provided several details about how it was planning on combatting the prevalence of fake news stories on the site. The plan included developing "better technical systems to detect what people flag as false before they do it themselves," making it easier for users to flag fake stories, collaborating with fact checking organizations, "exploring labeling stories that have been flagged as false by third parties or our community," and working with journalists and news industry members on ways to develop a better fact checking system and policy, among others. Zuckerberg also wrote that Facebook would seek to disrupt fake news economics, referencing a November 15 announcement that Facebook had updated its ad policies to clarify that its advertising ban on false and misleading content applied to fake news websites. The updated

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position would bar websites publishing large amounts of fake news from utilizing Facebook's lucrative ad network. Google also announced on November 15 that it intended to take similar steps.

A spokeswoman for Facebook told *The Wall Street Journal* on November 15 that the updated policy would be applied strictly. "While implied, we have updated the policy to explicitly clarify that this applies to fake news," the spokeswoman told *The Wall Street Journal*. "We vigorously enforce our policies and take swift action against sites and apps that are found to be in violation. Our team will continue to closely vet all prospective publishers and monitor existing ones to ensure compliance." However, *The Wall Street Journal* reported that the change in advertising policy would not curb problems related to Facebook users' widespread sharing of fake news stories. As the *Bulletin* went to press, Facebook had not provided further updates on the implementation of its plan to combat fake news.

Despite Facebook's proposed plans, critics argued that Facebook's actions should have come much sooner. In a November 22 interview with CBS News, Adam Schrader, who was one of the contractors that worked for Facebook's "Trending" topics division and was later replaced by an algorithm, said that Facebook's executives failed to see obvious problems. "[Zuckerberg himself may not have seen the problem coming,] but leaders within the company should've been paying more attention to what was [] showing up in people's news feeds, for sure," Schrader said. "By stopping fake news from trending, you're likely to stop fake news from spreading further, and I think one of the biggest principles of journalism is making sure people have truthful, accurate, and fair news." Schrader also told CBS News that it was unreasonable to expect that every person would fact check each news item on their Facebook feeds, so the company should have stepped in to address the problem.

Others expressed skepticism over granting Facebook wide latitude to determine whether news appearing on its site was fake, partly because many fake stories often contain a mixture of truth and falsity. In a November 25 blog post on its website, Article 19, an advocacy group for freedom of expression worldwide, argued that granting Facebook the authority to police the truth could lead to troubling outcomes. "Recently, Facebook has been blamed for spreading 'fake news' and contributing to the election of Donald Trump as the next [U.S.] president. There have since been calls for Facebook to take action to address the issue and be treated as a media company in this regard," Article 19 wrote. "While tech giants hold considerable power over media and civic space, assigning them the mission of sorting out what constitutes 'true' information is a dangerous route to take. What's more, in the complex world we live in, even journalists and other contributors to the news should never be held liable for reporting 'fake news' unless they have failed to dedicate reasonable efforts to verify information."

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

In a November 30 commentary, *The New Yorker* staff writer Nicholas Lemann suggested that journalists needed to take a role in combatting fake news because relying solely on Facebook could be a troubling proposition. "So what should we do about journalism's role in non-reality-based politics? The easy part — which won't be all that easy, because of the current economic troubles of journalism — is to expand the real-news ecosystem as much as possible, by training people in how to do that work and by strengthening the institutions that will publish and broadcast it. (Along with this goes enhancing the smaller ecosystem for correcting fake news: snopes.com, *PolitiFact*, factcheck.org, and so on.)," Lemann wrote. "The hard part is figuring out what to do about the proliferation and influence of fake news. It's a sign of our anti-government times that the solution proposed most often is that Facebook should regulate it. Think about what that means: one relatively new private company, which isn't in journalism, has become the dominant provider of journalism to the public, and the only way people can think of to address what they see as a terrifying crisis in politics and public life is to ask the company's billionaire C.E.O. to fix it."

In an attempt to help unsuspecting Facebook users, *The Washington Post*'s Glenn Kessler published a "fact checker's guide for detecting fake news" on November 22 that provided several tips for how people could easily identify whether a story was false or not. The *Post*'s suggestions included: actually reading a story before sharing it on Facebook because it has a catchy headline; examining the web address of the story to see whether the domain indicated the website was based outside of the United States; looking for a "contact us" page because fake news sites rarely provide such information; examining the byline to determine whether the person writing the story is real; reading a suspicious article closely for unusual and made-up quotes; scrutinizing whether the story provides or links to legitimate sources or websites; and using search engines to double-check assertions made in the story, among others. "Combatting the spread of fake news begins with you, the reader," Kessler wrote. "If it seems too fantastic, it probably is. Please think before you share."

Casey Carmody
Silha *Bulletin* Editor

Restrictions on "Ballot Selfies" Raise First Amendment Issues During 2016 Election

During the 2016 presidential election, several states dealt with legal questions regarding "ballot selfies," the posting of photographs of completed ballots on social media sites. In New Hampshire and Colorado, courts ruled in favor of allowing individuals to take such photographs, citing the practice as a constitutionally-protected form of speech and political expression. Meanwhile, courts in Michigan and New York refused to strike down laws that prohibited ballot selfies, citing concerns related to voter fraud as well as other issues related to the timing of the complaints. The debate over these types of photographs was also drawn to the forefront of national conversations after a high-profile celebrity shared a ballot selfie on social media, possibly in violation of one state's laws.

FIRST AMENDMENT

On Aug. 24, 2016, *The New York Times* reported that Judge Paul Barbadoro of the U.S. District Court for the District of New Hampshire struck down a New Hampshire law on August 11 that prohibited voters from taking pictures of completed ballots. *Rideout v. Gardner* No. 14-cv-489-PB (D.N.H. 2016). In 2014, New Hampshire legislators amended a 1979 law to provide that "No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted.. . . This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means." N.H. Rev. Stat. Ann. § 659:35. The law imposed a fine of up to $1,000 for showing photographs of completed ballots to others or posting them on social media, according to *The New York Times*. In response, the American Civil Liberties Union (ACLU), representing several plaintiffs, challenged the new provisions in federal district court. The plaintiffs included two Republican candidates for the New Hampshire State House of Representatives in 2014 who publicly shared photos of their own primary ballots, according to *The New York Times*. A third plaintiff had also knowingly violated the law when he posted a photograph on social media of his completed ballot in 2014.

In his opinion, Judge Barbadoro wrote that the state provided no evidence of "an actual or imminent problem with images of completed ballots being used to facilitate either vote buying or voter coercion." Judge Barbadoro also cited concerns related to the First Amendment to strike down the law, writing, "The new law is invalid because it is a content-based restriction on speech that cannot survive strict scrutiny," which is the most stringent standard for judging infringements on fundamental rights.

> "Where First Amendment rights are at issue, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."
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> **— U.S. District Court Judge Christine Arguello**

In November 2016, the Associated Press (AP) reported that a federal judge in Colorado had come to a similar conclusion about voters within the state posting ballot selfies on social media. On Nov. 4, 2016, U.S. District Court for the District of Colorado Judge Christine Arguello granted an injunction that barred Colorado state officials from enforcing an 1891 law that prohibited a voter from "show[ing] his ballot after it is prepared for voting to any person in such a way as to reveal its contents." Colorado Revised Statute § 1-13-712(1). *The Denver Post* reported on November 4 that residents could not be prosecuted for sharing images of marked ballots on social media, but local rules could still be enforced to ensure that photos taken at polling places did not create privacy concerns for other voters.

In her written opinion, Judge Arguello addressed the First Amendment concerns of banning ballot selfies. "Where First Amendment rights are at issue, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Arguello wrote. "By issuing an injunction [against the law being enforced] in this case, Coloradans get what they are entitled to — clarity on an issue that implicates fundamental constitutional rights." *Hill v. Williams*, No. 16-cv-02627-CMA (D. Colo. 2016).

The AP reported that during hearings on whether the injunction barring the law from being enforced should be granted, University of Colorado at Boulder economics professor Jeffrey Zax testified that ballot selfies have the potential to revive 19th century-style vote-buying, though he could point to no modern evidence of it. "When it's difficult for someone to prove the way they voted, it's much harder to sell your vote," Zax testified, according to the AP. "With a cellphone camera, ballot secrecy is eradicated."

Although she conceded that Colorado had several justifications for passing a law barring photographs of ballots, Judge Arguello held that free expression interests outweighed any such concerns. "No one disputes that reducing the risk of voter fraud, including vote buying, vote selling, and voter intimidation is a significant government interest," Arguello wrote. "The issue is whether [the law] is sufficiently narrow to serve that governmental interest." Ultimately, she found that the law criminalized more speech than necessary. As a result, Judge Arguello issued a temporary injunction, meaning the ruling was temporary and might not be upheld in the future.

However, not all courts agreed with the approaches of the federal judges in New Hampshire and Colorado. On Oct. 31, 2016, *Slate* reported that the U.S. Court of Appeals for the Sixth Circuit overturned a lower court's injunction barring Michigan from enforcing a law banning ballot selfies. *Crookston v. Johnson*, No. 16-2490 (6th Cir. 2016).

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The case arose when plaintiff Joel Crookston challenged a Michigan law that stated "[i]f an elector shows his or her ballot . . . to any person other than a person lawfully assisting him or her . . . after the ballot has been marked . . . the ballot shall not be deposited in the ballot box, but shall be marked 'rejected for exposure' . . . and the elector shall not be allowed to vote at the election." Mich. Comp. Laws § 168.738(2).

Crookston had taken a picture of his completed ballot for the Michigan State University Trustee election on Nov. 6, 2012. Crookston then posted the picture on Facebook. Four years later, Crookston sought an injunction in the U.S. District Court for the Western District of Michigan that would bar the law from being enforced when he planned to publicly share a photo of his completed ballot for the state and federal elections on Nov. 8, 2016. The federal district court granted a preliminary injunction in late October 2016 and denied a motion from Michigan Secretary of State Ruth Johnson to stay the injunction until after the election. Johnson then sought an emergency stay of the preliminary injunction from the U.S. Court of Appeals for the Sixth Circuit.

In a 2-1 decision, Judge Jeffrey Sutton, joined by Judge Ralph B. Guy, Jr. provided multiple reasons for why an emergency stay should be granted. First and foremost, he explained that there were serious doubts that Michigan's law negatively impacted Crookston's First Amendment rights. "[It's] not clear . . . whether a ban on ballot selfies 'significantly impinges' Crookston's First Amendment rights," Judge Sutton wrote. "A picture may be worth a thousand words, but social media users can (and do) post thousands of words about whom they vote for and why."

Judge Sutton also noted that the timing of Crookston's decision to seek an injunction, which was nearly four years after becoming aware of the law at issue, did not give courts the ability to carefully consider the magnitude of any decision. "Timing is everything. Crookston's motion and complaint raise interesting First Amendment issues, and he will have an opportunity to litigate them in full — after this election. With just ten days before the November 2016 election, however, we will not accept his invitation to suddenly alter Michigan's venerable voting protocols, especially when he could have filed this lawsuit long ago," Judge Sutton wrote. "Any such change also would require nuanced policy decisions that no one should be making at the eleventh hour — absent a good explanation for the delay.. . . Our opinion, it bears adding, will not render this case moot. Crookston seeks to vindicate this right in this year's election and future elections. That means he will be able to pursue his claim after the election, when there will be time for due deliberation in the district court and our court."

In a concurring opinion, Judge Guy focused on the question of whether taking a selfie delays the voting process, potentially interfering with other individuals' ability to vote. Specifically, Judge Guy argued that when people are confronted with long lines at a polling place, they typically leave without voting rather than waiting for extensive periods of time in order to vote. "This raises the question of how much delay does taking a selfie cause? There is no easy answer to that question," he wrote. "If one just points the camera at a spot on the ballot and takes a picture this obviously would take little time. If all a person wants is a picture of the ballot that can be done by securing a sample ballot and taking a picture of it. But that is not a selfie for the obvious reason that there is no 'self.' As to how many might avail themselves of the opportunity to take a selfie, I don't really know. But I do know that the number of persons who feel compelled to record their every waking moment and broadly share it with others is immense." Judge Guy also noted that "there was no hearing in the district court on this issue so the State has had no opportunity to present evidence."

"[It's] not clear . . . whether a ban on ballot selfies 'significantly impinges' Crookston's First Amendment rights. A picture may be worth a thousand words, but social media users can (and do) post thousands of words about whom they vote for and why."

— U.S. District Court Judge Jeffrey Sutton

In a dissenting opinion, Chief Judge R. Guy Cole, Jr. argued that the preliminary injunction should remain in place specifically because of the potential penalty for violating the law. "The penalty in Michigan for taking a ballot selfie is the loss of one's right to vote," Chief Judge Cole wrote. "In permitting the loss of such a fundamental right, the majority puts the administrative interests of the state above the individual rights of the citizens of Michigan." Furthermore, Chief Judge Cole wrote that the Michigan Secretary of State had failed to meet any of the standards required for a court to grant a motion to stay, which included the likelihood that the movant will prevail on the merits of the appeal, the likelihood that the movant will be irreparably harmed absent a stay, the prospect that others would be harmed if the stay was not granted, and the public's interest in granting the stay.

Chief Judge Cole argued that Michigan's law prohibiting ballot selfies violated the First Amendment because an explicit restriction on speech required the relevant law be at least "narrowly tailored to serve a significant governmental interest." He wrote that the state did not meet this burden. "[Michigan] has not provided any evidence to show that the problems these laws and instructions were meant to address actually exist in Michigan today," Chief Judge Cole wrote. "When a state infringes upon the freedom of speech of its citizens, it cannot simply assert a government interest in the abstract, it must show that those interests exist and are actually served by the prohibitions imposed by the state."

Similar to the U.S. Court of Appeals for the Sixth Circuit, U.S District Court for the Southern District of New York Judge P. Kevin Castel refused on November 3 to issue an injunction that would block the enforcement of a New York law that criminalizes the exposure of marked ballots at polling sites. *Silberberg v. Board Of Elections of the State of New York*, No. 16-cv-8336 (S.D.N.Y. 2016). The New York

law, which was passed in 1890, states that "[a]ny person who . . . [s]hows his ballot after it is prepared for voting, to any person so as to reveal the contents . . . is guilty of a misdemeanor." N.Y. Elec. Law § 17-130(10). *The Wall Street Journal* reported on November 3 that Judge Castel wrote in his opinion denying the motion that New York had adopted the law for several important reasons, including the prevention of "voter bribery or intimidation."

Although he conceded that ballot selfies present a "potent form of speech presumptively entitled to First Amendment protections," Judge Castel also expressed concerns over the timing of the court action brought by the plaintiffs. "This action was commenced 13 days before the presidential election, even though the statute has been on the books longer than anyone has been alive. Selfies and smartphone cameras have been prevalent since 2007," Judge Castel wrote. "A last-minute, judicially-imposed change in the protocol at 5,300 polling places would be a recipe for delays and a disorderly election, as well-intentioned voters either took the perfectly posed selfie or struggled with their rarely-used smartphone camera. This would not be in the public interest, a hurdle that all preliminary injunctions must cross."

Beyond court rulings, the debate over ballot selfies drew widespread national exposure on Oct. 24, 2016 when musician Justin Timberlake posted an image on Instagram of himself at a voting booth in Tennessee. In a caption, Timberlake wrote, "There could be early voting in your town too. If not, November 8th! Choose to have a voice! If you don't, then we can't HEAR YOU! Get out and VOTE!" *Fortune* reported on October 26 that despite the message encouraging individuals to vote, Timberlake's photo raised questions over whether he was breaking state law. In 2015, Tennessee adopted a law that effectively prohibited voters inside polling places from using mobile phones to make telephone calls, snap pictures, or record videos. In an interview with *Fortune*, Tennessee Secretary of State's Office Spokesman Adam Ghassemi explained that mobile device use inside polling places was allowed only for informational purposes to assist with voting.

On October 25, Memphis-area newspaper *The Commercial Appeal* reported that state officials had initially said that they were reviewing whether Timberlake had violated state election laws. Later that day, Shelby County District Attorney Amy Wierich released a statement explaining that Timberlake would not face any penalty. "No one in our office is currently investigating this matter nor will we be using our limited resources to do so," Weirich said in the statement, according to *The Commercial Appeal*.

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> **— Richard L. Hasen, University of California, Irvine School of Law professor**

Timberlake's predicament demonstrated both the debate and confusion over ballot selfies among the fifty states, which all have their own election rules. *The New York Times* reported on November 8 that states are not consistent in how they handle ballot selfies. The *Times* noted that 20 states and the District of Columbia clearly allowed such photos while 18 other states clearly did not. The laws in twelve states were unclear on whether ballot selfies were permissible. *The Washington Post* reported on November 8 that state laws regulating ballot selfies have been in flux in recent years, with many states attempting to clarify their positions on the practice through legislative processes or policy statements from government officials overseeing elections. In an interview with the *Post* in 2014, Media Law Resource Center Deputy Director Jeffrey Hermes explained that such clarifications were necessary because ballot selfie cases implicate foundational democratic rights. "Usually banning political speech would be a violation of the First Amendment," Hermes said. "But with photography at polling places, there's an intersection of two fundamental aspects of democracy: freedom of speech and the integrity of the voting process."

Others agree that selfie ballot cases raise novel questions that pit important cornerstones of American democracy against each other, and experts have taken opposite sides on the issue. The AP reported on November 4 that Colorado's Deputy Secretary of State Suzanne Staiert continued to stand by the state's ban despite the injunction placed upon it. "We still believe it is good protection against intimidation and vote buying and a number of other vote fraud crimes," Staiert said. In an August 2015 story about ballot selfies, University of California, Irvine Law Professor Richard L. Hasen told *The New York Times* that ballot selfies opened the door to illegal election practices."Without the ballot-selfie ban, we could see the re-emergence of the buying and selling of votes — and even potential coercion from employers, union bosses and other," Hasen said.

In the same August 2015 story by the *Times*, ACLU of New Hampshire Legal Director Gilles Bissonnette disagreed with the assertions that ballots selfies would lead to election corruption, arguing that the now-defunct New Hampshire law had specific problems. Bissonnette also suggested that state officials had other tools to combat election corruption that did not limit free expression. "The problem with [New Hampshire's] law is that it was an outright ban on an innocent form of communication," Bissonnette told the *Times*. "It didn't ban displays involved in vote buying or intimidation. It banned all displays, including ones that carried political messages.. . . The best way to combat vote buying and coercion is to investigate and prosecute cases of vote buying and coercion."

Scott Memmel
Silha Research Assistant

President Barack Obama Leaves Mixed Legacy on Government Transparency

In January 2017, President Barack Obama left office, eight years after he won his first presidential campaign with promises of greater government transparency, saying during his inaugural address that "transparency and the rule of law [would] be the touchstones of [his] presidency." Throughout his two terms, President Obama re-iterated those promises and, at one point in 2013, declared that he has had "the most transparent administration in history." Open government advocates reflecting on President Obama's record have suggested that he did not fully deliver on his promises to make the government more transparent. Rather, critics have argued that President Obama will leave a mixed legacy when it comes to providing greater government transparency to the public.

PRESS FREEDOM

In a Sept. 2, 2016 blog post, Alex Howard, senior policy analyst for the Sunlight Foundation, a nonpartisan nonprofit organization that advocates for greater government transparency, wrote that judging President Obama's record on government transparency is not an easy task. "Over the past seven years, we have acknowledged this administration's progress on open government, decried its failures and advocated for reform," Howard wrote. "The challenge that we and the rest of the country face in judging [whether Obama's administration has provided greater government transparency] is that there is no consensus for what the 'most transparent administration' in U.S. history is, nor how we should assess it." Howard suggested that President Obama's record should be viewed broadly, including examining topics such as compliance with and support of the Freedom of Information Act (FOIA), handling of whistleblowers and classified information leaks, and permitting press access to the White House and other government officials, among others.

President Obama's Record on FOIA

During his terms, President Obama's administration was regularly criticized for its handling of records requests made under FOIA. 5 U.S.C. § 552. For example, the Obama Administration blocked news organizations' FOIA requests after a Navy SEALs team killed Osama bin Laden during a raid in Abbottabad, Pakistan in 2011. Several news organizations, including the Associated Press (AP), *Politico*, Fox News, and National Public Radio (NPR), among others, filed records requests to obtain photos of the deceased, reports on the raid plans, and other details of the mission. However, Department of Defense officials refused to grant expedited reviews for the requests, raising concerns that government officials would seek to leak details about the raid anonymously and selectively. Transparency experts also expressed concerns that government officials would improperly classify the records, including the photos of bin Laden, in order to withhold disclosure by citing FOIA exemptions involving national security. In 2013, the U.S. Court of Appeals for the D.C. Circuit held that U.S. intelligence officials had properly classified the photos of bin Laden and that FOIA's national security exemption allowed the government to withhold the records. News organizations later reported allegations that Department of Defense officials had purged records related to bin Laden in order to circumvent any sort of records disclosure under FOIA. (For more information on the bin Laden photo controversy, see "Legal and Ethical Issues Arise when bin Laden Dies" in the Summer 2011 issue of the Silha *Bulletin*, and "D.C. Circuit Upholds FOIA Denial on bin Laden Photos" in the Summer 2013 issue.)

> "I'm not suggesting that there are not legitimate national security concerns, but what I am saying is that the reflexive impulse that swept the nation after September 11 to withhold any information that could possibly be used by terrorists is today denying the public basic information it needs to function if our democracy is going to function."
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> **— David A. Schulz, First Amendment Attorney**

During the 29th Annual Silha Lecture, First Amendment attorney David A. Schulz suggested that concerns over national security had also led to greater government secrecy during President Obama's term. Schulz argued that in the wake of the September 11 terrorist attacks, both government officials and courts began to broadly interpret the national security exemptions of FOIA, resulting in fewer government record disclosures to the public. He noted that constitutional rights of access to courts were also declining, specifically citing criminal proceedings occurring during the Obama Administration that had been closed to the public because the cases involved classified information and military tribunals in Guantanamo Bay. "I'm not suggesting that there are not legitimate national security concerns, but what I am saying is that the reflexive impulse that swept the nation after September 11 to withhold any information that could possibly be used by terrorists is today denying the public basic information it needs to function if our democracy is going to function," Schulz said during the lecture. (For more on Schulz's lecture, see "29th Annual Silha Lecture Examines the Right to Access Government Information in the Wake of National Security and Privacy Concerns" in the Fall 2014 issue of the Silha *Bulletin*.)

The Obama administration has also been criticized more broadly for its handling of record requests under FOIA. In March 2015, the Center for Effective Government, a non-profit organization focused on government transparency but ceased operations in 2016, issued a report grading the handling of FOIA requests by the 15 federal agencies that receive the most requests.

The center graded agencies' performance on areas that included

establishing clear internal rules for how records should be released, timeliness of cooperating with requests, and the "user-friendliness" of an agency's FOIA website. The Center for Effective Government reported that 10 agencies received a grade of D+ or worse. The remaining agencies either received Bs or Cs, and none received an A.

"The Freedom of Information Act represents the foundational transparency law for the federal government," Center for Effective Government President and CEO Katherine McFate said in a press release accompanying the report. "It is supposed to guarantee ordinary Americans access to government information; it allows the media, advocacy organizations, and citizens to see how government does its work, how decisions are made, and what our public officials do in our name. But providing information to the public requires staff, resources, and commitment. Our report shows agencies are still struggling with the task."

During that same month, the Obama administration decided that it would formalize a rule established during President George W. Bush's administrations that exempted the White House Office of Administration (OA) from FOIA requests. The OA oversees the White House's records archiving system and was subject to FOIA for more than 30 years prior to the Bush administration. In 2007, *Mother Jones* reported that millions of e-mails were missing from the OA's systems. To protect itself from disclosing records about the missing e-mails, the Bush administration claimed that OA was an "advisory office" rather than a federal agency, which would exempt the OA from FOIA requests. On March 17, 2015, the Obama administration issued a final rule in the Federal Register that codified the OA as an advisory office. The designation prompted several open government advocates to criticize Obama's administration as paying only lip service to government transparency.

The Obama administration faced further criticisms in March 2015 after the AP reported that federal agencies had engaged in unprecedented amounts of "censor[ing] government files" or completely denying access to records under FOIA during the previous year. The AP's investigation also found that in nearly one in three cases, courts ruled that the government had improperly redacted or withheld information when challenged. Adding more embarrassment for the Obama administration, *Vice News* reporter Jason Leopold, who is known as a prolific filer of FOIA requests, testified during a June 2015 Congressional hearing that the Pentagon's Office of Net Assessment had once offered to comply with a FOIA request so long as Leopold promised never to file another request. (For more information on the OA decision, the AP report, and Leopold's testimony, see "Obama Administration's Handling of Freedom of Information Act Requests Under Fire" in the Summer 2015 issue of the Silha *Bulletin*.)

Despite the widespread criticisms, President Obama also approved key legislation that strengthened FOIA. In 2010, President Obama signed a bill that repealed sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act that exempted the Securities and Exchange Commission (SEC) from complying with FOIA requests for records regarding "surveillance, risk assessments, or other regulatory and oversight activities." In 2016, President Obama signed the FOIA Improvement Act, which made major reforms to FOIA, including establishing a presumption of openness standard for records, providing greater access to frequently requested records, the creation of a single online portal for FOIA requests, and placing new limitations on agencies' use of Exemption 5 of FOIA, which permits agencies to withhold various types of inter- and intra-agency documents. Advocates praised the reforms as a major update to the 50-year-old FOIA, but argued that further changes would still be needed to make the law more effective. (For more on the SEC bill, see "Congress Revokes New FOIA Exemption for Securities and Exchange Commission" in the Fall 2010 issue of the Silha *Bulletin*. For more on the FOIA Improvement Act, see "President Obama Signs Law Making Significant Amendments to the Freedom of Information Act" in the Summer 2016 issue.)

President Obama's Record on Whistleblowers and Leakers

The Obama administration has also had a troubling history of cracking down on government whistleblowers and leakers of classified information. *Politico* reported on May 12, 2016, that over the course of the eight-year term, the Obama administration prosecuted eight individuals under the Espionage Act, 18 U.S.C. § 793 *et seq*., for disclosing sensitive information to the public. Previous administrations combined had brought only three such prosecutions under the Espionage Act against government leakers since the law was adopted in 1917. The numerous cases brought by the Obama administration have involved the high profile prosecutions of former Central Intelligence Agency (CIA) officers John Kiriakou and Jeffrey Sterling, former National Security Agency (NSA) official Thomas Drake, and U.S. Army Pvt. Chelsea Manning, among others. The Obama administration justified its approach to prosecuting leakers of classified information as necessary for national security purposes. (For more on the Obama administration's prosecution of individuals under the Espionage Act, see "The Media and the Military: Guantanamo Access Rules Loosened; Other Guidelines Set to Limit Leaks" in the Fall 2010 issue of the Silha *Bulletin*, "Open Government Advocates Criticize Obama's Prosecution of Leakers" in the Winter/Spring 2011 issue, "Judge Rebukes Government on Leak Prosecutions" in the Summer 2011 issue, "The Obama Administration Takes on Government Leakers; Transparency May be a Casualty" in the Winter/Spring 2012 issue, "Leaks: New Policies Emerge; Congress Gets Involved" in the Summer 2012 issue, "Manning, Kiriakou Face Punishment for Blowing the Whistle on the War on Terror" in the Winter/Spring 2013 issue, and "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue.)

Critics have also long suspected that Obama administration officials would charge former NSA contractor Edward Snowden, who provided a trove of classified information to journalists Glenn Greenwald and Laura Poitras that exposed widespread U.S. government spying and surveillance on communications worldwide, with violating the Espionage Act if he were ever to return to the United States. Snowden left the country in the wake of his disclosures of classified information and has been living in Russia since 2013. In late 2016, several news organizations, government transparency groups, and civil rights organizations began calling on President Obama to pardon Snowden before leaving office. As the

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Bulletin went to press, President Obama had not commented on whether he would take any such action. (For more information on Snowden's disclosures, see "Snowden Leaks Reveal Extensive National Security Agency Monitoring of Telephone and Internet Communication" in the Summer 2013 issue of the Silha *Bulletin*, "Snowden Leaks Continue to Reveal NSA Surveillance Programs, Drive U.S. and International Protests and Reforms" in the Fall 2013 issue, "NSA Surveillance Practices Prompt Reforms and Legal Challenges Throughout All Government Branches" in the Winter/Spring 2014 issue, "Fallout from NSA Surveillance Continues One Year After Snowden Revelations" in the Summer 2014 issue, "Government Surveillance Critics Target Broad Authority of Executive Order 12333" and "29th Annual Silha Lecture Examines the Right to Access Government Information in the Wake of National Security and Privacy Concerns" in the Fall 2014 issue, "Two Years After Snowden Revelations, National Security Surveillance Issues Still Loom" in the Summer 2015 issue, and "NSA Telephony Metadata Collection Program Remains Controversial Even After It Ends" in the Fall 2015 issue.)

During the 28th Annual Silha Lecture, leading First Amendment attorney James C. Goodale argued that the Obama administration's zealous pursuit of leakers while citing national security concerns was damaging to a free press and government transparency. Goodale, who served as vice chairman of *The New York Times* as well as the *Times*' general counsel, suggested that the Obama administration's approach to whistleblowers was similar to the President Richard J. Nixon administration's attempts in 1971 to prevent *The New York Times* from publishing key portions of the Pentagon Papers, a 47-volume history of American relations with Vietnam leaked to the press by Daniel Ellsberg. Ultimately, the U.S. Supreme Court determined that the government could not issue a prior restraint without more than the mere suggestion of national security concerns. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Goodale argued that the indictments against various individuals under the Espionage Act had "created an atmosphere of fear in Washington, which has made it very hard for the press to gather news and write stories." Goodale also suggested that President Obama's embrace of national security arguments had been harmful for the First Amendment. "In every instance that I know about, Obama has chosen to favor national security over the First Amendment. But isn't the lesson of the Pentagon Papers just the reverse?" Goodale asked during the lecture. "President Obama has not learned the lessons of the Pentagon Papers.. . . When faced with a choice of trying to balance national security and the First Amendment, he's always chosen national security — I hope we get a president the next time around who is more sophisticated about national security." (For more information on Goodale's lecture, see "Silha Lecture Links Pentagon Papers and Obama Administration's Treatment of Leakers" in the Fall 2013 issue of the Silha *Bulletin*.)

> "President Obama has not learned the lessons of the Pentagon Papers.. . . When faced with a choice of trying to balance national security and the First Amendment, he's always chosen national security."
>
> **— James C. Goodale, First Amendment Attorney**

The Obama administration also faced widespread criticism from press advocates for its years-long pursuit of *New York Times* reporter James Risen's testimony during the government's prosecution of former CIA agent Jeffrey Sterling. The U.S. Department of Justice (DOJ) focused on Risen after he published classified information about an unsuccessful CIA plan to undermine Iran's nuclear program in his 2006 book *State of War*. Government prosecutors brought charges against Sterling under the Espionage Act, alleging that he was the source of Risen's information. Prosecutors claimed that Risen was the only person who knew whether Sterling had disclosed classified information and issued a subpoena seeking Risen's testimony. Risen refused to testify, leading to a lengthy court battle between the government and the journalist. In 2014, the U.S. Supreme Court declined to hear the case, which allowed the U.S. Court of Appeals for the Fourth Circuit's decision ordering Risen to testify to stand. Ultimately, prosecutors dropped their pursuit of Risen's testimony in early 2015 when it became clear that Risen would prefer to go to jail rather than disclose any information about his source. Sterling was later convicted without Risen's testimony. (For more information on Risen's case, see "Judges Rebuke Government on Leak Prosecutions" in the Summer 2011 issue of the Silha *Bulletin*, "Reporters Struggle to Claim Privilege to Avoid Testifying About Confidential Sources" in the Fall 2013 issue, "Update: Supreme Court Declines to Hear Reporter's Privilege Cases" in the Summer 2014 issue, "Attorney General Holder Leaves Problematic Legacy on Press Rights and Civil Liberties" in the Fall 2014 issue, and "Espionage Conviction Ends Lengthy Struggle to Compel Journalist's Testimony" in the Winter/Spring 2015 issue.)

During the 30th Annual Silha Lecture, Risen said that the Obama administration's decision to pursue both whistleblowers and journalists ultimately meant that government employees were less likely to come forward with information even when it was not classified, making government operations more opaque. As a result, the only way the public was able to get information about the government's secretive operations was through individuals, such as Chelsea Manning and Edward Snowden, who were willing to take significant risks to leak information to the public. "The crackdown on leaks has made it very difficult [for] that normal organic relationship between reporters and the government. So there's a huge clampdown on any form of dissent within the government, and I think that's been like a lid on a pressure cooker," Risen said. "So the only people now willing to come out are the people that are willing to risk their entire life to [disclose information to the press].. . . They say, 'I'm gonna get one shot at this, and I'm going to take as much as possible.' But there's not very many people like that, and I think that's why you've seen Manning and Snowden. That's not a business model for journalism, and it's not a model for

the way government should work." (For more information on Risen and his attorney Joel Kurtzberg's discussion on Risen's legal battle with the government, see "30th Annual Silha Lecture Addresses Challenges to Reporting on National Security Matters" in the Fall 2015 issue of the Silha *Bulletin*.)

However, President Obama also sought to place some limitations on instances when DOJ officials could issue subpoenas to reporters. In 2013, President Obama directed then-Attorney General Eric Holder to review the DOJ's guidelines for investigations that involved news media organizations. After several months of review, the DOJ released updated guidelines, which was the first time the guidelines had been revised in nearly 25 years. The updates stipulated that DOJ officials must provide notice prior to issuing a subpoenas for journalists' phone or other communications records unless the Attorney General determines notification would create a "clear and substantial threat" for an investigation, created greater oversight mechanisms for internal approval processes prior to subpoenaing journalists, and safeguarded information that was collected from journalists, among other changes. In 2015, the DOJ further clarified language in its internal guidelines based on feedback from news organizations and its experiences pursuing Risen's testimony. Although the guidelines provide some protections for journalists, they are procedural rules for the DOJ that do not carry any actual force of law. (For more information on the DOJ guidelines, see "Department of Justice Revises Guidelines for Investigating Journalists" in the Summer 2013 issue of the Silha *Bulletin*, and "Espionage Conviction Ends Lengthy Struggle to Compel Journalist's Testimony" in the Winter/Spring 2015 issue.)

President Obama's Record on Press Access

As for media access to the White House and President Obama, press advocates have regularly criticized the Obama administration. In 2013, the White House Correspondents' Association sent an open letter to then-White House Press Secretary Jay Carney to protest the White House's overreliance on an in-house photographer to capture images of the president. The letter listed numerous events during 2013 that the White House had granted exclusive access to official presidential photographer Pete Souza, effectively barring press photographers from covering the event. Souza would later make the photos available to the press free of charge. Critics of the White House's decision to limit independent photography of the president and to provide official photos to the public argued that the practice essentially amounted to propaganda and an attempt to control the news. (For more information on the White House Correspondents' Association's letter, see "Ethical Issues in Fall 2013 Include Questionable '60 Minutes' Source, Restrictive White House Photography Practices" in the Fall 2013 issue of the Silha *Bulletin*.)

> "The crackdown on leaks has made it very difficult [for] that normal organic relationship between reporters and the government. So there's a huge clampdown on any form of dissent within the government, and I think that's been like a lid on a pressure cooker."
>
> **— James Risen, *New York Times* reporter**

In August 2015, the Society of Professional Journalists (SPJ), representing a coalition of 53 news organizations and press advocacy groups, also sent a letter to President Obama protesting several administration policies that limited journalists' access to federal government employees. The coalition's complaints against the Obama administration included prohibitions on staff communicating with the press prior to checking in with public affairs offices or designated political appointees, delays in press interviews with staff members or refusals of interviews altogether, officials monitoring press interviews of staff members, and practices of officials speaking on the condition that they not be identified unless they have the title of spokesperson. The coalition argued that these constraints on the press for speaking with administration officials led to less transparency and an uninformed public.

"The public has a right to be alarmed by these constraints — essentially forms of censorship — that have surged at all levels of government in the past few decades," the coalition wrote. "Surveys of journalists and public information officers (PIOs) demonstrate that the restraints have become pervasive across the country; that some PIOs admit to blocking certain reporters when they don't like what is written; and that most Washington reporters say the public is not getting the information it needs because of constraints. An SPJ survey released in April confirmed that science writers frequently run into these barriers."

"Some federal officials have said these policies are appropriate because employees can become whistleblowers to report wrongdoings. These whistleblower policies do not work," the coalition added. "We acknowledge that the PIO function is often important or creating a strong central point for synthesizing and distributing official information, and we appreciate the dedication and earnestness of these public employees. But information-control practices have gone too far, and must be curtailed for the good of our democracy and reputation in the world."

In an April 2015 report for the *Columbia Journalism Review*, political reporter Susan Milligan contended that the Obama White House often sought to circumvent the press, instead seeking to provide news directly to the public through social media channels. "Presidents have long tried to get around the press when it suits them. But the dynamics have changed dramatically with the current president, especially with the escalation of technology, social media, and an increasingly sophisticated ability to identify and reach niche audiences," Milligan wrote. "Previous presidents have held a town hall meeting or given an exclusive to a specialty publication to get a message out or announce a new policy to a friendly audience. The Obama White House has done this, too, and taken it a step further, becoming the first to have its own in-house video reporting operation, which produces 'West Wing Week,' a Friday show viewable on the White House's

Transparency, *continued on page 16*

Transparency, *continued from page 15*

website. That enables the administration to bypass the press corps completely, if it chooses."

In a May 24, 2016 column, *Washington Post* media columnist Margaret Sullivan suggested that President Obama's legacy on transparency when it comes to press access should ultimately be viewed as mixed at best. "Call it Transparency Lite. On Monday, during a visit to Vietnam, the president spent some quality time with the media — in the form of Anthony Bourdain, the celebrity chef. A couple of years ago, he did a heavily publicized interview with the comedian Zach Galifianakis on the faux talk show "Between Two Ferns" [to discuss health care in the United States], and last year he had a visit to podcaster Marc Maron's garage for a chat about fatherhood and overcoming fear," Sullivan wrote. "But his on-the-record interviews with hard-news, government reporters have been relatively rare — and, rather than being wide-ranging, often limited to a single subject, such as the economy."

"Remarkably, *Post* news reporters haven't been able to interview the president since late 2009. Think about that. The *Post* is, after all, perhaps the leading news outlet on national government and politics, with no in-depth, on-the-record access to the president of the United States for almost all of his two terms," Sullivan added. "I couldn't get anyone in the White House press office to address this, despite repeated attempts by phone and email — which possibly proves my point."

President Obama's Record as a Whole

As President Obama's second term was winding down, White House Press Secretary Josh Earnest penned an Aug. 30, 2016 letter to the editor for *The New York Times* defending the Obama administration's record on transparency, arguing that it had achieved many steps to becoming more transparent than previous administrations. "These accomplishments include, but are not limited to, routinely and proactively releasing the name, date and time of nearly every White House visitor. Some will recall that the previous administration went to the Supreme Court to try to prevent the release of these records," Earnest wrote. "President Obama, as a matter of policy, invites White House journalists to cover his formal remarks at fund-raisers, even when they are held in a private home. Previous presidents have granted, at best, intermittent access to such events. The Obama administration has also proactively released more than 180,000 data sets on a federal government website named, appropriately enough, Data.gov. This means that reporters and citizens have access to mind-boggling amounts of data — that they may not even have known existed — without having to formally request it."

"If journalists don't acknowledge steps that the Obama administration has taken to strengthen transparency, who will?" Earnest asked. "Leading the fight for government transparency means confronting politicians who face intense political pressure on narrow, short-term interests and pressing them to prioritize transparency, too, even when it's politically inconvenient — especially when it's politically inconvenient. In this regard impartial journalists are advocates. Effective advocacy means giving credit where it is due. If President Obama's government transparency effort is not even noted by *The Times*'s media columnist [Jim Rutenberg, who criticized Obama's transparency record on August 29], then why would future presidential candidates make it a priority?"

Journalists, news organizations, and press advocates panned Earnest's response to criticisms of President Obama's record on transparency. In a Sept. 12, 2016 letter to Earnest, a coalition of 40 journalism and open government groups, including SPJ, The Poynter Institute, the Reporters Committee for Freedom of the Press, and the Student Press Law Center, among others, maintained that the widespread criticisms of President Obama should stand, suggesting that his record on transparency should be considered a failure. "You say in your letter that effective advocacy means giving credit where it is due," the coalition wrote to Earnest. "That will happen when journalists believe meaningful improvements have been made. The actions the Obama administration has taken to invite journalists to cover the President's formal remarks at fund-raisers, information being made available on Data.gov and releasing names of White House visitors are all steps in the right direction. But they're not enough. And we believe the problems outweigh what you are calling accomplishments."

"We are disappointed that, as we rapidly approach the election of a new president, we cannot use the Obama administration as an example of how it should be done. To rephrase your last question — if this President's transparency effort is such a disappointment and the press does not object[,] why would future administrations consider being more open?" the coalition asked. "But we do object. President Obama may be leaving the White House, but we aren't going anywhere. Our promise to the American people is to keep fighting for their right to know what their elected officials are up to. To keep fighting for information and images they need to know and see to liver their best, most informed, lives as American citizens. It's the least we can do."

However, the Sunlight Foundation's Howard took a more tempered approach in his September 2 commentary when considering the president's record on transparency as a whole, suggesting that President Obama should be viewed as having encouraging aspirations that he was never able, or willing, to fully realize. "President Obama's choice to make open government part of his first day in office reflects an optimistic worldview that connected democracy and legitimacy to transparency and accountability in the wake of a decade of secrecy around an expanding national security state," Howard wrote. "While the actions of his administration contradicted this in deed, it would be an error to dismiss the ideas themselves or the investments in time, money and technology as meaningless or divorced from an important aspect of American democracy that this presidency has deepened. The most definitive statement we can make today is that President Obama will leave office with a mixed record on open government, although it's not too late to embrace reforms that will cement the aspects of this legacy that have merit or to connect these initiatives to the ideals and principles that the American experiment was founded upon."

Casey Carmody
Silha *Bulletin* Editor

United States Supreme Court Set to Hear Oral Arguments on "Disparaging" Trademarks

On Sept. 29, 2016 the U.S. Supreme Court granted *certiorari* in *Lee v. Tam*, a case in which plaintiffs are challenging the constitutionality of the "disparaging clause" of the Lanham Act, which bars the Patent and Trademark Office (PTO) from registering scandalous, immoral, or disparaging trademarks. 15 U.S.C.A. § 1052(a). The case was brought by Simon Shiao Tam, the founder and bass player of a Portland, Ore. all-Asian American dance rock band called "The Slants." According to Tam, the band chose the controversial name in part to "reclaim" and "take ownership" of Asian stereotypes.

SUPREME COURT NEWS

In 2010, Tam filed an application seeking to register the mark of "The Slants." However, PTO denied the registration of the band's name, finding that the mark was disparaging to people of Asian descent and would be in violation of Section 2(a) of the Lanham Act barring the registration of such marks. Tam appealed the PTO's decision to the Trademark Trial and Appeal Board, which again denied the registration of the mark. Tam then appealed the board's decision to the U.S. Court of Appeals for the Federal Circuit, arguing that the PTO erred in refusing the registration and challenged the constitutionality of Section 2(a).

In April 2015, a three-judge panel for the Federal Circuit initially affirmed the PTO's decision. *In re Tam*, 758 F.3d 567 (Fed. Cir. 2015). However, the full Federal Circuit voted to rehear the case *en banc*. On Dec. 22, 2015, the Federal Circuit came to a new conclusion, holding 9-to-3 that the exclusion of "disparaging" trademarks violated the First Amendment. *In re* Tam, 808 F.3d 1321 (Fed. Cir. 2015) (*en banc*). Writing for the majority, Judge Kimberly Moore wrote that Section 2(a) of the Lanham Act is a "viewpoint-discriminatory regulation of speech, created and applied in order to stifle the use of certain disfavored messages." The court noted that the provision significantly contributed to the chilling effect on speech. "Discrimination against a mark by virtue of its offensive, disparaging nature discriminates against the mark's political or social message," Judge Moore wrote.

The majority also held that the prohibition on the registration of trademarks was not a regulation of "commercial speech." Commercial speech is a subset of protected speech first identified in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*, when the U.S. Supreme Court struck down a state provision prohibiting pharmacists from advertising prescription drug prices. 425 U.S. 748 (1976). The Supreme Court has long maintained that government regulations of commercial speech are subject to a lower level of scrutiny than what is applied to restrictions on other types of speech, such as political expression. Regardless, the Federal Circuit held that Section 2(a) would be unconstitutional even if trademarks were considered commercial speech, as the government lacked a substantial governmental interest as required under *Central Hudson Gas & Electric Corp v. Public Service Commission*, which established a four-part test for determining whether government regulations of commercial speech could be considered constitutional. 447 U.S. 557 (1980).

The consumer advocacy organization Public Citizen, Inc. disagreed with the Federal Circuit's assessment of what constitutes commercial speech. In an *amicus* brief, Public Citizen argued that trademark law regulates commercial speech. "The essential characteristic of a trademark is that it is a word, set of words, or image that denotes good or services offered in commerce," the brief explained. "The legal protections afforded trademarks affect the owner's commercial interests." The brief noted that the question of applicable First Amendment scrutiny, and the importance of classifying trademarks as commercial speech, would not need to be addressed by the court if the court determined that the disparagement provision does not restrict speech, or if Tam's mark was not disparaging itself.

Other *amici* have argued that holding the "disparaging clause" to be unconstitutional could negatively affect other areas of the modern trademark system. An *amicus* brief filed on behalf of 31 law professors argued that denial of registration for a trademark is not a punishment for speech. "The Federal Circuit's mistake was to treat a regulatory, rights-granting program as if it were a punishment for speech, rather than a government program awarding rights to control commercial speech to one private party: rights which allow the registrant to suppress the speech of others," the professors wrote. The brief also noted that application of strict scrutiny, or even the intermediate scrutiny standard of *Central Hudson*, would not be limited to the disparagement bar. "Many of the other bars, as well as other provisions of the Lanham Act, [such as bars on marks which are immoral, deceptive, or falsely suggestive of a connection with persons, institutions or religions,] have features that are at least dubious under *Central Hudson* scrutiny, which assumes that the government is directly suppressing speech and therefore puts a relatively heavy burden on the government to justify its prohibitions," the professors added.

In a Nov. 8, 2016 newsletter, K & L Gates LLP attorneys Joanna Dikos and Thomas W. Dollar wrote that regardless of the outcome, the U.S. Supreme Court's decision would have a significant impact on intellectual property law. "*Tam* promises to be a consequential case not only for the holder of potentially disparaging marks but for the IP world more broadly. If the U.S. Supreme Court strikes down the disparagement provision as a content-based speech restriction, other provisions of § 2 [of the Lanham Act] are likely in jeopardy as well. Foremost among them are § 2(a)'s provisions concerning 'immoral, deceptive, or scandalous matter,' which have broad applications similar to the disparagement provision," the attorneys wrote. "At the same time, a decision upholding the disparagement provision could be equally consequential. The Federal Circuit warned that the logic behind § 2(a) could be extended to copyright registration, allowing the government to refuse registration of works containing offensive racial slurs or religious insults."

In the near term, Tam's case is having an immediate impact on a

Trademarks, *continued on page 18*

American Bar Association Expresses Concerns over Publishing Report Calling Donald Trump a "Libel Bully"

On Oct. 24, 2016, *The New York Times* reported that the American Bar Association (ABA) was hesitant to publish a report analyzing then-presidential candidate Donald Trump's history of filing libel lawsuits against his critics. News reports suggested that ABA officials appeared worried that publishing the report with its highly critical language would prompt Trump to file a lawsuit against the organization. However, the association maintained that it had sought minor changes to ensure that the ABA maintained a non-partisan position in the election. After news broke about the association's concerns, several press advocates and media law attorneys criticized the ABA for seeking to stifle and censor a report about threats to free expression.

LIBEL

The report at issue, titled "Donald J. Trump Is A Libel Bully But Also A Libel Loser," was written by First Amendment attorney Susan Seager, who also teaches media law at the University of Southern California. *Washington Post* media columnist Erik Wemple reported on October 25 that Seager proposed to write the report for the ABA Forum on Communications Law's quarterly newsletter *Communications Lawyer* after Trump announced in February 2016 that he intended to "open up" U.S. libel laws in order to make it easier for individuals to win libel lawsuits against the press. (For more information on President-elect Trump's comments about libel laws, see "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue of the Silha *Bulletin*.)

According to the *Times*, Seager's report examined court records related to seven free speech-related lawsuits that Trump and his companies had filed previously against various individuals, including an architecture critic and his newspaper, a political commentator, a former Trump University student, and a beauty contest contestant, among others. The report, which contained 81 footnotes referencing sources, noted that Trump had lost four of his lawsuits, withdrawn two, and obtained a default judgment in private arbitration after the beauty contestant failed to appear. Seager concluded the report advocating that state legislatures pass anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation, and criticized Trump's attempts to sue his critics.

"Trump's speech-targeting lawsuits filed in public courts were doomed to failure because the First Amendment protects good-faith reporting about public figures (that is, published without actual malice, [meaning knowledge of falsity or reckless disregard for the truth as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964)]) and immunizes subjective opinions and jokes, even if they are 'negative' and 'horrible,' as Trump complains," Seager wrote. "Journalists and whistleblowers may have won dismissal of Trump's libel lawsuits, but at significant cost of time, energy, and money.. . . [A]nti-SLAPP laws, while not perfect, would help discourage frivolous libel lawsuits favored by Trump & Co. Instead of labeling frivolous, speech targeting lawsuits 'SLAPP suits,' perhaps we should call them 'Trump Suits.'" Seager's full report is available at http://www.medialaw.org/index.php?option=com_k2&view=item&id=3470.

The *Times* reported that upon receiving a draft of the article, ABA Deputy Executive Director James Dimos expressed concerns over the language used in the report in an October 19 e-mail sent to the association's leadership group as well as one of *Communications Lawyer*'s editors. Particularly, Dimos noted that ABA staff had suggested that Seager's language could prompt Trump to file a libel lawsuit against the bar association. "While we do not believe that such a lawsuit has merit, it is certainly reasonable to attempt to reduce such a likelihood by removing inflammatory language that is unnecessary to further the article's thesis," Dimos wrote in the e-mail, according to the *Times*. "Honestly, it is the same advice members of [the ABA's Forum on Communications Law] would provide to their own clients."

The *Washington Post*'s Wemple reported on October 25 that Dimos' e-mail also contained a set of proposed

Trademarks, *continued from page 17*

similar trademark case that involves the Washington Redskins, a professional American football team, as it was making its way through the Fourth Circuit. On June 18, 2014, the PTO decided to cancel the registration of six "Redskins" marks, arguing that the marks were disparaging to Native Americans under Section 2(a) of the Lanham Act. Shortly thereafter, Pro-Football, Inc., the corporate entity that owns the professional football team, sought review of the PTO's decision in the U.S. District Court for the Eastern District of Virginia. On July 8, 2015, the federal district court affirmed the PTO's decision, holding that the federal trademark registration program should be considered government speech — a theory rejected by the Federal Circuit in *Tam* — and was thus exempt from First Amendment scrutiny. The federal district court also found that the cancellation of the "Redskins" marks did not violate the team's free speech rights. *Pro-Football, Inc. v. Blackhorse*, 112 F.Supp. 3d 439 (E.D. Va. 2015).

In an unusual move, Pro-Football, Inc. petitioned the U.S. Supreme Court on April 25, 2016 to grant *certiorari* in the case prior to it being heard before the U.S. Court of Appeals for the Fourth Circuit. Pro-Football, Inc. argued that their case was substantially similar to *Lee v. Tam*, and therefore the Court should consider the cases together. The Supreme Court denied *certiorari* in the Redskins case on October 3. On October 18, the U.S. Court of Appeals for the Fourth Circuit agreed to postpone oral arguments in anticipation of the Supreme Court's decision in *Tam*.

The U.S. Supreme Court set oral arguments in *Lee v. Tam* for Jan. 18, 2017.

Ronald Waclawski
Silha Research Assistant

edits. Dimos wrote that the changes would "do no harm to the article while addressing the legitimately held views of ABA staff who are charged with managing the reputational and financial risk to the Association." Edits included changing the headline from "Donald J. Trump Is A Libel Bully But Also A Libel Loser" to "Presidential Election Demonstrates Need for Anti-SLAPP Laws," removing several phrases describing Trump as a "loser" and a "bully," re-phrasing titles describing Trump as "the GOP presidential nominee" to "the presidential nominee," and deleting several of Seager's critical comments about Trump's appearance and actions, among other edits.

Wemple reported that Dimos had called the edits "suggested changes." However, Seager told *The Washington Post* that she had perceived them to be "required edits" before the ABA would allow her report to be published in the Fall 2016 issue of *Communications Lawyer*. As a result, she chose to withdraw her article rather than make changes. The Media Law Resource Center later agreed to publish Seager's report on its website on October 21 without substantial edits.

In an October 25 post on *Law Newz*, Seager criticized the ABA for attempting to change the language in the report, noting that she intended to be extremely critical of Trump. "I am a journalist and First Amendment lawyer. I have spent years defending writers against libel lawsuits. I've told celebrity lawyers to stuff their blowhard cease-and-desist letters," Seager wrote. "But I did not expect to be censored by the American Bar Association when I tried to publish my study/article, 'Donald J. Trump Is a Libel Bully but Also a Libel Loser.'"

"I wasn't worried that my censored words would create liability because my words are accurate descriptions of Trump's legal strategies and losses, protected opinion, and privileged fair reports of official court records. It's true most of my 6,500-word, 81-footnoted article was untouched by the ABA's edits. But I wanted to preserve my blunt and colorful language to emphasize the urgent threat Trump poses to a free press and free speech," Seager added. "I also think most lawyer articles are boring. I am a journalist at heart and try to keep the law from deadening my writing. I used lively language in my article to attract an audience beyond lawyers. To use one of Trump's favorite phrases, it's 'sad' that the ABA censored my article. The ABA proved my point: that Trump chilled speech by using baseless lawsuits and empty threats."

In an October 25 interview with Law.com, ABA spokeswoman Carol Stevens defended the association's actions, noting that officials never said that the article should not be published. Stevens maintained that Seager's report could be viewed as a partisan attack on Trump, which could create problems for the ABA. "We have a strong policy that we are a nonpartisan organization," Stevens said. "We don't contribute to candidates, we don't endorse candidates. We're strictly nonpartisan, that's why this ended up on people's radar." Former ABA president H. Thomas Wells Jr. also told Law.com that the ABA was acting as a responsible organization by closely reviewing Seager's work. "The ABA as an organization has an obligation to make sure that things it publishes are not actionable," Wells said. "And whether it's written by a forum or a section, it all comes back to the overall organization."

Several media law attorneys and free press advocates were critical of the ABA for seeking significant changes to Seager's report. In an interview for the *Times* October 24 story, attorney David J. Bodney, a former chairman of the ABA's Forum on Communications Law, said that the organization's position had little justification. "It is more than a little ironic that a publication dedicated to the exploration of First Amendment issues is subjected to censorship when it seeks to publish an article about threats to free speech," Bodney told the *Times*. "If push came to shove, as I recently told an [ABA] representative, one could surely imagine top-notch libel lawyers standing in line to defend this article against a defamation lawsuit on a *pro bono* basis. Evidently, that wasn't assurance enough."

In an October 25 op-ed for the *New York Daily News*, prominent First Amendment attorney Floyd Abrams wrote that the ABA's actions presented a troubling vision of the future. "The decision of the American Bar Association to stifle publication of an article in a publication of the ABA Media Law Committee that was critical of Donald Trump was not only an unconscionable abandonment of free speech principles but an ominous sign of what may lie ahead," Abrams wrote. "Think of it. A committee of media lawyers established by the ABA to assure protection of First Amendment rights determined to publish a detailed report about cases commenced by Trump. The piece concluded that Trump had often threatened litigation against his critics to silence them and had commenced seven of them. He never won any of them when they were litigated and his only victory came when a former beauty contest winner did not appear in court."

"That the ABA, the nation's preeminent national bar association, should seek so hard to avoid controversy and potential litigation that it prevents one of its committees — one devoted to the First Amendment, no less — from publishing what it viewed as an extremely newsworthy article about free speech is truly distressing," Abrams added. "The visage of such critics of the press, of Internet publications and of individuals who speak out using their wealth to intimidate their critics into silence is a new one in American life. As a result of Supreme Court cases that are highly protective of First Amendment rights, speakers and publications are far better protected against the threat of punishing libel litigation than was once the case. But the dangers of litigation by wealthy individuals devoted to punishing speech critical of them remain. The costs of defending litigations against well-funded plaintiffs can be overwhelming. And the risks of losing such litigation in an atmosphere in which the nation is so deeply divided are accentuated. These are dangerous times."

On October 28, *Law360* reported that the ABA had reversed course and agreed to publish Seager's article without changes. In an interview, Seager told *Law360* that she had contacted the ABA to offer to resubmit the article without changes in response to its public statements during the controversy. "I'm very happy that the ABA has decided to publish my article in its uncensored version," Seager said. "I only wish the ABA could admit that it tried to kill my story and try to censor my story, and not pretend otherwise. But now many more people can read the article, and that's the important thing."

Casey Carmody
Silha *Bulletin* Editor

Congress Adopts Law Protecting Online Consumer Reviews

On Nov. 28, 2016 the U.S. Senate passed the Consumer Review Fairness Act, H.R. 5111, a law that would protect consumers from retaliation after posting negative online reviews. The law voids "non-disparagement" or "gag" clauses, provisions in form contracts meant to stifle a consumer's ability to leave negative reviews. Form contracts are documents drafted unilaterally by one party and signed by a second party who has no negotiating power and must adhere to the contract's provisions. Terms of service agreements are a common type of form contract. The bill passed the House of Representatives on Sept. 12, 2016, and the bill was presented to President Barack Obama for approval in early December 2016. Proponents have argued that the bill is necessary to ensure that customers can provide honest reviews of businesses without fear of facing a lawsuit.

ONLINE SPEECH

On April 28, 2016, Rep. Leonard Lance (R-N.J.) introduced the Consumer Review Fairness Act in the U.S. House of Representatives. According to the House Report, the purpose of the CRFA "is to prohibit the use of certain non-disparagement clauses in form contracts that restrict the ability of a consumer to publicly review the goods or services offered in interstate commerce that were the subject of the contract." H.R. 114–731. The report also explained the danger that could arise from the proliferation of such clauses: "[i]f such clauses become widely adopted, negative yet truthful reviews may be chilled, undermining the overall credibility of consumer reviews. The newfound utility of consumer reviews would then be reduced as trust in their veracity diminishes."

The bill voids any provision of a form contract when the provision prohibits or restricts individuals' ability to provide reviews of any goods or services, imposes penalties or fees against an individual who creates any such reviews, or requires that an individual transfer their intellectual property rights related to reviews to the reviewed company. The bill also grants the Federal Trade Commission (FTC) the power to enforce the Consumer Review Fairness Act and impose fines under Section 5 of the Federal Trade Commission Act, which grants the FTC the authority to regulate unfair and deceptive acts and practices. 15 U.S.C. § 45.

The bill was introduced in response to a federal case where an online seller penalized a consumer for a negative review left on a website, and subsequently reporting the penalty as a debt, negatively effecting the consumer's credit. The case involved KlearGear, an online retailer, that allegedly failed to ship an item ordered by John and Jennifer Palmer in December 2008. In February 2009, Jennifer posted a negative review of the company on RipoffReport.com. In May 2014, *Ars Technica* reported that more than three years later, John received an e-mail from the company that directed him to delete the negative review within 72 hours or face paying $3,500. The e-mail indicated that the Palmers' negative review was in violation of KlearGear's "non-disparagement clause" that appeared in the company's terms of service. However, the clause did not appear in the company's terms of service when the Palmers placed their order in 2008, according to *Ars Technica*.

> "[N]on-disparagement clauses are unnecessary to defend against unlawful reviews (*i.e.*, defamation) and thus serve only to suppress lawful reviews."
>
> **— Scott Michelman, Public Knowledge attorney**

When the Palmers refused to remove the critical review, KlearGear employed a collection agency to collect the $3,500, which damaged the couple's credit. In December 2013, the Palmers filed suit in the United States District Court for the District of Utah seeking a declaratory judgment that any alleged debts that arose out of KlearGear's non-disparagement clause should be considered null and void. The complaint also alleged that KlearGear had violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, for reporting a debt that the Palmers claimed they did not owe, as well as counts of defamation, intentional interference with prospective economic relations, and intentional infliction of emotional distress.

On April 30, 2014, Judge Dee Benson issued a default judgment against KlearGear, writing, "KlearGear.com is liable to Plaintiffs for violating the federal Fair Credit Reporting Act, for defamation, for intentional interference with prospective contractual relations, and for intentional infliction of emotional distress." Judge Benson also ruled that Palmer "does not now, and never did, owe KlearGear.com or any other party any money based on KlearGear.com's 'non-disparagement clause' or any money based on John Palmer's failure to make any payment allegedly owing under that clause or John Palmer's dispute that he owed any money under that clause." Order Entering Default Judgment, *Palmer v. Kleargear.com*, Civil Action No. 13-00175 (D. Utah May 5, 2014). On June 25, 2014, *Ars Technica* reported that Judge Benson awarded $306,750 in compensatory and punitive damages, plus attorney's fees, to the Palmers. *Ars Technica* noted that "[t]he couple also wanted the judge to rule that John Palmer had not agreed to this 'non-disparagement clause,' which is in violation of the First Amendment."

KlearGear is not the only company who has tried to penalize customers over negative reviews. On Sept. 15, 2015, Joe Mullin of *Ars Technica* reported that George Pelz, the owner of Pageo Jewelry, a Boston-based jeweler, sued an anonymous reviewer named "Linda G.," who had left a negative review of his store on Yelp, an online site publishing user reviews about local businesses. Upon seeing the criticisms, Pelz left a reply on the review, calling the anonymous reviewer a "Yelp terrorist." Pelz later filed a defamation suit against "Linda G." on July 27, 2015 in the Boston Municipal Court, Central Division, alleging that the review contained several false statements that harm his reputation. On Sept. 30, 2015, *Ars Technica* reported that during pre-trial proceedings. Pelz subpoenaed Yelp to obtain the name and address of "Linda

G.," and that Yelp had complied. Yelp PR Manager Rachel Waler told *Ars Technica* via e-mail that the company had initially resisted Pelz's request but complied after Pageo produced facts that Yelp believed supported his case.

Yelp is not unfamiliar with requests to reveal the identities of their anonymous online reviewers, having complied with several requests related to defamation suits in the past. Such requests have drawn the attention of various civil liberties organizations who defended the identities and speech of anonymous online reviewers. In an *amicus* brief for *Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.*, a Virginia case involving a similar subpoena, the Electronic Frontier Foundation (EFF) argued that the First Amendment protects not only the right to speak freely, but to do so anonymously. 62 Va. App. 678, No. 140242 (Va. Ct. App. 2014). "The right to speak anonymously is deeply embedded in the political and expressive history of this country," the EFF wrote in its brief. "Allowing individuals to express their opinions unmoored from the context of identity encourages participation in the public sphere by those who might otherwise be discouraged from doing so." (For more on Yelp compliance with requests to reveal identities of their anonymous online reviewers, see "Recent Cases Put Online Defamation in the Spotlight" in the Winter/Spring 2013 issue of the Silha *Bulletin*, and "Virginia Court Orders Yelp to Identify Authors of Allegedly Defamatory Reviews" in the Winter/Spring 2014 issue).

As Congress was considering the bill, Scott Michelman, an attorney for consumer advocacy organization Public Knowledge, provided written testimony for a Nov. 4, 2015 hearing before the U.S. Senate Committee on Commerce, Science & Transportation that cited several types of harms that non-disparagement clauses impose on both consumers and the marketplace. These harms included preventing consumers from being able to express themselves; subjecting consumers to bullying; potentially subjecting consumers to retaliation for not retracting their reviews; suppression of negative reviews distorting the view of the businesses using those clauses; and creating disadvantages for businesses who choose not to employ those clauses by the skewing of available reviews.

Michelman also responded to criticisms that non-disparagement clauses are a reasonable tool for businesses to protect their reputation. "[M]ost online review sites already provide an avenue for businesses to defend their reputation — by responding to the criticism and pointing out, for instance, how the business's practices have changed from what a customer is criticizing or why a consumer's concern was unreasonable," Michelman wrote. Michelman's testimony also noted that businesses only have a legitimate ground for complaint against defamatory statements, as opposed to lawful reviews that are merely negative. "[N]on-disparagement clauses are unnecessary to defend against unlawful reviews (*i.e.*, defamation) and thus serve only to suppress lawful reviews," Michelman wrote.

> "At the end of the day, fair and honest commentary — whether it's positive or negative — serves to inform both consumers and, if taken properly by the business owner, can actually help them to improve their business practices, as well."
>
> **— Laurent Crenshaw, Yelp Director of Public Policy**

In a December 7 interview with NBC News, Yelp Director of Public Policy Laurent Crenshaw said that the company was pleased that Congress had passed the Consumer Review Fairness Act, noting that the bill would provide protections for online expression. "While these clauses aren't everywhere, when people hear about them, it does create a chilling effect and that's something we've been concerned about and were very glad that Congress has taken steps to eliminate," Crenshaw told NBC News. "At the end of the day, fair and honest commentary — whether it's positive or negative — serves to inform both consumers and, if taken properly by the business owner, can actually help them to improve their business practices, as well."

Although the courts have been grappling with non-disparagement clauses, laws targeting such clauses are a relatively recent development. The first law of this kind was signed by California Gov. Jerry Brown on Sep. 9, 2014. In a Sep. 10, 2014 story for *Forbes*, Eric Goldman described the California law as a "first-in-the-nation statute to stop businesses from contractually gagging their customers." The California law penalized businesses using provisions which would waive a consumer's right to make statements regarding the seller or its employees: up to $2,500 for the first violation, $5,000 for subsequent violations, and $10,000 for willful or reckless violations. A similar bill was introduced in the Massachusetts House of Representatives in January 2015.

Having cleared both houses of Congress, the Consumer Review Fairness Act was presented to President Obama on Dec. 2, 2016. The president signed the bill into law on December 15.

Ronald Waclawski
Silha Research Assistant

The Daily Beast Pulls Article Effectively Outing Olympic Athletes

In August 2016, Rio De Janeiro, Brazil hosted the 2016 Summer Olympics. During the games, *The Daily Beast* published a story by Nico Hines, who described his attempts to solicit sex from athletes in the Olympic Village using dating apps. Hines reported being most successful when he used gay dating apps like *Grindr*. Although Hines never engaged in any sexual activities with athletes, he described his encounters with detailed descriptions that potentially exposed several athletes as gay, which prompted a swift rebuke on social media. In the wake of widespread criticism, *The Daily Beast* revised and later removed the story, but the fallout from the article prompted a discussion on both media ethics and the privacy rights of gay individuals.

MEDIA ETHICS

On Aug. 11, 2016, Hines published an article on *The Daily Beast* titled "I Got Three Dates in an Hour in the Olympic Village." In the article, Hines, a straight man with a wife and child, reported on his attempts to solicit dates, hookups, and sex from athletes in Rio's Olympic Village using various dating apps, including popular gay dating apps *Grindr* and *Jack'd*. Hines noted that he had the most success finding instant hookups using *Grindr*. Hines' article went on to describe those who responded in stark detail, including their height, weight, country of nationality, and in some instances the event they were competing in. Hines also indicated that he only clearly identified himself as a journalist when asked.

The story was swiftly condemned on social media and in mainstream publications for effectively outing gay Olympians. On Aug. 12, 2016, Christopher Mele and Miraj Chokshi of *The New York Times* reported that although no names were explicitly mentioned in Hines' article, it was so detailed that "it was not hard to guess the identities of the men he had contacted, and not all of them from gay-friendly countries." Immediately after the story was published, critics swiftly condemned both Hines and *The Daily Beast* for acting irresponsibly. Among Hines' critics was Tongan swimmer Amini Fonua (@AminiFonua), who tweeted his dissatisfaction with the article, writing "As an out gay athlete from a country that is still very homophobic, @thedailybeast ought to be ashamed." Gus Kenworthy (@guskenworthy), an American skier who competed in the 2014 Sochi Olympics and came out as gay in 2015, also responded to Hines' article, writing, "So @NicoHines basically just outed a bunch of athletes in his quest to write a shitty @thedailybeast article where he admitted to entrapment."

According to *The New York Times*, *The Daily Beast* responded to the criticism on August 11 with a revised story and editor's note. Sydney Smith of *iMediaEthics* reported on August 11 that *The Daily Beast* editor-in-chief John Avlon had said he understood why many people complained about the story, which led to the revisions. "There was legitimate concern that the original version of this story might out gay male athletes, even by implication, or compromise their safety," Avlon said, according to *iMediaEthics*. "We apologize for potentially jeopardizing that safety in any way. As a result, we have removed all descriptions of the men and women's profiles that we previously described."

By 9 p.m. on August 11, *The Daily Beast* had decided to pull the story entirely, rerouting the URL for Hines' story to an editor's note apologizing for publishing the story and explaining its removal. "We initially thought swift removal of any identifying characteristics and better clarification of our intent was the adequate way to address this. Our initial reaction was that the entire removal of the piece was not necessary," the editor's note explained. "We were wrong. We're sorry. And we apologize to the athletes who may have been inadvertently compromised by our story."

On August 14, *Outsports* reported that the International Olympic Committee (IOC) condemned the article and noted that *The Daily Beast* had recalled Hines from Rio. "We understand the organization concerned recalled the journalist after complaints and withdrew the story," an IOC spokesperson told *Outsports*. "This kind of reporting is simply unacceptable."

The fallout from the article sparked a debate on journalistic ethics and the dangers of outing closeted athletes. In a series of posts on Twitter on August 11, Seattle-area alternative newspaper *The Stranger* editor Dan Savage, a high-profile commentator on LGBTQ issues, wrote that Hines had recklessly endangered lives. "So . . . straight 'journalist' for @thedailybeast probably gonna get some gay guy killed with this piece," Savage wrote. "Dear @Olympics, [y]ank this guy's press credentials." In an August 11 interview with *The New York Times*, retired University of Wisconsin-Madison journalism ethics professor Robert Drechsel said that *The Daily Beast*'s story was "thoughtless, insensitive and unethical," noting that it should have never been published. "It's hard to find the words to describe [this situation]," Drechsel said. "Why in the world — why in the world of journalism — would anyone do this?"

In an August 11 article for *Slate*, Mark Joseph Stern, who covers the law and LGBTQ issues, characterized Hines' article as "dangerous" and "wildly unethical." Stern condemned the thinly-veiled descriptions of his subjects, noting that after several minutes on Google he could surmise the identity of five athletes mentioned in the article. "Several athletes who were closeted at home (and possibly to their own teammates) will wake up on Thursday morning to the news that *The Daily Beast* outed them," Stern wrote, positing the injury that could be sustained by these athletes. "Their teammates could ostracize and alienate them; their families could disown them; their countries could imprison them."

Stern also took issue with Hines' use of gay dating apps for an offensive purpose. "*Grindr* is an app for men who wish to hook up with other men," Stern writes. "To be on *Grindr* when you do not have that goal . . . is itself a mendacious deception. This misrepresentation might be excusable had Hines noted in his profile that he was a journalist on assignment. But naturally, he did not." Stern also critiqued *The Daily Beast* revising the original article as "too little, too late," noting that "[n]othing on the internet can be readily deleted."

Although Stern's warning about the resilience of internet content rings true,

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Advocates Criticize Law Enforcement Officials' Deceptive Activities Involving the Press

During the fall of 2016, news organizations criticized law enforcement officials over the use of deceptive techniques involving the press while investigating criminal activity. In September, the U.S. Department of Justice (DOJ) Office of the Inspector General released a report finding that Federal Bureau of Investigation (FBI) agents had not violated the agency's undercover policy when posing as journalists in order to investigate a bomb threat made against a high school in Washington state. On Dec. 3, 2016, the *Los Angeles Times* reported that the Santa Maria Police Department intentionally provided false information to the press about gang activity on the central coast of California. Several news organizations reported the information as legitimate and criticized the department after learning about the deception.

LAW ENFORCEMENT CONFLICTS

U.S Department of Justice Defends FBI Impersonation of a Journalist

In September 2016, the U.S. DOJ Office of the Inspector General released a report that defended the agency's actions when agents posed as journalists in 2007 to investigate a bomb threat made against a Washington state high school. The revelations of the FBI's decision to impersonate journalists drew widespread criticism from members of the press as well as press advocates, who argued that such tactics undermine the legitimacy of news organizations. The Inspector General's report also discussed new policy restrictions on agents' ability to pose as reporters. That report was met with renewed criticism from supporters of an independent press.

On Oct. 28, 2014, the FBI acknowledged that it had created a fake Associated Press (AP) news article during a 2007 investigation into a bomb threat at Timberline High School in Lacey, Wash. FBI officials sought to use the story to lure a suspect into downloading secret software onto his computer in order to track his location. After the *Seattle Times* reported on the FBI's tactics in 2014, both the Reporters Committee for Freedom of the Press (RCFP) and the AP filed Freedom of Information Act (FOIA) requests in October 2014 seeking information about the policies surrounding the agency's impersonation of a news organization.

In a Nov. 6, 2014 letter to the editor in *The New York Times*, FBI Director James Comey defended the FBI's decision to impersonate journalists. "We do use deception at times to catch crooks, but we are acting responsibly and legally," he said. "That technique was proper and appropriate under Justice Department and F.B.I. guidelines at the time. Today, the use of such an unusual technique would probably require higher-level approvals than in 2007, but it would still be lawful and, in a rare case, appropriate."

In response to the RCFP's and AP's FOIA requests, the FBI released documents in February 2016 outlining the internal procedures related to "sensitive circumstances," such as when an agent impersonates a member of the media. One redacted document indicated that the FBI failed to follow their procedural guidelines. In an April 28, 2016 story, the RCFP also raised concerns about the adequacy of the procedures. "The agency's apparent conclusion that those review processes may 'reasonably' be disregarded in situations like the Timberline case signals that the FBI's internal procedures may be less robust than they appear," the RCFP wrote. (For more information on the FBI's initial decision to impersonate journalists and release of records under FOIA, see "Federal Investigators' Deceptive Use of Media Raises Concerns" in the Fall 2014 issue of the Silha *Bulletin* and "Canadian and U.S. News Organizations Raise Complaints

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***Daily Beast,** continued from page 22*

The Daily Beast was not the only website to scrub the story. On Aug. 17, 2016, Steven Nelson of *U.S. News & World Report* reported that the Wayback Machine, a San Francisco based internet archive, had also removed the article from its website. Responding to criticism of the article's removal, Wayback Machine director Mark Graham told *U.S. News & World Report* that "[i]t's not a decision that's made lightly, but certainly we and all human beings have a responsibility to exercise judgment in times when individual personal safety is at risk."

On Oct. 27, 2016, *Outsports*' Jim Buzinski reported that *The Daily Beast* and Hines had not responded to any requests for comments on the story, despite *Outsports* sending seven e-mails asking for a response. Buzinski noted that Hines still had not publicly apologized for publishing the story, and *The Daily Beast*'s failure to provide further comment indicated a lack of transparency and accountability. "The article was journalistic malpractice of the highest order," Buzinski wrote. "Who thought this was a good idea? Which editor OKd the idea? Which editor(s) read the first version and OKd it for publication? Were any LGBT *Daily Beast* editorial staff consulted before the story ran? Why did the story stay up the entire day, with only modest changes and a different headline? Why has the *Daily Beast* not been transparent about any investigation? What has happened to Hines — was he suspended? [F]ired?"

"The story was a dangerously clumsy attempt at being edgy, sexy and getting page views," Buzinski added. "I am convinced neither Hines nor the *Daily Beast* sought to out gay Olympians, yet they were collectively clueless and insensitive to the ramifications of the article and what it means to be an LGBT person. They owe everyone an explanation, and in Hines' case, a detailed apology. People are not going to forget this."

As more countries begin addressing discrimination against LGBTQ individuals, the number of out celebrities, including Olympic athletes, has been steadily climbing. On July 11, 2016, *Outsports* reported that 55 out athletes, including 11 gay men, were scheduled to compete in the 2016 Summer Olympics, up from 23 in the 2012 London Olympics.

Ronald Waclawski
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Deception, *continued from page 23*

over Law Enforcement Officers Impersonating Journalists" in the Spring 2016 issue).

On Sept. 16, 2016, *The New York Times* reported that the U.S Department of Justice (DOJ) Office of the Inspector General released a report clearing the FBI of any wrongdoing during its 2007 investigation into the bomb threat. In the report, the DOJ Inspector General's office defended the agency's actions, maintaining that the investigation complied with the FBI's undercover agent policies at the time. "We believe that the judgments agents made about aspects of the planned undercover activity in 2007 did not violate the undercover policies in place at the time," the report said. "We found that Department and FBI policies in effect in 2007 did not prohibit agents from impersonating journalists or from posing as a member of a news organization, nor was there any requirement that agents seek special approval to engage in such undercover activities."

Politico reported on September 15 that the DOJ did offer some mild criticism of the FBI's actions in 2007, stating that the agents arguably needed higher-level approval than what they had actually obtained at the time. However, the report found that FBI agents had acted reasonably given the confusing wording of the agency's relevant internal procedures about when "sensitive circumstances" arise in an undercover investigation. "The only policies in effect at the time that might have required elevated consideration regarding the FBI's plans turned on whether the undercover activity involved a 'sensitive circumstance,'" the report said. "We concluded, given the lack of clarity in the policy language, that making a determination whether a situation was a 'sensitive circumstance' was a challenging one and that the judgments made by the agents were not unreasonable given the lack of clarity."

The Inspector General's report also found that the FBI clarified these ambiguities by implementing a new "interim" policy that required approval by high-level leadership before an agent could pose as a journalist, according to Fox News on September 15. The new policy, approved in June 2016, established that agents are permitted to impersonate journalists only after they have received authorization from a special committee at the FBI's headquarters as well as from the FBI's deputy director. Also, an agent's impersonation of a journalist is only allowed as part of an undercover operation.

In addressing the need for the policy change, the report recommended that the FBI should move quickly to fully incorporate the interim policy into its official undercover policy guide. The Inspector General's Office also encouraged the FBI to make further considerations about approval processes. "We think the Department should consider the appropriate level of review necessary before agents in a criminal investigation are allowed to use the name of a third-party organization or business without its knowledge or consent, in light of the potential impact that use might have on the third party's reputation," the report said.

In the wake of the Inspector General's report and despite the policy changes, media advocates still expressed concerns over the FBI's impersonation of journalists and the support for such tactics by the DOJ. In a September 15 press release, AP Vice President Paul Colford criticized the Inspector General's report clearing the FBI of wrongdoing. "[The AP is] deeply disappointed by the inspector general's findings, which effectively condone the FBI's impersonation of an AP journalist in 2007. Such action compromises the ability of a free press to gather the news safely and effectively and raises serious constitutional concerns," Colford said. "Once again, AP calls on the government to refrain from any activities involving the impersonation of news media, and we demand to be heard in the development of any policies address such conduct."

RCFP Steering Committee Chairman David Boardman also issued a statement on Sept. 15, 2016 further criticizing the DOJ's findings. "The Reporters Committee for Freedom of the Press is deeply troubled by today's disclosure in a report from the Justice Department's Office of Inspector General that the FBI believes that there is a place in this country for federal agents to impersonate journalists," Boardman said in the statement. "Such a policy can seriously damage both the public's trust in its free press and the ability of journalists to hold government accountable. We urge the Justice Department to take seriously the need for reform and the importance of protecting the integrity of the newsgathering process."

On September 21, *Washington Post* columnist Joe Davidson criticized the FBI's decision to allow agents to pose as AP reporters to investigate the Timberline High School bomb threats. He maintained that such impersonation of journalists could create dangerous situations for reporters, calling upon his own personal experiences. As a reporter for the *Wall Street Journal* in 1986, Davidson briefly lived with a family in a shanty section in an industrial seaport on the Indian Ocean in Port Elizabeth, South Africa in order to report on life under apartheid. Davidson wrote that at one point, three young men confronted him and warned him that "people are saying you are with the CIA." He explained that this confrontation showed the dangers that journalists face when being mistaken for intelligence or law enforcement officials.

"That experience demonstrated the grave risks that can grow from situations that allow people to confuse intelligence or law enforcement officials with journalists," Davidson wrote. "Like those officials, journalists go into dangerous environments, investigate controversial and illegal doings, and question unsavory characters. Being mistaken for an officer, while not having the same resources for protection — a gun and backup assistance, for example — can be hazardous to a reporter's life."

California Police Issue Fake News Release

On Dec. 3, 2016, the *Los Angeles Times* reported that the police department in Santa Maria, Calif. had issued a news release with deliberately false information as part of its investigation of gang activity on the central coast of California. The phony announcement was issued in February but was only discovered in court documents in late November 2016 by the *Santa Maria Sun*. The news release claimed that two gang members, Jose Santos Melendez and Jose Marino Melendez, had been picked up for identity theft and handed over to immigration authorities, according to the *Los Angeles Times*. In fact, the police had taken the two men into protective custody after learning that they were about to be killed by a rival gang.

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U.S. Government Ends Formal Oversight of Key Internet Infrastructure Functions Amidst Censorship Concerns

On Oct. 1, 2016, the U.S. government officially ended its formal oversight of the Internet Corporation for Assigned Names and Numbers (ICANN) after a two-year transition period. The transition had sparked debates in Congress, with critics claiming that President Barack Obama's administration was surrendering American control over a key aspect of the internet's infrastructure to foreign powers who sought to censor internet content. Proponents of the measure argued that such fears were misguided, and that the transition would change very little in the day-to-day operations of the internet.

INTERNET TECHNOLOGY

The internet functions at the center of the debate were managed by the Internet Assigned Numbers Authority (IANA). According to the IANA website, the authority controls the allocation of Internet Protocol (IP) addresses to regional IP registries (RIRs) and administers the Domain Name System (DNS) associated with those numbers. The IP address of a website is a series of numbers separated by periods. (The IP address for the University of Minnesota is 134.84.151.218). These addresses can be used in browser search bars in lieu of the web address or Uniform Resource Locator (URL), though the latter is typically easier to remember. The DNS enables the translation of URLs to IP addresses, allowing users to access the correct website by entering in "umn.edu" instead of the IP address.

Prior to 1998, these IANA functions were managed by computer scientist Jon Postel and funded by the U.S. Defense Department, but the rapid expansion of the internet at the end of the century bred concerns over a lack of centralized governance and internet stability. These concerns led to the U.S. Department of Commerce restructuring the IANA functions under the private, nonprofit organization ICANN in 1998. ICANN uses a multi-stakeholder model, representing individuals, non-commercial stakeholder groups, industry, and governments. From its inception until Oct. 1, 2016, ICANN had contracted with the United States Department of Commerce National Telecommunications and Information Administration (NTIA) to perform IANA functions.

On March 14, 2014, the NTIA announced its intent to fully transition IANA functions to ICANN, meaning that the U.S. government would no longer have final authority over DNS processes. According to a March 14, 2014 press release, NTIA explained that "[f]rom the inception of ICANN, the U.S. Government and Internet stakeholders envisioned that the U.S. role in the IANA functions would be temporary." The NTIA noted that they supported governance of IANA functions to be overseen by a multi-stakeholder institution and would not accept any proposal that would allow ICANN's functions to be taken over by a government-led or intergovernmental organization, including control by the United Nations.

Shortly after the NTIA announcement, the IANA Stewardship Transition Coordination Group (ICG) was formed, which requested and compiled proposals from the Internet Engineering Task Force (IETF), Domain Names Community, and RIRs on how to best move forward with the transfer of authority from the U.S. government to solely ICANN. On June 9, 2016, the NTIA

ICANN, *continued on page 26*

Deception, *continued from page 24*

According to the *Los Angeles Times*, Santa Maria Police Chief Ralph Martin defended the tactic to issue a statement with false information, which he credited with saving the two men. "It was a moral and ethical decision, and I stand by it," Martin said during a press conference. "I am keenly aware and sensitive to the community and the media. I also had 21 bodies lying in the city in the last 15 months." The *Los Angeles Times* also reported that Martin said he had been criticized by news organizations, but had also received several calls of support. "I think if they were in my shoes they would have done the same thing," he said.

However, several members of the media and press advocates were troubled by the fake release after reporting the information as legitimate. NBC-affiliate KSBY news director Kendra Martinez told the *Los Angeles Times* that such situations would undermine any authority that news organizations have. "While we strongly support the police department's efforts to protect citizens in harm's way, we are concerned this type of deception can erode the basic trust of our residents and viewers," Martinez said.

In the same *Los Angeles Times* story, Jonathan Kotler, a professor at the University of Southern California Annenberg School for Communication and Journalism, explained that the police did not do anything illegal when it provided fake information to the press. However, he said that such decisions could raise questions about the credibility of both the police department and the press. "If the press cries foul here, saying they were led astray by a false release, then you've got the press being angry about being misled," Kotler told the *Los Angeles Times*. "But on the other hand, the cops would say, 'But look, we saved lives.' In that kind of PR battle, who do you think comes off looking better, the press or the police?"

International Association of Chiefs of Police Vice President Louis Dekmar also told the *Los Angeles Times* that tactics involving deceiving the media were ill advised. "Any time you enter into a ruse that involves the media, it creates a real distrust between the police and the folks we rely on," said Dekmar. "There's a symbiotic relationship between the media and police. You need facts in order to accurately report to the public. We need the media to report facts accurately to get assistance from the public."

Scott Memmel
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ICANN, *continued from page 25*

adopted a formal plan to cede authority to ICANN, which allowed the U.S. government's contract to formally expire on Sept. 30, 2016.

Proponents of the IANA transition have argued that the transition reflects the policy that a global internet is administered by the global community. On a Feb. 10, 2016 panel for the North American Network Operators Group in San Diego, California, American Registry for Internet Numbers President and CEO John Curran explained that the transition is important primarily in shifting who ICANN is interacting with. "It's not changing the job, it's just changing who is asking ICANN to do the job," he said. In a July 28, 2015 interview for the "High Tech Forum Podcast," American Enterprise Institute visiting fellow Shane Tews noted that "[o]ther countries didn't appreciate the fact that the domains under their control—such as .uk and .eu—were overseen by a department of the United States government."

However, the IANA transition was met with criticism by several members of the internet community. At a July 14, 2016 panel for the Internet Governance Forum USA, Associate Director at the International Center for Law and Economics Kristian Stout noted that although he was generally in favor of the transition, he recommended a one- to two-year transition period, citing potential jurisdiction problems and a lack of public interest commitments within ICANN's mission statement. "[ICANN] is a California corporation," Stout said. "Everything in those bylaws hinges on the fact that it is a California corporation. If there is something that could change anything about that status or the law that's applicable to it, that changes the calculus of all the accountability provisions that are in those bylaws."

Although most criticisms in the internet community are focused on the logistics of the transition, several conservative U.S. politicians and organizations characterized the transition as the United States relinquishing control of the internet to foreign countries. This effort was spearheaded predominantly by Sen. Ted Cruz (R-Texas), who claimed that the transition would empower foreign governments, including Russia and China, to censor the internet and create a gateway for ICANN to regulate content. Sen. Cruz's efforts to oppose the transition began shortly after he dropped out of the Republican presidential primary race in early May 2016. On June 8, 2016, Sen. Cruz introduced the Protecting Internet Freedom Act to the Senate, which would have prohibited the NTIA from allowing the IANA functions contract to lapse unless specifically authorized by Congress to do so. He also sought to attach a block of the IANA transition to governmental funding provisions, though to no effect.

> "Many foreign governments would prefer to bring DNS management under the purview of an organization like the United Nations, because it is a more sympathetic forum — and one where governments are the only stakeholder who can meaningfully participate."
>
> **— Danielle Kehl, New America's Open Technology Institute fellow**

Sen. Cruz drew sharp criticism for his position regarding the IANA transfer. In a September 20 op-ed for *The Washington Post*, Massachusetts Institute of Technology (MIT) professor Tim Berners-Lee and MIT Internet Policy Research Initiative Director Daniel Weitzner wrote that Sen. Cruz's fears of foreign government censorship were overblown and that his "plan to ride to the defense of the Internet on a white horse is based on a fundamental misconception." Berners-Lee and Weitzner noted that authoritarian countries that engage in censorship do so through blocking access to entire platforms or operating large-scale firewalls. "Repressive governments expend a great deal of energy censoring speech online — but they do so entirely without ICANN," Berners-Lee and Weitzner wrote.

In a November 4, 2016 commentary for *Politico*, Danielle Kehl, a fellow at New America's Open Technology Institute, noted that the transition was actually the most effective way to stop foreign governments like Russia and China from gaining a larger role in internet governance. "ICANN's multi-stakeholder model is a much more appealing alternative to the intergovernmental solution that countries like Russia and China have tried to replace ICANN with for years," Kehl writes. "Many foreign governments would prefer to bring DNS management under the purview of an organization like the United Nations, because it is a more sympathetic forum — and one where governments are the only stakeholder who can meaningfully participate."

TechDirt reported on Sept. 30, 2016 that several state officials also attempted last ditch efforts to prevent the IANA transition in the District Court for the Southern District of Texas. On Sept. 28, 2016, Attorney Generals from Texas, Arizona, Oklahoma, and Nevada sought a preliminary injunction in the Southern District of Texas, staying the expiration period of the IANA contract and preventing the NTIA from relinquishing its rights. *USA Today* reported on Oct. 1, 2016 that Judge George Hanks, Jr. denied this request on September 30.

Although the IANA transition is complete, ICANN may continue to face scrutiny from critics of the deal and internet observers regarding the effects of the transition. This heightened scrutiny may also include voices from the White House. During his campaign, President-elect Donald Trump announced support of Republican efforts to delay the IANA transfer in late September. In a Nov. 11, 2016 interview with *Scientific American*, President of the Information Technology and Innovation Foundation President Robert Atkinson quelled doubts on the future of the transition. "I don't know if the president has the power to change this," Atkinson said, responding to a question about whether the Trump administration could reverse the IANA transition. "But even if they had the power, I don't think they'd do it. The horse has left the barn."

Ronald Waclawski
Silha Research Assistant

Rolling Stone Found Liable for Defaming Dean in Now-Retracted Campus Rape Story

On Nov. 4, 2016, *The New York Times* reported that a federal jury had found *Rolling Stone* liable for defaming University of Virginia (UVA) Associate Dean of Students Nicole Eramo for its depiction of her in a now-retracted story about an alleged rape on UVA's campus. The decision came more than a year and a half after the story was widely debunked following further investigations by a variety of journalists, law enforcement officials, and the Columbia School of Journalism. Press advocates and observers were split over the outcome of the defamation trial, with some arguing that *Rolling Stone* had failed to adhere to important journalistic reporting techniques, while others suggested that aspects of the outcome could set troubling precedents for the press.

DEFAMATION

The story at issue in the lawsuit, titled "A Rape on Campus" and written by Sabrina Rubin Erdely, reported that an unidentified student named "Jackie" had been gang raped during a party at a fraternity house near the UVA campus in 2012. The story, published in November 2014, depicted UVA officials as having greater concerns over the university's reputation instead of focusing on how to properly handle sexual assaults in their campus community. Erdely reported that sexual assaults were a regular occurrence within UVA's fraternity culture, and that Eramo had failed to assist Jackie in the aftermath of the alleged attack.

After the story gained national prominence, several other news organizations conducted investigations into the alleged rape. Under further scrutiny, much of Erdely's reporting for the story began to unravel. In March 2015, law enforcement officials in Charlottesville, Va., where UVA is located, announced that they had conducted an investigation into the alleged rape and found no evidence that it had actually occurred. Then, the Columbia School of Journalism, which was commissioned by *Rolling Stone*, published a report in April 2015 that described the magazine's failure to properly investigate the story as well as detailed the ethical missteps that the magazine had made prior to publishing the story. Specific mistakes included Erdely's failure to corroborate information that portrayed subjects in a derogatory light, the use of pseudonyms that obscured key information, editors ignoring fact checkers' concerns, and the magazine's failure to provide fraternity officials with enough details to sufficiently respond to rape allegations, among other issues. *Rolling Stone* formally retracted "A Rape on Campus" on the same day the Columbia School of Journalism published its report.

In May 2015, Eramo filed a defamation lawsuit against *Rolling Stone* in the United States District Court for the Western District of Virginia, claiming that the magazine had harmed her reputation when it cast her as "the chief villain of the story." Eramo sought $10 million in compensatory and punitive damages for the harm to her reputation. In early 2016, Eramo's attorneys contended that Jackie had fabricated the gang rape in order to attract the attention of a classmate in whom she had a romantic interest. During the pre-trial proceedings, Eramo's side sought to force Jackie to provide her communications with *Rolling Stone*, Erdely, and UVA administrators, as well as testify about the alleged attack. However, attorneys for Jackie, who was not a defendant in the suit, argued that she was a sexual assault victim who should be shielded from Eramo's requests. Ultimately, U.S. District Court Chief Judge Glen E. Conrad ordered that Jackie could be deposed but placed several limitations on the deposition. Jackie was eventually deposed in April 2016. (For more information on "A Rape on Campus" and the subsequent controversy, see "News Organizations Backpedal after Failures to Fact Check, Anchor's False Stories," in the Winter/Spring 2015 issue of the Silha *Bulletin*, "Update: *Rolling Stone* Continues to Face Backlash for Campus Rape Story in the Summer 2015 issue, and "*Rolling Stone* Faces New Reporting Controversy, Continues to Face Questions over Retracted Story" in the Winter/Spring 2016 issue.)

During the several months of pre-trial proceedings, court filings showed that shortly after *Rolling Stone* published "A Rape on Campus," Erdely had come to doubt Jackie's account of the gang rape. On July 2, 2016, *The Washington Post* reported that court filings indicated that Erdely had sent an e-mail to *Rolling Stone* editors Will Dana and Sean Woods on Dec. 4, 2014 suggesting that their "worst nightmare" appeared to be becoming a reality. In the e-mail, Erdely wrote that as questions began to be raised about the story, she had spoken with Jackie in order to more clearly identify the assailants. As they continued to speak, Jackie's story became more confusing. "By the time we ended our conversation, I felt nearly certain that she was not being truthful," Erdely wrote in the e-mail, according to the *Post*. Erdely also wrote, "We have to issue a retraction."

In addition to the e-mail, Eramo's attorneys entered evidence from Erdely that included several hundreds of pages of notes that the journalist had taken during the investigation. The notes appeared to indicate that Erdely had regularly deferred to Jackie's wishes for privacy rather than seeking to verify various claims, that Jackie had told Erdely about several books and an episode of a television crime drama that depicted attacks similar to the one that the student had claimed to suffer, and that Erdely had been warned that Jackie's account of the attack had changed over time. Eramo attorney Libby Locke told *The Washington Post* that the notes provided key evidence showing that *Rolling Stone* should have had serious doubts about its story. "Erdely's reporting file demonstrates that there were numerous red flags that put *Rolling Stone* on notice that Jackie was not a credible source and that the gang rape story she told *Rolling Stone* was false," Locke said. "But none of those facts stood in the way of *Rolling Stone* publishing a false and defamatory article, relying on a source who was not credible and painting Ms. Eramo as a callous and indifferent administrator."

On September 22, *The Wall Street Journal* reported that Judge Conrad had determined that the case should proceed to a jury trial. In a memorandum opinion, Judge Conrad wrote that many of the statements that Eramo had alleged were defamatory could be considered factual assertions rather than merely opinions, meaning that the statements could be the basis of a libel claim. He also noted

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that a fact finder could potentially determine that the statements in question had harmed Eramo's reputation, and therefore should be considered by a jury. However, *The Wall Street Journal* reported that Judge Conrad held that Eramo was a "limited-purpose public figure" because she had thrust herself into the spotlight as UVA's primary authority on handling rape allegations on campus. Accordingly, Eramo would need to prove that *Rolling Stone* had acted with actual malice when publishing "A Rape on Campus," meaning she would need to show that the magazine knew that the statements in question were false or had acted with reckless disregard for the truth, as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch*, 418 U.S. 323 (1974). Judge Conrad's opinion found that a "reasonable jury could infer actual malice in light" of the record that had been established during pre-trial proceedings, according to *The Wall Street Journal*.

The trial itself began on October 17, with Eramo taking the stand on the opening day, according to an October 18 story by *The Washington Post*. During her testimony, Eramo said that in the wake of "A Rape on Campus," she had received hundreds of threatening e-mails and the university no longer permitted her to handle sexual assault cases. Eramo told the court that any appearance of a failure to investigate the alleged gang rape was due to Jackie's refusal to provide any identifying information about her attackers. Furthermore, the dean's testimony indicated that she had not learned of the rape until nearly eight months after it allegedly happened. *The Post* reported that Eramo also said that she had repeatedly encouraged Jackie to report the attack to the police, but Jackie refused. Eramo's attorneys also argued during trial that Erdely had come to campus with a pre-conceived notion about how the story should be reported and merely sought individuals to play familiar roles, with a focus on Eramo being the uncaring administrator. As a result, Erdely had failed to investigate and corroborate information that would have painted a different picture of Eramo.

Rolling Stone's defense attorneys pushed back against Eramo's testimony on cross-examination, pointing to the fact that the U.S. Department of Education had conducted an investigation into UVA's handling of sexual assaults. The agency later published a report that was critical of the university as well as of Eramo, according to an October 19 story by *The Washington Post*. The defense attorneys also noted that "A Rape on Campus" contained several flattering descriptions of Eramo, including the fact that many students and sexual assault survivors at UVA praised the dean for her work.

The Washington Post reported on October 22 that Erdely defended her reporting about Jackie during multiple days of testimony. Particularly, the journalist testified that Jackie relayed several anecdotes about various friends, family members, teachers, and others that contained very specific information. Similarly, Jackie's account of the alleged rape contained specific details, which led Erdely to believe that her subject was credible. The journalist also noted that Jackie showed off a tattoo, which included a feminist symbol and a rose with the word "Unbreakable," commemorating her survival of the attack. Erdely later testified that after other news organizations began to poke holes in "A Rape on Campus," she spoke with Jackie again to re-confirm details in early December 2014. Erdely explained that after the conversation, she believed that Jackie was no longer credible and had been intentionally misleading. "It was a mistake to rely on someone whose intent was to deceive me," Erdely testified, according to the *Post*.

Several other key individuals testified about the reporting that resulted in *Rolling Stone*'s publication of "A Rape on Campus." *The Washington Post* reported on October 24 that Jackie continued to stand by her story in the taped deposition from April 2016 that she was the victim of a gang rape. However, Jackie explained that she suffered from post-traumatic stress disorder and that many of the specific details of the attack and what happened afterward were "foggy." Jackie also said that she had felt pressure from Erdely to cooperate and told friends that she no longer wanted to be part of the story after learning that her experience would be the focal point.

The Washington Post reported that in a separate day of testimony, *Rolling Stone* fact checker Elisabeth Garber-Paul said that she thought Erdely was a thorough reporter and believed the story was true before it went to print. According to her testimony, Garber-Paul spent approximately four hours with Jackie to get the full details of the alleged attack. The fact checker said that Jackie provided several specific details, which appeared to confirm Erdely's reporting. Garber-Paul also testified that she knew that Jackie's account had evolved over time but attributed it to the fact that traumatic events can affect memory. The fact checker acknowledged that she did not verify quotes that had been attributed to Jackie's friends, which she regretted.

On October 28, *The New York Times* reported that *Rolling Stone* publisher Jann S. Wenner said in a taped deposition played in court that he believed it was wrong for the magazine to fully retract the story. "We did everything reasonable, appropriate up to the highest standards of journalism to check on this thing," Wenner said during the deposition. "The one thing that we didn't do was confront [who Jackie accused] — the rapists.. . . I stand by the rest of the article: personally, professionally and on behalf of the magazine." Specifically, Wenner said that he believed much of the criticism of UVA was accurate, even if Jackie's story was not. He also placed blame on Jackie for the innacuracies, testifying that journalists could not do anything "if someone [was] really determined to commit fraud," according to the *Times*.

After more than two weeks of testimony and evidence, the jury began deliberations on November 1. *The Washington Post* reported that after nearly three days of deliberating, the jury found that both *Rolling Stone* and Erdely were liable for defaming Eramo. The jury found that Erdely had acted with actual malice after publishing statements in the story describing Eramo's reactions to Jackie's alleged attack as well as for statements that Erdely made when criticizing Eramo in interviews about "A Rape on Campus." The *Post* reported that the jury also found that *Rolling Stone* had "republished" the story on Dec. 5, 2015 when it added an editor's note to explain that Jackie's stories had discrepancies. The jury determined that this republication showed that the magazine had acted with actual malice when it continued to leave "A Rape on Campus" available online in its entirety until April 5, 2015 despite the serious questions that had been raised about the veracity of the story. On November 7, the *Post* reported that the jury awarded Eramo $3 million in damages, with Erdely responsible for $2 million and *Rolling Stone* responsible for $1 million.

The Washington Post reported on November 4 that after the jury's decision, *Rolling Stone* issued a statement apologizing for its reporting failures. "In our desire to present this complicated issue from the perspective of a survivor, we overlooked reporting paths and made journalistic mistakes that we are committed to never making again," *Rolling Stone* said in the statement. "We deeply regret these missteps and sincerely apologize to anyone hurt by them, including Ms. Eramo. It is our deep hope that our failings do not deflect from the pervasive issues discussed in this piece, and that reporting on sexual assault cases ultimately results in campus policies that better protect our students."

In the same story, Eramo's attorney Locke told the *Post* that she was pleased with the jury's decision. "We've said this all along, that *Rolling Stone* published a false and defamatory article about her," Locke said. After the jury awarded damages on November 7, Eramo explained that she was glad that the case was over, according to the *Post*. "I'm certainly happy to put this behind me and move on to the next chapter of my life," Eramo said. *The New York Times* reported on November 7 that Eramo had also said that she was not convinced that *Rolling Stone* was truly remorseful. "It took two years and all this to get an apology," Eramo said. "And I still don't believe it is a real apology. The regret I see is that they're in the position they're in today."

Legal observers and commentators on the press appeared divided over the outcome of the case. In a November 4 column, *Washington Post* media critic Erik Wemple argued that *Rolling Stone* could only blame itself for the outcome of the case because the reporting related to "A Rape on Campus" was sloppy and its handling of the subsequent controversy was worse. "[T]his was a case of genuine media bias. Not, mind you, the sort of alleged media bias — lefty journos polluting the mainstream media — that we so often hear about. The bias here was a reporter seeking the most explosive story possible and blowing through all the warning signs that it wasn't true," Wemple wrote. "En route to this elaborate gang-rape scene — which, of course, turned out to have been false — Erdely passed up more routine instances of sexual assault on other campuses, including Yale University, as [the *Post*] reported in April 2015. This striving to find the most explosive possible scenario helps to contextualize all the failings highlighted in the oh-so-comprehensive Columbia report on *Rolling Stone*'s story: The failure to contact the alleged assailants; the failure to corroborate the account with as many people as possible; the worries that if they pushed to hard to confirm the account, 'Jackie' would withdraw from the whole thing."

In a November 4 interview with *The New York Times*, University of California, Berkeley Graduate School of Journalism Dean Edward Wasserman said that he was troubled by this case, and others, that appeared to show an increasing rate of news organizations facing complaints in court about journalism practices. "This doesn't speak of a well-functioning system of press accountability," Wasserman told the *Times*. "This speaks to a capricious system in that publications can be faced with ruinous consequences for wrongdoing that could be settled more smoothly and more routinely."

Other observers noted that some of the specific findings in the *Rolling Stone* case could raise problems for journalism organizations. In a November 4 interview with CNN, Director of the Silha Center and Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley said that she was concerned about the jury's decision finding that *Rolling Stone* had acted with actual malice because it had republished "A Rape on Campus" when the magazine added an editor's note with clarifications. "I think *Rolling Stone* was trying to make good and make up for original deficiencies in the article, which is something we say, as an ethical matter, news organizations should do," Kirtley said. "If doing something like that increases your vulnerability to suit, that's an incredible disincentive for journalists to do that sort of thing."

In a November 27 commentary for the *Columbia Journalism Review* (CJR), Bill Wyman, the former arts editor for National Public Radio and *Salon*, wrote that journalists must also now be careful when discussing their stories during promotional interviews on other news outlets. "The jury found several passages in *Rolling Stone*'s article defamatory. Erdely's culpability went further, to include an assertion she'd made to WNYC radio host Brian Lehrer, another on a *Slate* podcast, and a third in an email to *Washington Post* reporter while promoting the piece," Wyman wrote. "This kind of secondary speech — talking about your story on other media — is rarely a subject of newsroom discussion, but reporters talking up their stories elsewhere often overstate their findings. Says one libel lawyer: 'I see this daily in my practice.'"

On December 5, *The Washington Post* reported that *Rolling Stone* had filed a motion with the federal district court asking it to set aside the jury's decision holding the magazine liable for defaming Eramo. Specifically, *Rolling Stone* argued that the jury had erred when finding that the magazine had republished "A Rape on Campus" when it added the editor's note with clarifications several days after the story was originally published. "There is no question that the article's unraveling was a major black eye for *Rolling Stone*," the magazine's attorneys wrote in the motion, according to the *Post*. "It defies logic for a jury to find that by placing a prominent disclaimer on the article notifying readers that *Rolling Stone* no longer stood behind Jackie as a source, apologizing, and promising a full investigation, *Rolling Stone* was actually trying to recruit a new audience and spread now-discredited information from Jackie." As the *Bulletin* went to press, Judge Conrad had not yet ruled on *Rolling Stone*'s motion. The magazine had also not publicly stated whether it would appeal the jury's decision.

The Washington Post also reported on November 4 that *Rolling Stone* was still facing a $25 million defamation lawsuit filed by the Phi Kappa Psi fraternity, which owned the house where the gang rape had allegedly taken place. The case continued to remain in pre-trial proceedings, but University of California, Los Angeles law professor Eugene Volokh told Wyman in the November 27 *CJR* commentary that the jury's decision in Eramo's case "certainly should embolden" attorneys for the fraternity. As a result, Wyman wrote that it would not be surprising if *Rolling Stone* reached a settlement with the fraternity.

Casey Carmody
Silha *Bulletin* Editor

Gawker and Hogan Reach $31 Million Settlement in Invasion of Privacy Suit

On Nov. 2, 2016, *The Wall Street Journal* reported that Gawker Media filed documents in a U.S Bankruptcy Court for the Southern District of New York indicating that the company had reached a $31 million settlement with professional wrestler Hulk Hogan over an invasion of privacy lawsuit. In March 2016, Hulk Hogan won a $135 million judgment in his suit against the now-defunct *Gawker*. The settlement ends a years-long legal fight between the professional wrestler and *Gawker*, which was known for its irreverent tone and sharp examination of public figures. *Gawker* officials said that they were confident that they could have won the battle on appeal but believed that a settlement was in their best interests. The settlement also leaves unresolved several key First Amendment issues that appeared throughout the case.

INVASION OF PRIVACY

The four-year legal battle between Hogan and Gawker Media began in 2012 after *Gawker* published a story by then-editor-in-chief A.J. Daulerio titled "Even For a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe For Work but Watch It Anyway." The story included a one-and-a-half-minute excerpt from a 30-minute video recording of Hogan engaging in sexual acts with the then-wife of radio host and Hogan friend "Bubba the Love Sponge" Clem. Daulerio also provided a description of the full video as well as commentary on the public's fascination with celebrity sex tapes.

In December 2012, Hogan filed a lawsuit against *Gawker* in a Florida state circuit court alleging claims of invasion of privacy and intentional infliction of emotional distress. Hogan sought approximately $100 million in damages. After several years of pre-trial delays and proceedings, the case went to trial in early March 2016. At the end of the two-week trial, a six-person jury awarded Hogan $55 million for economic injuries, $60 million for emotional distress, and $25 million in punitive damages. The entire case was further complicated when the Florida Court of Appeal for the Second District overturned trial Judge Pamela Campbell's decision to seal several court records related to an investigation that the FBI conducted into an alleged extortion attempt against Hogan by a third party. The records, which were unsealed while jurors were deliberating, contained statements from Hogan and other key witnesses given to the FBI under oath that directly contradicted sworn deposition statements provided to *Gawker*'s attorneys in 2015.

In May 2016, *Forbes* reported that Peter Thiel, billionaire tech investor and co-founder of online payment service company PayPal, had secretly funded Hogan's lawsuit, as well as several other lawsuits, against *Gawker*. Thiel later confirmed that he funded the lawsuit because he believed *Gawker* had "ruined people's lives for no reason." In 2007, a *Gawker* spin-off site outed Thiel as gay despite his attempts to keep his sexual orientation secret. That same month, Judge Campbell denied a motion from *Gawker* asking her to reduce the damages awarded to Hogan. As a result, *Gawker* would have been required to post a $50 million bond prior to appealing the jury's decision. However, Gawker Media filed for bankruptcy in June 2016, which would allow the company to avoid the bond and continue to operate its slate of websites as the appellate process commenced.

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> **— John Cook, Gizmodo Media Executive Editor**

As part of the bankruptcy process, Gawker Media sold its assets to Univision Communications, Inc. in August 2016 for approximately $135 million. Later that month, Univision Communications announced that it would end *Gawker*'s operations but would continue to operate several of Gawker Media's other sites. *Gawker* formally ceased operations on Aug. 22, 2016. Despite ending its editorial operations, Univision Communications chose to keep *Gawker*'s archives publicly accessible online. Gawker Media also continued to operate as a separate entity while completing bankruptcy proceedings. (For more information about the legal dispute between Hogan and *Gawker* as well as the subsequent developments, see "*Gawker* Faces $140 Million Judgment after Losing Privacy Case to Hulk Hogan in the Winter/Spring 2016 issue of the Silha *Bulletin*, and "*Gawker* Shuts Down After Losing Initial Appeal of $140 Million Judgment in Privacy Case," in the Summer 2016 issue.)

After the sale, controversy continued for several of Gawker Media's former sites. On Sept. 10, 2016, Reuters reported that Univision Communication executives voted to delete six posts across various sites that were formerly run by Gawker Media, including three posts on sports-focused *Deadspin*, two on tech-oriented *Gizmodo*, and one on feminist blog *Jezebel*. The six deleted posts had been the targets of various litigation and whose subjects included a man who claimed to have invented e-mail, a former major league baseball pitcher, a man who was acquitted of sexual assault, and a conservative blogger. *Forbes* reported on September 10 that attorney Charles Harder, who represented Hogan in his lawsuit against *Gawker*, also represented several of the litigants bringing lawsuits related to the now-deleted posts.

In a statement, Univision Communications noted that the removal of posts was a necessary step to move forward with the *Gawker*-related properties. "Following our acquisition of assets from Gawker Media, we have decided to take down select articles that are the subject of pending litigation against the prior owners," Univision Communications said in the statement, according to Reuters. "At this time of

transition, the decision was based on a desire to have a clean slate as we look to support and grow the editorial missions of the acquired brands."

After the Univision Communications executives' decision was announced, Gizmodo Media Executive Editor John Cook sent a memo to his editorial staff explaining that he had voted against removing the posts. "While I believe that Univision is a company that values and defends aggressive, independent reporting, the decision to remove these posts is, in my view, at odds with its tradition of confronting bullies with honesty," Cook wrote in the memo, according to Reuters. In a September 10 interview with *Forbes*, Cook also noted that the removal of the posts was contrary to the editorial philosophy of Gawker Media. "This decision was an affront to an idea that we have committed to for 13 years, which is that we should be able to say true things about public figures," Cook said. "When they attack us for doing that, we stand by our reporters and we stand by our stories. It's very difficult to see posts getting erased from the internet."

Cook also told *Forbes* that Univision Communication's decision to remove posts could set a bad precedent of other news organizations facing lawsuits from litigants with well-financed backers. "I think eventually people will wake up to [the] fact that we were the canary in the coal mine," Cook said. "For all the journalists that took pleasure and delight in watching us fall, the end result for all of us is going to be a severe tightening of what we can say. They better get used to it."

On Nov. 2, 2016, *The Wall Street Journal* reported that Hogan and Gawker Media had reached a settlement. As part of its proposed bankruptcy plan filed in U.S. Bankruptcy Court, Gawker Media indicated that it had agreed to pay Hogan $31 million to settle the invasion of privacy lawsuit as well as provide him with a portion of the proceeds from any future sale of the Gawker.com domain name. *The Wall Street Journal* also reported that the court documents indicated that Gawker Media had settled lawsuits with two other plaintiffs who had sued *Gawker* for defamation. *Forbes* reported on December 5 that the settlement deal was subject to court approval. The settlement with Hogan did not cover the punitive damages that both Gawker Media ex-Chief Executive Officer Nick Denton and Daulerio owed Hogan, meaning that both Denton and Daulerio would need to reach settlements individually with Hogan, according to *Forbes*.

After the settlement was announced, Thiel released a statement on November 2 praising the outcome of the case between Hogan and *Gawker*. "It is a great day for Terry Bollea [Hulk Hogan's real name] and a great day for everyone's right to privacy," Thiel said in the statement, according to *The Wall Street Journal*'s November 2 story. In a separate statement, Hogan attorney David Houston noted that his client welcomed the settlement. "All parties have agreed it is time to move on," Houston said in the statement provided to *The Wall Street Journal*.

> "It's a shame the Hogan trial took place without the motives of the plaintiff's backer being known. If there is a lasting legacy from this experience, it should be a new awareness of the danger of dark money in litigation finance."
>
> **— Nick Denton, Gawker Media ex-Chief Executive Officer**

For his part, Denton wrote in a November 2 blog post that he was unhappy with the settlement but believed the deal was in the best interest of everyone in order to move on from the case. "After four years of litigation funded by a billionaire with a grudge going back even further, a settlement has been reached. The saga is over," Denton wrote. "As the most unpalatable part of the deal, three true stories — about Hulk Hogan, the claim by Shiva Ayyadurai that he invented email and the feud between the founders of Tinder — are being removed from the web."

"Yes, we were confident the appeals court would reduce or eliminate the runaway Florida judgment against *Gawker*, the writer of the Hogan story and myself personally. And we expected to prevail in those other two lawsuits by clients of Charles Harder, the lawyer backed by Peter Thiel," Denton added. "But all-out legal war with Thiel would have cost too much, and hurt too many people, and there was no end in sight. The Valley billionaire, famously relentless, had committed publicly to support Hulk Hogan beyond the appeal and 'until his final victory.' *Gawker*'s nemesis was not going away. For Thiel, an investor in Facebook and Palantir, the cost of this exercise is less than 1% of his net worth and a little additional notoriety. The other protagonists — including Hulk Hogan and A.J. Daulerio, the author of the *Gawker* story about him — had much more at stake. That motivated a settlement that allows us all to move on, and focus on activities more productive than endless litigation. Life is short, for most of us."

Denton also reflected more broadly on the precedent that the legal battle between Hogan and *Gawker* would set. "It's a shame the Hogan trial took place without the motives of the plaintiff's backer being known. If there is a lasting legacy from this experience, it should be a new awareness of the danger of dark money in litigation finance," Denton wrote. "And that's surely in the spirit of the transparency *Gawker* was founded to promote. As for Peter Thiel himself, he is now for a wider group of people to contemplate."

Several legal commentators noted that the $31 million settlement between Hogan and Gawker Media left many unanswered questions. Particularly, the settlement meant that Gawker Media would drop its appeal of the Florida jury's decision from March 2016. In a November 4 interview with *Forbes*, Ken White, a lawyer and co-founder of legal blog "Popehat," said that the settlement prevented the Florida appellate courts from examining whether the jury's decision may have violated the First Amendment. "There has always been a tension in the right to privacy and the First Amendment, and it's not one of the First Amendment areas that have been explored well in court," White said. "I don't think the [Florida] trial court did a particularly good job of that. It was mostly about revulsion at *Gawker*, a revulsion I frankly share, but not a serious exploration of the First Amendment issues."

Reporters Committee for Freedom of the Press Litigation Director Katie

***Gawker*,** *continued on page 32*

Gawker, *continued from page 31*

Townsend told *Forbes* that she agreed the settlement left many questions open while also potentially creating problems in the future for other news organizations. "The claims that Hulk Hogan prevailed on, we're not going to see those tested on appeal. I think it does [set] some precedent, not in a legal way, but in a very real way, for future plaintiffs who may be emboldened to do this kind of thing, because we know juries can have a different reaction to privacy claims than a court would necessarily support," Townsend said. "I'm sure in Peter Thiel's mind, he believes that *Gawker* was a particularly bad actor. That being said, the question that this all boils down to is who gets to decide that a media organization should no longer exist?"

Beyond the unanswered First Amendment questions, other press advocates expressed concerns that the U.S. Bankruptcy Court may remove important provisions of Gawker Media's bankruptcy plan that provided protections for its former staff. On November 16, *The Wall Street Journal* reported that Gawker Media's liquidation plan had included a "third-party release" provision that would shield its former writers, editors, and freelance contributors from future lawsuits related to their work at *Gawker* in exchange for giving up indemnification claims against the company. In other words, Gawker Media would no longer be required to provide financial and legal assistance if its former journalists were sued over their reporting for *Gawker*, thus freeing up more funds to pay creditors. In return, the "third-party release" provision in the bankruptcy plan would bar future plaintiffs from bringing lawsuits against *Gawker*'s former staff for stories published on *Gawker* sites when it was managed by Gawker Media.

The Wall Street Journal reported that the "third-party release" would provide future legal protections to *Gawker*'s former staff because Univision Communication's deal to purchase Gawker Media's assets included provisions that indicated it could not be held legally responsible for any of Gawker Media's previous content. This meant that Univision Communications was not obligated to provide any sort of legal or financial assistance to former *Gawker* staff if they were sued over content that published prior to the bankruptcy sale.

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> **— Katie Townsend, Reporters Committee for Freedom of the Press Litigation Director,**

In a Dec. 6, 2016 press release, the Society of Professional Journalists (SPJ) announced that a coalition of 21 press advocacy groups and media organizations had filed an *amicus* brief calling on the U.S. Bankruptcy Court to uphold the "third-party release" provision because it provided adequate safeguards against future litigation. The brief argued that such protections were necessary to protect journalists' First Amendment rights. The coalition also suggested that without such protections, journalists could be hesitant to publish stories that are important for the public out of fear that they would potentially be responsible for large legal fees if faced with a possible lawsuit. However, the coalition noted that the "third-party release" proposal would provide adequate protections for *Gawker*'s former employees in the future.

"In their contracts with employees, *Gawker* included clauses that would have required the organization to provide a legal defense to its journalists if they were sued as part of their job. These types of clauses are standard at most media companies," SPJ National President Lynn Walsh said in the press release announcing the filing of the *amicus* brief. "In the company's proposed bankruptcy plan, employees were losing their rights under this clause and instead provided a 'third-party release' that would prevent any additional lawsuits that have not yet been filed once the bankruptcy is finalized. SPJ and other organizations are asking that this 'third-party release' be kept intact. If journalists cannot depend on these types of agreements they may not be as likely to produce investigative stories."

On Dec. 13, 2016, *Forbes* reported that the U.S. Bankruptcy Court approved Gawker Media's bankruptcy plan, which included the $31 million settlement and the "third-party release."

Casey Carmody
Silha *Bulletin* Editor

State Courts Consider Reporter's Privilege Issues

During the fall of 2016, several individuals sought to invoke reporter's privilege in various jurisdictions throughout the United States to prevent being compelled to reveal their confidential sources and non-confidential notes. In Massachusetts, a judge ordered conservative media host Glenn Beck and his producers to identify confidential sources when he was a defendant in a civil lawsuit arising from his reporting on the Boston Marathon bombings in 2013, which ultimately led Beck to settle the suit out of court. Meanwhile, *New York Times* reporter Frances Robles won an appeal in front of a New York state appellate court that allowed her to withhold notes from a jailhouse interview in 2013. Finally, the Minnesota Court of Appeals reversed a district court decision that would have compelled Star Tribune reporter Paul McEnroe to reveal his confidential source that was at the center of a defamation lawsuit brought by the subject of a 2013 story.

REPORTER'S PRIVILEGE

Glenn Beck Ordered to Identify Two Confidential Sources; Reaches Settlement in Defamation Suit

On Aug. 9, 2016, U.S. District Court for the District of Massachusetts Judge Patti B. Saris ruled that conservative media host Glenn Beck and two of his producers must identify unnamed Department of Homeland Security (DHS) officials that the host said linked Saudi national Abdulrahman Alharbi to the Boston Marathon bombing in 2013, which killed three people and injured 264 others. In the month following the attack, Beck reported that Alharbi, a 20-year-old Saudi Arabian student, was involved in the plot to place bombs at the finish line of the annual race. Beck alleged that Alharbi was a "proven terrorist" who "funded the operation," according to an August 9 *Washington Post* story.

The Washington Post reported that although police had investigated Alharbi and found that he was in the marathon audience during the bombing, law enforcement officials cleared him of any wrongdoing. Nevertheless, Beck continued to claim in several radio broadcasts and on his website, *TheBlaze*, that Alharbi was responsible for recruiting the brothers who carried out the attack and directing when the bombs should be detonated.

In March 2014, Alharbi brought a defamation lawsuit against Beck as well as several organizations associated with Beck in the U.S. District Court for the District of Massachusetts. *The Washington Post* reported that Alharbi alleged that Beck falsely accused him of participating in the bombing, which caused "grave injury." In trial depositions, Beck revealed that two of his editors at *TheBlaze*, then-head of the investigative unit Joe Weasel and chief content officer Joel Cheatwood, had obtained the information about Alharbi from confidential sources. The sources included four DHS investigative officers as well as two congressional aides. According to their depositions, Weasel talked to five of the sources while Cheatwood spoke with one.

In the August 2016 order, Judge Saris explained that Alharbi had argued that he needed the identities of the confidential sources because the information was "directly relevant to his claims, and cannot otherwise be determined from a less sensitive source." *Abdulrahman Alharbi v. TheBlaze, Inc. et. al.* No. 14-11550-PBS (D. Mass. Aug. 9, 2016). In response, Beck and his co-defendants, *TheBlaze*, Mercury Radio Arts, and Premier Radio Networks, argued that "the motion to compel is untimely, and that the sources' identities are protected by a qualified privilege under the First Amendment."

In her decision, Judge Saris applied a balancing test in which "the defendants' promise of confidentiality to the sources weighs against compelled disclosure. Although Massachusetts does not have a statutory shield law protecting journalists from revealing confidential sources, Judge Saris used precedent from previous court decisions interpreting the scope of the reporter's privilege in Massachusetts that required a "heightened sensitivity to First Amendment concerns and invite[s] a balancing of considerations." *In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004). According to Judge Saris' decision, courts must "balance the potential harm to the free flow of information that might result against the asserted need for the requested information." *Bruno & Stillman*, 633 F.2d 583, at 596 (1st Cir. 1980). After applying this balancing test, Judge Saris found that Alharbi was able to demonstrate a compelling need for the information. "The plaintiff has a strong need for the sources' identities to meet his burden of demonstrating that the defendants did not act with the proper standard of care in their reporting about Alharbi," Judge Saris wrote. As a result, she ordered Beck and his co-defendants to identify at least two of the officials from DHS.

Politico reported on Aug. 24, 2016 that despite the order, at least one of Beck's producers planned to refuse to disclose the names of the DHS sources. Beck's attorney, Michael Grygiel, also told Judge Saris that the radio host would refuse to name any sources, according to *Politico*. "Defendants cannot disclose the identities of Confidential Sources 1 and 2 for several compelling reasons. First and foremost, as a matter of fundamental journalistic integrity, Defendants cannot disclose the identities of the Confidential Sources without their authorization," Grygiel wrote in a letter to Judge Saris that *Politico* had obtained. Grygiel's letter added that Beck's sources were told of the judge's demand, but "were unwilling to be identified," despite the fact that Judge Saris said she would withhold their names from the court record and bar those involved in the litigation from revealing the sources.

Politico reported that Grygiel's letter also appeared to restate a claim that Beck had made earlier in August that he believed that his sources would be harmed or killed if they were publicly identified. "As previously represented to the Court, Defendants are justifiably concerned that substantial harm could come to the Confidential Sources if they are identified," Grygiel wrote. "Second, if Mr. Weasel were to disclose the identities of the Confidential Sources, it is a near certainty that no confidential sources would ever again speak to Mr. Weasel or The Blaze Inc. and its affiliates, to the detriment of an informed public."

Politico reported that at the time Grygiel wrote the letter, it appeared Weasel could be held in contempt of court and jailed for refusing to name

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the five confidential sources he spoke with even though he was not a named defendant in the case. If the producers and Beck refused to comply with the order, Judge Saris could have imposed fines on *TheBlaze* or "take[n] action to limit the company's defenses in the lawsuits, such as instructing a jury that it could infer that the sources did not exist." *Politico* also noted that it was unlikely that Beck would be held in contempt because Grygiel wrote in the letter that the radio host had no direct contact with the sources and "could not identify" them.

On September 13, *Politico* reported that Beck reached an out-of-court settlement with Alharbi. The parties declined to disclose any specific terms of the deal. However, a joint statement released by the parties indicated that both sides benefitted from the settlement. "No party has admitted any fault, wrongdoing, or responsibility as part of the settlement," representatives for Beck and for Alharbi wrote in the statement, according to *Politico*. "Defendants have agreed to settlement of the pending action in furtherance of fundamental principles of journalistic integrity by preserving the confidentiality of their sources consistent with their rights and privileges under the First Amendment. The Plaintiff has pursued this action for the reasons set forth in his Complaint and believes those interests have been served by this resolution."

New York Times *Reporter Wins Appeal after Judge Ordered Her to Testify*

On Oct. 20, 2016, a New York state appellate court determined that the New York shield law protected *New York Times* reporter Frances Robles from testifying about jailhouse interviews she had conducted with Conrado Juárez, who was accused of killing a toddler in 1991. The appellate court's decision overturned an August 4 order from Justice Bonnie G. Wittner, a trial judge for the New York Supreme Court for New York County, who ruled that Robles must testify during the Juárez's trial. Justice Wittner's August 4 decision had raised concerns among news organizations and press advocates because the New York shield law prevents courts from compelling journalists to testify about information from confidential and non-confidential sources. However, the organizations praised the reversal by the appellate court for basing its decision on a broad view of the types of protections that the state shield law provides.

In October 2013, New York police officials arrested Juárez after they determined the identity of a murdered four-year-old girl nicknamed "Baby Hope." The child's body had been found in July 1991 but remained unidentified for more than 20 years, according to an April 13, 2016 story by *The New York Times*. After an extensive interrogation, Juárez confessed on videotape to committing the murder. Juárez also told investigators that he and his sister dumped the body in the woods off a highway. Four days after the videotaped confession, Juárez withdrew his confession, telling Robles during a jailhouse interview that he had helped dispose of the toddler's body but denied killing the child. Instead, Juárez told the *Times* reporter that detectives had "browbeat him into a confession." *The New York Times* later published Juárez's account of the interrogation on Oct. 17, 2013.

> "It's important that our reporters be allowed to give voice to people who are incarcerated, and this subpoena threatened to silence those voices."
>
> **— David McCraw, The New York Times Company Assistant General Counsel**

During pre-trial proceedings, prosecutors announced that they would seek to have Robles testify about her interview with Juárez in order to prove that his confession was freely given and should be admitted at trial. On April 13, 2016, the *New York Times* reported that Justice Wittner determined that Robles would not be compelled to testify at a pretrial hearing about Juárez's confession. Justice Wittner also quashed two subpoenas that would have required Robles to turn over her notes from the interview she had with Juárez. In the one-page decision, Justice Wittner relied upon New York's shield law to quash the subpoenas, writing that the district attorney's office had not shown "that its case would rise or fall on Ms. Robles's testimony and her notes, as the shield law says it must in order to compel a journalist to take the witness stand."

New York's shield law states that journalists cannot be compelled to testify or provide information about news obtained from confidential sources. N.Y. Civ. Rights Law § 79-h. However, *The New York Times* noted in its April 13 story that when journalists have named their sources, such as when Robles identified that her information came from Juárez, journalists receive fewer safeguards under the law. In such contexts, a journalist can be forced to take the stand or turn over notes if prosecutors can show the information is "highly material and relevant" as well as "critical or necessary to the maintenance of a party's claim" to prove their case. The prosecution must also show that the information cannot be obtained from another source.

In the wake of the April 13 ruling, The New York Times Company assistant general counsel David McCraw praised Justice Wittner's decision to quash the subpoenas. "New York law recognizes that the proper role of journalists is out reporting stories, not serving as witnesses in court cases," McCraw told the *Times* on April 13. "The court's decision underscores that the public interest is best served by protecting reporters from unnecessary subpoenas."

The *Times* reported that despite the victory, Justice Wittner's decision "left the door open for prosecutors to argue again at trial that Ms. Robles's testimony was critical to their case." In August 2016, prosecutors again sought to compel Robles to testify about Juárez's recanted confession but in the context of the trial rather than during pre-trial proceedings. The *Times* reported that court documents filed by lead prosecutor Melissa Mourges argued that there was no scientific evidence available that directly linked Juárez to the crime. As a result, Mourges maintained that Robles interviews with Juárez corroborated many of the details he told the police. "Simply stated, the prosecution cannot succeed unless the jury accepts the statements as both voluntary and true," she wrote. "This means the case

virtually rises and falls on evidence surrounding all the statements Juárez made."

The *Times* reported that Robles' lawyer Kate Bolger argued that Juárez's confession could be corroborated in ways that did not require Robles' to testify or discloser her notes. "The district attorney has three hours of a video confession along with the corroborating evidence from the victim's body and related physical evidence; it does not also need to question Ms. Robles about an interview in which Mr. Juárez did not confess," Bolger wrote in documents opposing the prosecutor's motions seeking to compel Robles' testimony. On Aug. 4, 2016, Justice Wittner agreed that Robles should testify during the actual trial, ruling that Robles' notes and testimony were "material, relevant and critical to the people's case" against Juárez because the only other public statements he gave in addition to his confession were to the journalist during the jailhouse interview, according to the *Times*.

After the decision, Bolger told *The New York Times* that she intended to file an appeal immediately with the New York Supreme Court, Appellate Division. "Ms. Robles believes the court had it right the first time," Bolger told the *Times*, referencing Justice Wittner's decision to quash subpoenas during pre-trial proceedings in April 2016. "This kind of subpoena interferes with the reporter's ability to communicate news and the public's right to hear it, and Ms. Robles remains hopeful that the appellate court will reverse today's decision." Justice Wittner also agreed to stay her decision pending appeal, but she predicted the appellate court "will confirm what I did."

During the appeals process, the Reporters Committee for Freedom of the Press (RCFP), which led a coalition of 57 media organizations, filed an *amicus* brief on Aug. 19, 2016 that urged the appellate court to overturn Justice Wittner's order. The brief argued that "the lower court incorrectly interpreted the Shield Law's strict standards for determining when the privilege against disclosure of nonconfidential information may be overcome and plainly erred by treating its disclosure not as a last resort, but rather as a routine occurrence."

The coalition's *amicus* brief also emphasized the benefits for the public of protecting journalists from compelled disclosure of their nonconfidential sources. "It is not exclusively the compelled testimony in one case that harms the news media, but also the broader perception it creates that the news media must routinely testify against their own sources, thus chilling future cooperation," the coalition wrote in the brief. "Protecting nonconfidential information from compelled disclosure, whether in the form of testimony about an interview or notes describing such an encounter, is vitally important to the free flow of information to the public. Routine compelled disclosure of nonconfidential but unpublished information would stymie reporting by threatening the independence of the news media and deterring sources from speaking to journalists, as well as burdening the news media's time and resources and discouraging journalists from reporting on controversial matters and maintaining records of past reporting."

Additionally, the RCFP-led coalition argued that jailhouse interviews, such as the one Robles conducted with Juárez at Rikers Island, played an important role in informing the public. "Jailhouse interviews are an essential source of information not just about the particulars of one case, but about how the criminal justice system operates," the coalition wrote. "Because such interviews typically arise from criminal prosecutions, they are also likely to tempt prosecutors into eying subpoenas to the news media as a way to gather evidence for trial. Consequently, the news media's ability to report on matters concerning crime, criminal justice, and prison conditions, as informed by jailhouse interviews, hinges upon a strong interpretation of the Shield Law's qualified privilege against compelled disclosure of nonconfidential information."

On Oct. 20, 2016, *The New York Times* reported that the New York Supreme Court, Appellate Division, First Department ruled that Robles could not be subpoenaed to testify about the jailhouse interview. *In re People of the State of New York v. Juarez*, 39 N.Y.S.3d 155 (1st Dept. 2016). In a unanimous decision, the court found that Robles' notes were not "critical or necessary," as required by the state shield law, to the prosecution of Juárez, which was contrary to the finding by Justice Wittner. According to the *Times*, the court based its decision on "the consistent tradition in this state of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events.'" Additionally, the appellate panel found that the prosecutors failed to make "a clear and specific showing" that Robles' notes and memories of the interview with Juárez were instrumental to their case.

In an October 20 interview with the *Times* after the decision, McCraw praised the appellate court for taking a broad view of the New York shield law. "We are grateful to the court for recognizing how important this issue is not just to *The Times* and to Ms. Robles, but to journalists everywhere," McCraw said. "It's important that our reporters be allowed to give voice to people who are incarcerated, and this subpoena threatened to silence those voices." Bolger agreed that the appeals court's decision to overturn Justice Wittner's ruling was the correct outcome. "We are very happy with the results and that the court reiterated New York's policy to protect journalists," Bolger told the *Times*.

The *Times* reported on Oct. 20, 2016 that a spokeswoman for the Manhattan district attorney's office did not say whether they would appeal the ruling. As the *Bulletin* went to press, an appeal had not been filed.

Court of Appeals of Minnesota Says Journalist Does Not Have to Reveal Confidential Sources

On Sept. 12, 2016, the Minnesota Court of Appeals ruled that a former investigative reporter for the Minneapolis *Star Tribune* would not be required to reveal an anonymous source related to a defamation case brought by an assisted living facility located in Chisholm, Minn. The case arose after *Star Tribune* reporter Paul McEnroe wrote about abuses taking place at the facility. Range Development Company, which owned the facility at the center of the story, later filed a lawsuit against McEnroe, alleging that his story contained several "misstatements." During the pre-trial proceedings, a St. Louis County District court judge ordered that McEnroe must reveal his source, which led to the appeal.

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In April 2013, the *Star Tribune* published McEnroe's story reporting that an assisted living facility owned by Range Development Company had abused several of its patients. McEnroe wrote that the facility had left a man with developmental disabilities and mental illness "alone and sitting in filth." Additionally, McEnroe's story indicated that when police arrived, the patient was found "in a urine-soaked chair and still not responding." Police on the scene also found that the resident's room was cluttered and that the carpet was soaked in urine. Further, McEnroe reported that the patient had critically low blood sugar and was diagnosed at the hospital with a severe urinary tract infection, from which the patient later recovered. Ambulance-service employees later filed a report against the assisted living facility alleging neglect of the patient under the Minnesota Vulnerable Adults Act. Minnesota Public Radio (MPR) reported in a Sept. 12, 2016 story about the case that McEnroe's information about the poor conditions had been obtained from a confidential source who leaked a not-yet-released Minnesota Department of Health (MDH) report investigating the incident.

Shortly after the *Star Tribune* published McEnroe's story, Range Development filed a defamation lawsuit in the St. Louis County District Court against McEnroe and the newspaper, claiming the story contained nine damaging "misstatements." The company alleged that the false statements included descriptions that "black mold festered on a table," that the resident was found "barely alive," and that "[t]he case ha[d] been referred to the St. Louis County attorney's office for possible criminal charges." Range Development also claimed that McEnroe's story contained information than went beyond what was in the MDH's report. The company filed a motion to compel McEnroe to divulge the name of his confidential source, arguing that the name was necessary in order to determine the basis for the additional information about the case that appeared in the *Star Tribune*. A St. Louis County District Court judge granted Range Development's request that McEnroe reveal his source, finding that "the identity of defendant McEnroe's source will provide evidence as to whether or not he, or any other named defendant, spoke with actual malice in making the allegedly defamatory statements." McEnroe appealed, arguing that both a qualified First Amendment reporter's privilege and the Minnesota Free Flow of Information Act, the state's shield law, protected him from testifying about his source. Minn. Stat. 595.01 *et seq*.

On Sept. 12, 2016, a three-judge panel for the Minnesota Court of Appeals overturned the district court's order. In the unanimous decision, Judge Lucinda Jesson noted that the case implicated many aspects of the law governing defamation and reporter's privilege. "This case stands at the intersection of common-law defamation, the First Amendment right to free speech, and the parameters of a journalist's privilege, if any, under the First Amendment," Judge Jesson wrote. "McEnroe seeks to protect his source through recognition of a constitutionally imposed qualified journalist's privilege and a broad reading of the journalist's privilege provided by Minnesota statute in the act."

Judge Jesson next focused on the relevant portions of the Minnesota Free Flow of Information Act, writing that "[w]hile the [Minnesota Free Flow of Information] act affords news media a substantial privilege not to disclose sources, it also carves out certain exceptions to this journalist's privilege. See Minn.Stat. § 595.024, .025. One exception applies to disclosure of sources in defamation cases if certain conditions have been met. Minn.Stat. § 595.025." Under this latter section, the statute states that a defamation plaintiff must meet two conditions before a journalist can be compelled to disclose the identity of a source. First, "that there is probable cause to believe that the source has information clearly relevant to the issue of defamation," and second, "that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights." Minn. Stat. 595.025.

Applying this test, the three-judge panel found that Range Development did not satisfy their burden required to compel disclosure of source information by a journalist. "We are not convinced that [Range Development's] justifications demonstrate that the identity of the source will lead to persuasive evidence of falsity or actual malice," the court said. "Range [Development] has not made the affirmative showing required to merit an exception to the act's general rule that a court may not require a reporter to disclose confidential sources." As a result, the panel wrote that "[b]ecause the district court erred by concluding that the statutory standards for disclosure were met, we reverse the district court's order requiring disclosure of McEnroe's confidential source."

In a September 12 press release, Star Tribune Media Company general counsel Randy Lebedoff praised the Minnesota Court of Appeals decision. "We are pleased that the court strongly and clearly upheld the reporter's privilege in Minnesota," Lebedoff said, according to the *Star Tribune*'s September 12 story. According to the Minnesota appellate court case management system, Range Development's attorney James Clark did not file an appeal of the Minnesota Court of Appeals decision. The *Star Tribune* reported on September 12 that the defamation case was still set for trial, but a start date had not yet been determined.

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Independent Journalists Face Threats to Newsgathering Rights

Several independent journalists found themselves fighting restrictions on their abilities to gather news during the fall of 2016. In North Dakota, a journalist for *Democracy Now!* faced an arrest warrant after she reported on protests opposing the construction of an oil pipeline crossing a Native American reservation. Several other individuals were also arrested in North Dakota and Washington state for recording similar protests. Meanwhile, an independent blogger in Minnesota fought a restraining order brought against him by a woman who had been the subject of his reporting. Press freedom advocates argued that these attempts at restricting journalists' newsgathering abilities posed threats to First Amendment rights.

NEWSGATHERING

North Dakota Officials Issue Warrant for* Democracy Now! *Reporter During Pipeline Protests

On Sept. 10, 2016, *The Dickinson* [N.D.] *Press* reported that the Morton County, N.D. sheriff's office had obtained an arrest warrant for *Democracy Now!* reporter Amy Goodman. The warrant was issued after Goodman reported on clashes between protesters and private security personnel at the Dakota Access Pipeline construction site on September 3. The construction area was the location of a longstanding faceoff between Texas-based Energy Transfer Partners, which is building the $3.8 billion oil pipeline, and activists arguing that the pipeline threatens the safety of the drinking water source for the nearby reservation of the Standing Rock Sioux Tribe. Goodman's report included footage of private security guards using pepper spray and releasing guard dogs to attack protestors, according to *The Dickinson Press*. Goodman's video footage went viral on social media sites and was picked up by several national news outlets.

The Dickinson Press reported that Morton County officials had accused Goodman of criminal trespassing, which is a Class B misdemeanor in North Dakota and carries a sentence up to 30 days in prison and up to a $1,500 fine. Upon learning of the arrest warrant, Goodman released a statement on the *Democracy Now!* website on September 10 that criticized the sheriff's office. "This is an unacceptable violation of freedom of the press," Goodman said in the statement. "I was doing my job by covering pipeline guards unleashing dogs and pepper spray on Native American protesters." *The Guardian* reported on September 12 that Goodman was not immediately arrested.

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> **— Matt Taibbi, *Rolling Stone* political reporter**

Upon learning of the warrant, press advocacy groups criticized the Morton County sheriff's office. In a September 12 press release, the Committee to Protect Journalists (CPJ) called on prosecutors to immediately drop any criminal charges against Goodman. "This arrest warrant is a transparent attempt to intimidate reporters from covering protests of significant public interest," Carlos Lauría, CPJ senior program coordinator for the Americas, said in the press release. "Authorities in North Dakota should stop embarrassing themselves, drop the charges against Amy Goodman, and ensure that all reporters are free to do their job."

McLean County State's Attorney Ladd Erickson, who was handling the prosecution on behalf of Morton County, defended his decision to bring the trespassing charge in an October 11 interview with the *Bismarck Tribune*, arguing that Goodman was no different from any of the protesters. Specifically, Erickson said that Goodman's September 3 story failed to indicate that protesters had trespassed on private property and did not report that protestors allegedly assaulted security guards. "She's a protester, basically. Everything she reported on was from the position of justifying the protest actions," Erickson said. "Is everybody that's putting out a YouTube video from down there a journalist, too?"

In an October 13 commentary, *Rolling Stone* political reporter Matt Taibbi defended Goodman and criticized Erickson's arguments after learning that the prosecutor claimed to be a fan of Taibbi's work. "The whole point of fighting to be independent for your whole career, and building your own news network instead of working at someone else's existing, corporate-funded one, [such as Goodman has,] is so that you can cover something like the Dakota Pipeline story whenever you feel like it. So not only was Amy Goodman doing journalism when she as at those protests, the only kind of journalist who would even be there almost by definition would have to be one like Amy Goodman," Taibbi wrote. "But a prosecutor who arrests a reporter because he doesn't think she's 'balanced' enough is basically telling future reporters what needs to be in their stories to avoid arrest. This is totally improper and un-American. We have enough meddling editors in this country without also recruiting government officials to the job. Mr. Erickson, thanks sincerely for reading, but please drop the charges."

On October 15, *Democracy Now!* reported that Erickson had dropped the trespassing charge because of legal complications with proving that Goodman had actually received notice that she was trespassing, as required by North Dakota's criminal trespassing statute. Erickson informed Goodman's lawyers that he intended to file a new charge against the journalist for engaging in a riot, which also carried a punishment of up to 30 days in prison and up to a $1,500 fine. *Democracy Now!* also reported that Goodman had travelled back to North Dakota to face

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the riot charge if a judge agreed to approve it.

However, *The New York Times* reported on October 17 that Morton County District Judge John Grinsteiner refused to sign the charging documents, citing a lack of evidence. As a result, Goodman would not face prosecution. Goodman defended her reporting in a Facebook Live broadcast shortly before the judge's decision to deny the riot charge. "I wasn't trespassing. I wasn't rioting," Goodman said in the broadcast, according to *The New York Times*. "The 'Democracy Now' team and I were there to report, to document what was happening on the ground. These charges are simply a threat to all journalists around the country: Do not come to North Dakota."

Despite the victory, Goodman attorney Reed Brody told the *Times* that Erickson indicated that he was still considering other charges against the journalist. "The prosecutor seems to be determined to charge [Goodman] with something," Brody said. "It's hard to see what the State of North Dakota gains by charging a reporter with a crime for doing her work. If the attempt is to prevent people from talking about the Dakota Access pipeline, it certainly has not worked out for them."

On October 18, *Washington Post* columnist Radley Balko wrote that although the dismissal of charges against Goodman was a positive development, Erickson's actions were a threat to the First Amendment. "The fact that Goodman may have been covering the protests from a point of view that's friendly to the protesters doesn't mean she's culpable for the actions of those protesters who may have broken the law. There's no 'advocacy exception' to the First Amendment's free-press protections. In fact, at the time the First Amendment was written and passed, there was no ideal of an 'objective' press. *All* press was advocacy press [*sic*]," Balko wrote. "These arrests and charges are an affront to both the free press and the right to protest. They're also ample evidence that Erickson isn't fit to be a prosecutor. He clearly doesn't understand the First Amendment. Or — even worse — he understands it just fine. He just chooses to ignore it."

Besides Goodman, law enforcement officials have arrested several others after reporting on and drawing attention to protests related to oil pipelines located in the United States. *The Guardian* reported on October 10 that the Morton County sheriff's office arrested actress Shailene Woodley and charged her with criminal trespassing and engaging in a riot. Woodley was broadcasting on Facebook Live when she was arrested and continued to broadcast throughout her arrest. On October 20, *The Guardian* also reported that documentary filmmaker Deia Schlosberg was arrested on October 11 when she was filming several protesters at a site near the TransCanada Keystone Pipeline in Pembina County in North Dakota. She was charged with several counts of felony conspiracy, which could carry a punishment of up to 45 years in prison. In a separate protest held on October 11, Lindsey Grayzel, also a documentary filmmaker, and cinematographer Carl Davies were arrested for filming protestors who had entered a restricted area near the Trans Mountain Pipeline in Skagit County, Wash. A Skagit County sheriff's office report indicated that neither Grayzel or Davies had entered the fenced restricted space. Both were charged with misdemeanor trespassing, a felony burglary charge, and felony "criminal sabotage," according to *The Guardian*. The maximum punishment for the charges is 30 years in prison.

In an October 14 op-ed for *The Nation*, filmmaker Josh Fox, whose film *Gasland* was nominated for an Academy Award, argued that the charges against Schlosberg and others represented a significant threat to press freedom of independent journalists. "Documentary journalism can show the activists as what they really are: sympathetic human beings who are doing something necessary and vital, real people who are sacrificing real freedom to stop the oil-industry extremists before it is too late. In fact, doc filmmaking may be the only thing that can do that," Fox wrote. "This is not only about reporting on the climate-change movement. Journalists have also been arrested reporting on Black Lives Matter, the movement for Native rights, and many other important movements the corporate media fails to cover. The First Amendment and the Constitution are at stake in [Schlosberg's] case. If we lose it, we lose America too."

Woman Convicted of Hiding Daughters Seeks Restraining Order Against Blogger

On Sept. 16, 2016, the Minneapolis *Star Tribune* reported that *MinnPost* columnist and blogger Michael Brodkorb was facing a restraining order after reporting at length about two Minnesota teenagers who had disappeared during their parents' contentious divorce and had been missing for more than two years. The teenage girls were later found alive on a horse ranch in western Minnesota, and their mother, Sandra Grazzini-Rucki, was convicted of six counts of felony deprivation of parental rights in July 2016 for hiding the girls from their father. Brodkorb's reporting on his blog, *Missing in Minnesota*, and for the *Star Tribune* helped investigators find the girls, and the blogger continued to cover Grazzini-Rucki's subsequent trial.

In September, Grazzini-Rucki petitioned a Washington County district court for a restraining order against Brodkorb, alleging that Brodkorb's reporting had put her in "great fear" for her safety and opened her to "harassing and defamatory remarks" because he had reported "slanderous misinformation on multiple websites, accounts, and media outlets" leading others to harass her through social media, according to the *Star Tribune*. Grazzini-Rucki's complaint also accused Brodkorb of following her in his car as well as surveilling her at home. The *Star Tribune* reported that the Washington County Judge John McBride immediately granted Grazzini-Rucki's request for a temporary restraining order because judges must initially assume that harassment allegations are true for safety purposes. The judge scheduled a hearing for the following week to consider the merits of Grazzini-Rucki's petition.

In a September 16 interview about the restraining order, Grazzini-Rucki told *City Pages* that Brodkorb had chased her and her attorney, Michelle MacDonald, in an orange minivan and attempted to snap photographs after Grazzini-Rucki had posted bail and left a Hastings jail in February 2016. "He was right up behind us, so Michelle pulled over, whipped a U-turn in the other direction. He stopped, pulled a U-turn, and kept following us," Grazzini-Rucki said. "He kept following us for at least 40 minutes." In the same *City Pages* story, Brodkorb disputed Grazzini-

Rucki's claims. "I don't drive an orange minivan," Brodkorb told *City Pages*. "If they were followed by someone in an orange minivan, it wasn't me, as I don't drive an orange minivan and I've never followed Sandra or her attorney."

Brodkorb also criticized Grazzini-Rucki for seeking a restraining order in a September 14 post on his blog. "It is my belief that Grazzini-Rucki filed the fraudulent petition to prevent me from continuing to report on the legal developments in her criminal trial and others who have been criminally charged related to the disappearance of Grazzini-Rucki's children," Brodkorb wrote. "While I am frustrated Grazzini-Rucki provided false information to the court which then allowed the order to be granted, I have a responsibility to follow the court's order, despite the process Grazzini-Rucki used to obtain it. Therefore, I will not attend a court hearing tomorrow morning involving Grazzini-Rucki, until I receive further clarification and guidance from my attorneys."

In the September 16 interview with *City Pages*, Brodkorb argued that Grazzini-Rucki was angered by the effectiveness of his work. "I think she was largely upset with my coverage of the case, when I was writing for the *Star Tribune* or when I was writing in an independent fashion," Brodkorb said. "The question remains whether she'll be on probation or get jail time. It's a culmination of the entire legal process that's gone on. It'll be the culmination of a lot of reporting and work that I've done, and she's obviously upset about that, so she's conjured up these fictitious events."

MinnPost reported on September 21 that despite the fact that the restraining order presented a potential threat to newsgathering, Brodkorb received little support from other journalists and news organizations. The *Star Tribune* noted in its September 16 story that the Society of Professional Journalists' (SPJ) Minnesota Pro Chapter said it would wait until the hearing on the restraining order before taking an official position on the situation. Brodkorb told *MinnPost* that he was disappointed at the lack of support. "I'm a dues paying member of The Society of Professional Journalists [SPJ]," Brodkorb said. "You'd think they could say something on at least the First Amendment issue here." Brodkorb also told *MinnPost* that the only local support that he received came in the form of a single tweet by *Star Tribune* reporter Paul Walsh.

However, *MinnPost* speculated that the lack of support by Minnesota's journalistic community for Brodkorb might be attributed to the blogger's previous, controversial career as a staff member for the Minnesota Republican Party. Brodkorb's political career came to an end in 2011 after he was exposed for having an affair with a Minnesota state senator, fired from his position as communications director for the Republican caucus in the Minnesota Senate, and filed lawsuits against the Senate for how it handled his firing. Brodkorb later told *MinnPost* in 2015 that he was no longer interested in engaging in partisan politics but would be blogging about Minnesota politics on a personal website and for the *Star Tribune*. *MinnPost* noted that Brodkorb's work with the *Star Tribune* and blog on the missing girls appeared to suggest that he appeared to indeed have had a change of heart.

> "I appreciate the court's recognition and rejection of this obvious and blatant abuse of the harassment order process. While I am pleased with the outcome of this case, I am disappointed that I had to go to court to defend my rights under the [U.S.] Constitution."
>
> **— Michael Brodkorb, Columnist and blogger**

Members of SPJ remained cautious in their support, nonetheless. *Mankato Free Press* managing editor and SPJ Secretary Joe Spear told *MinnPost* that Brodkorb's situation was troubling but his organization needed to wait for the hearing. "It does appear [Brodkorb] was acting as a journalist, at least in some capacity. Although not in the same capacity as if he was working for the *Star Tribune* or another organization," Spear said. "That said, it is an interesting question. I've never seen a restraining order granted over a reporter's exercise of First Amendment rights."

On Sept. 27, 2016, *City Pages* reported that Judge McBride dismissed the restraining order, finding that Grazzini-Rucki brought the petition in the wrong county. Under Minnesota law, Grazzini-Rucki was required to file the petition in the county where she lived, where Brodkorb lived, or where the harassment took place. None of those locations were in Washington County. Judge McBride also rejected MacDonald's claims that Washington County was the proper venue to bring the petition because Grazzini-Rucki was homeless and was living out of the attorney's office that was located within the county, according to *City Pages*.

"It is doubtful that [Grazzini-Rucki] ever established a 'permanent home' in her lawyer's office," Judge McBride wrote. "Furthermore, the Court accepts Ms. MacDonald's representation that [Grazzini-Rucki] is homeless. A person who is homeless, by definition, has no residence. It follows that [Grazzini-Rucki] does not have a residence in Washington County."

In a September 27 post on Facebook, Brodkorb praised Judge McBride's decision while criticizing Grazzini-Rucki's attempts to block his reporting. "I appreciate the court's recognition and rejection of this obvious and blatant abuse of the harassment order process. While I am pleased with the outcome of this case, I am disappointed that I had to go to court to defend my rights under the [U.S.] Constitution," Brodkorb wrote. "The First Amendment implications of a defendant in a criminal trial abusing the court system to silence unflattering reporting about themselves was clear to many from the beginning.. . . I would also like to specifically thank members of the media who saw this as an attempt to limit my First Amendment rights[.] I can only hope that my victory in court makes it less likely that this tactic will be used against other journalists in the future."

Casey Carmody
Silha *Bulletin* Editor

Media Law Issues at the Forefront in Several States

During the summer and fall of 2016, several states considered issues related to freedom of information and defamation. In Massachusetts and Illinois, lawmakers passed bills aiming to strengthen the states' Freedom of Information Acts and public records laws. On Nov. 16, 2016, the Indiana Supreme Court ruled unanimously that Notre Dame's Security Police Department is not a "law enforcement agency" or "public agency" under Indiana law, meaning that the department did not have to turn over their records related to student athletes to ESPN. Critics argued that the Indiana Supreme Court's decision would lead to less accountability and transparency for university police forces. In North Carolina, a jury awarded a plaintiff nearly $6 million in two libel verdicts against a Raleigh newspaper and one of its reporters. Press advocates suggested the large monetary punishments demonstrated evidence of growing unpopularity of media, particularly in front of juries.

STATE LAW UPDATES

Massachusetts Lawmakers Take Steps to Strengthen State FOIA Laws

In June 2016, Massachusetts Gov. Charlie Baker signed a bill that strengthened several provisions of the state's Public Records Law. Mass. Gen. Laws Ch. 66, § 10. The bill itself was adopted unanimously in both chambers of the Massachusetts legislature, and journalists praised the revisions to the state law. Despite the changes, some journalists in the state expressed skepticism over whether the revisions would be effective.

Gov. Baker signed H.4333, titled "An Act to Improve Public Records," 2016 Mass. Acts Ch. 121, into law in June 2016, which aimed to reform Massachusetts' public records law for the first time since 1973, according to Secretary of the Commonwealth of Massachusetts William Francis Galvin's website. The new law addressed widely-criticized weaknesses that made it difficult for citizens to get information about government functions, according to a May 25, 2016 press release from Common Cause Massachusetts, a non-partisan organization advocating for greater government accountability.

The bill made several significant changes to Massachusetts' public records law, according to Galvin's website. The first change was a new requirement that agencies and municipalities must designate one or more employees as the Records Access Officer (RAO), whose role will be to coordinate the response to requests for access to public records, assist individuals seeking public records in identifying the records they seek, assist the custodian of records in preserving public records, and prepare guidelines that enable requestors to make informed requests. The second change required RAOs to provide public records in an electronic format unless they are not available an electronic format or the requestor cannot receive or access the record electronically. Commonly requested records such as annual reports or minutes from open meetings are required to be made available online.

> "A strong public records law is critical to democracy and our ability as citizens to hold government accountable. [Massachusetts] made a significant commitment to transparency and freedom of information, improving open government, and moving our state a huge step forward from near last in the nation."
>
> **— Pam Wilmot, Common Cause Massachusetts Executive Director**

Third, the new law gives RAOs the ability to petition the Secretary of the Commonwealth of Massachusetts' Supervisor of Records office for an extension if they are unable to fulfill a records request within the designated time frame of 10 business days. Fourth, the new law codified the Supervisor of Records' Public Access Regulations that permit records custodians to charge 5 cents per page for black and white copies of records. Additionally, a state agency RAO may assess a fee of the hourly rate of the lowest paid employee with the skills necessary to search for, compile, segregate, redact or reproduce a requested record if the request requires more than four or more hours of employee time. RAOs in municipalities can charge an hourly rate if the request requires two or more hours of employee time. However, state agencies or municipalities may not charge more than $25 an hour unless receiving prior approval from the Supervisor of Records office.

Finally, the bill allows a requester to file an administrative appeal with the Supervisor of Records office if an agency or municipality fails to comply with the new law. The office is then required to issue a determination on the status of the records within 10 days of receiving the appeal. The law also permits courts to award attorney fees or costs to any records requestor who prevails in a court action against a state agency or municipality that failed to proper comply with the state's open record law.

Government transparency and accountability advocates praised the updates to the law. In a May 25 press release, Common Cause Massachusetts Executive Director Pam Wilmot said that the updates brought Massachusetts' open records law in line with other states' laws. "A strong public records law is critical to democracy and our ability as citizens to hold government accountable," Wilmot said in the press release. "[Massachusetts] made a significant commitment to transparency and freedom of information, improving open government, and moving our state a huge step forward from near last in the nation."

In a May 26 op-ed for the *Boston Globe* published prior to the law's enactment, Massachusetts American Civil Liberties Union (ACLU) Executive Director Carol Rose noted that many government officials had said the law was an "unfunded mandate" that required an "update to antiquated computer systems" and could lead to "frivolous requests and lawsuits." Rose described the concerns as unfounded. "Opponents of public records

reform hope that they can scare the Massachusetts legislature into retreat," Rose wrote. "They'd prefer to continue to ignore the law and hide public records from the people of Massachusetts, just as they have done for the last 40 years. But nobody — not even bureaucrats — should be above the law." The new law went into effect on Jan. 1, 2017.

Illinois Lawmakers Create Stiffer Penalties for Illinois FOIA Violations

On Aug. 2, 2016, the Crystal Lake, Ill. *Northwest Herald* reported that Gov. Bruce Rauner signed HB4715 into law, which strengthened the Illinois Freedom of Information Act (FOIA) and was part of a two-bill package known as "Molly's Law." 5 ILCS 140/1. *The Southern Illinoisan* reported on July 29 that the bill was first introduced in the wake of a wrongful death lawsuit filed by Larry Young after his daughter, Molly, was found dead in the apartment of Carbondale police dispatcher Richie Minton in March 2012. After investigators were unable to determine whether Molly's death was a suicide or homicide, Young filed numerous records requests under the state's FOIA in an attempt to obtain further information related to his suspicion that Minton murdered his daughter. *The Southern Illinoisan* reported that law enforcement officials balked at releasing documents to Young, citing several exemptions provided under the state's FOIA. Specifically, officials cited exemptions that allowed them to withhold records because of the graphic nature of the photos of the crime scene, privacy concerns of the deceased, and that the records were part of an ongoing police investigation. In early 2016, the Illinois Attorney General's Office finally ordered that law enforcement officials needed to provide Young with the records that he requested, according to *The Southern Illinoisan*.

With Young's challenges in mind, both houses of the Illinois legislature passed HB4715 on May 29, 2016, which would increase fines that courts could issue when state agencies delay turning over records after a court rules that they must do so, according to the *Northwest Herald*. Under existing Illinois law, a court could impose a single fine ranging from $2,500 to $5,000 on public bodies that "willfully and intentionally failed to comply with this Act, or otherwise acted in bad faith." HB4715 allowed a court to add an additional $1,000 penalty for each day the violation continues. Public Act 099-0586 Sec.11. Gov. Rauner signed the bill on July 19, 2016.

The bill also added provisions to the Illinois FOIA that permit public agencies to be penalized for failing to abide by an attorney general's binding opinion that an agency must comply with a records request, according to the *Northwest Herald*. The bill stated that the penalty is triggered when an agency does not comply with or appeal the attorney general's decision within 35 days, at which point there is a "rebuttable presumption" of a willful violation of the state FOIA. However, the bill required records requesters to file a lawsuit before a judge can determine the final penalties that should be applied to a state agency violating FOIA.

> "If this new law offers a disincentive to stall, I think it's probably a good thing. But there are a lot of small, poor municipalities, that simply ignore FOIA requests. I don't know how I would feel about socking a village that doesn't have money to fill potholes in the street with a fine for not answering a FOIA."
>
> **— Beth Hundsdorfer, *Belleville* [Ill.] *News-Democrat* reporter**

Gov. Rauner praised the bill in a signing ceremony on July 19, according to *The Southern Illinoisan*. "Our system is not perfect. We need to constantly work together so we get fairness and justice for all," Gov. Rauner said. "From a tragedy, hopefully we can bring something good. We can change our system so it works for the people. That is what today is about."

In an interview with the *Columbia Journalism Review* (*CJR*) on Aug. 16, 2016, Chicago-based attorney Matt Topic, who represented journalists in a 2015 lawsuit who sought to obtain police video footage under the state's FOIA that involved a white Chicago police officer shooting and killing an African American man in 2014, said that the law was a step in the right direction but questioned whether it would be effective. "The civil provision has been wholly ineffective at improving FOIA compliance," Topic said. "The new penalties are a step in the right direction, but I doubt things will improve substantially without significantly stronger penalties."

Others expressed concerns that simply fining government agencies for noncompliance was an ineffective plan, particularly because taxpayers would be paying the bill for an official's refusal to disclose documents. *Belleville* [Ill.] *News-Democrat* reporter Beth Hundsdorfer suggested that the fines were good in principle but may not be great in practice. "If this new law offers a disincentive to stall, I think it's probably a good thing," she told *CJR*. "But there are a lot of small, poor municipalities, that simply ignore FOIA requests. I don't know how I would feel about socking a village that doesn't have money to fill potholes in the street with a fine for not answering a FOIA. And, as a journalist, what happens to the money? It's taxpayer money. I don't want it. So, it's interesting and definitely an incentive for open records release, but, as with all things, the devil is in the details." The new provisions went into effect on Jan. 1, 2017.

Indiana Supreme Court Ruling Raises Questions about Police Transparency

On Nov. 16, 2016, the Indiana Supreme Court ruled unanimously that University of Notre Dame's Security Police Department should not be considered a "law enforcement agency" or "public agency" under Indiana's open records law. *ESPN, Inc. v. University of Notre Dame Police Department*, 71S05-1606-MI-359 (Ind. 2016). As a result, private university police forces in Indiana were not obligated to provide details of campus police reports to the public, and the Notre Dame department did not have to turn over records to ESPN, which was conducting an investigation into student athletes, according to the *South Bend Tribune* on November 17. The decision raised concerns from media members and advocates as being a blow to accountability and transparency of police departments, including at private universities.

In 2014, ESPN investigative reporter Paula Lavigne filed a request for incident reports from the University of Notre

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State Law, *continued from page 41*

Dame Security Police Department concerning 275 student-athletes, according to the Indiana Supreme Court opinion. When the university refused to disclose the records, ESPN filed several complaints with Indiana's Public Access Counselor, the state's authority on public records, before suing Notre Dame, a private university, in Indiana state trial court, alleging that the university's police force was violating the state's open records law, known as the Access to Public Records Act (APRA). Indiana Code. § 5-14-3-1 *et seq*. In April 2015, St. Joseph Superior Judge Steven L. Hostetler ruled in favor of the department in trial court, determining that the Notre Dame Police are not a "law enforcement agency" under Section (n)(6) of APRA because it was not "an agency or a department of any level of government." The trial court also found the department was not a "public agency" because it "exercised powers delegated 'by' the state, not powers 'of' the state."

In March 2016, a state intermediate appeals court ruled that Indiana's open records law applied to the university's police department because it had legal authority to make arrests and had jurisdiction outside the Notre Dame campus, making it a "public agency" under APRA, according to a November 17 *Sports Illustrated* story. The appellate court also cited the importance of transparency. "There is a danger that the public will be denied access to important public documents when a private agency is exercising a public function," the appeals court wrote. *ESPN, Inc. v. Univ. of Notre Dame Sec. Police Dep't*, 50 N.E.3d 385, 393 (Ind. Ct. App. 2016).

On Nov. 16, 2016, the Indiana Supreme Court unanimously reversed the appellate court's decision, agreeing with the trial judge that the Notre Dame's Security Police Department was not a "law enforcement agency" or a "public agency" under Indiana law. Specifically, the court found that the department was "an 'agency or department' of the University, not of the State of Indiana" and that it did not exercise "executive power" or a function of government required under APRA subsections 2(n)(1) and 2(n)(2). Indiana Code § 5-14-3-2(n). The court also found that the department was not a "public agency" under any of APRA's other definitions. As a result, private university police departments would not be required to comply with APRA. Accordingly, the court's decision allowed Notre Dame's police department to withhold crime reports about student athletes from ESPN.

The Indiana Supreme Court recognized that its decision could lead to less transparency for the public when it came to private universities, but the Court explained that it was bound by its constitutional duties. "We acknowledge the importance of an open government, as well as the broad access granted to government records by APRA," Justice Mark S. Massa wrote for the court. "The job of this Court is to interpret, not legislate, the statutes before it. Under APRA as it is currently written, the Department is not a 'public agency' under any of the three subsections identified."

> "The decision frees Notre Dame and other private colleges with police forces from any obligation to provide details on campus police reports and investigations. City, county and other professional forces are required to do so under the state's Access to Public Records Act."
>
> **— *South Bend Tribune* editorial staff**

University of Notre Dame spokesman Paul J. Browne told the *South Bend Tribune* on November 17 that the university was happy with the ruling. "We are pleased but not surprised by the decision," Browne said. "The Court took a careful look at APRA and unanimously concluded that the statute's plain language made clear that it did not apply to private university police departments." The *South Bend Tribune* reported that ESPN also released a statement that said, "We are extremely disappointed by the ruling and what it represents for public transparency."

In a Nov. 20, 2016 editorial, the *South Bend Tribune* wrote that the state supreme court's decision was a loss for the public. "The Indiana Supreme Court's ruling on Wednesday that the University of Notre Dame's campus police department is not a 'public agency' under Indiana law deals a strong blow to transparency," the *Tribune* wrote in the editorial. "The decision frees Notre Dame and other private colleges with police forces from any obligation to provide details on campus police reports and investigations. City, county and other professional forces are required to do so under the state's Access to Public Records Act."

However, the *South Bend Tribune* reported on November 18 that a technical mistake by the Indiana Legislature in early 2016 could actually mean that private university police departments are subject to open records requests. The legal technicality involved two bills that the legislature had adopted during its 2016 legislative session. The first bill would have clearly codified that private universities in Indiana were shielded from state access laws. The second bill involved amending APRA to handle public access to police body camera footage. As the bills completed the legislative process, the Indiana Legislative Services agency made minor changes to the body cameras bill so that it would closely track and reference the language of the first bill. The changed language of the body cameras bill indicated that private university police departments should be considered public agencies under APRA when it came to body camera footage.

Later, Indiana Gov. Mike Pence vetoed the first bill but signed the body camera bill. As a result, the language that private universities were shielded from open records requests was not in place in order to block the body camera bill's language that indicated that private university police forces were public institutions from applying to APRA as a whole. In an interview with the *South Bend Tribune*, Hoosier State Press Association Executive Director and General Counsel Steve Key explained that APRA now clearly states that its provisions apply to private university police departments. "They are public agencies and they are subject to the law," Key said. "That may not have been the intention of the legislators, but the law now applies." In a November 18 post on *The Indiana Law Blog*, retired attorney Marcia Oddi wrote that the Indiana Supreme Court's decision did not consider this technical inconsistency

because it focused on the 2014 version of APRA, which was the law applicable at the time of ESPN's records request.

Additionally, the *South Bend Tribune*'s November 20 editorial suggested that the legal irregularity was unlikely to remain in place much longer. "The change, which involves two bills related to police agencies, has been in effect since July 1. Since then, the public records law has applied to professional police departments at private universities including Notre Dame, according to some legal experts," the *Tribune* wrote. "We have little faith, however, that legislators will let this change stand once the 2017 session begins. That's a shame, because news organizations such as ESPN, *The Tribune* and [others] aren't asking for anything extraordinary in seeking more information from private institutions. It's information already accessible from the state's public universities. Police departments that operate under the same laws using the same powers granted by the state — including carrying guns and making arrests — shouldn't be treated differently."

"Why is this case and this concept important? Not because of some desire to dig up information about students and student-athletes. Rather, it's because hundreds of thousands of people visit Notre Dame each year," the *Tribune* added. "The Notre Dame Security Police department is entrusted with ensuring public safety. The public should have a view of how the department works and the cases it handles. This new twist in the police records issue further emphasizes the need for lawmakers to step up and support, in words and action, the principle that the public has a right to accountability and transparency whenever — and wherever — such police power is being exercised."

North Carolina Paper Faces $6 Million Libel Verdict

On Oct. 19, 2016, a jury in North Carolina rendered a $1.5 million libel verdict against *The News & Observer* in Raleigh and one of its reporters for its reporting on alleged malfeasance at North Carolina's State Bureau of Investigation (SBI). The following day, the jury awarded the plaintiff $7.5 million in punitive damages, which exceeded the cap that North Carolina had placed on such awards. The dual verdicts came at the end of a three-week libel trial brought against the newspaper by North Carolina SBI agent Beth Desmond. Press advocates criticized the large monetary punishments as well as noted that newspapers' decisions to take libel cases to a jury trial rather than reach settlements were becoming risky propositions.

In 2012, North Carolina SBI agent Beth Desmond brought a libel suit against *The News & Observer* and reporter Mandy Locke in the North Carolina District Court for Wake County over a front-page story from 2010 that reported on the questionable practices by the SBI. *The News & Observer* reported on Oct. 17, 2016 that Desmond had alleged that six statements in the story harmed her reputation, including "that independent firearms experts questioned whether Desmond knew anything about her field, and also that some suspected she falsified evidence in a 2006 criminal trial to help Pitt County prosecutors win a murder conviction," among others. Desmond also claimed that the article led to severe emotional distress, mental anguish, injury to moral character and reputation, medical expenses, and that she was transferred out of the crime lab's firearms section, according to the to an Aug. 10, 2016 story by the *Carolina Journal*.

During the course of the trial, several of Locke's sources for the 2010 story testified that they were misquoted or that their statements were published without proper context, according to a Nov. 18, 2016 *Carolina Journal* story. However, Locke maintained that her story was accurate, testifying that her sources were under pressure from the firearms analyst community to "distance themselves" from what they told her when she interviewed them for the story. In Oct. 2, 2016 commentary on *Medium*, writer and documentary filmmaker Bradley Bethel reported that Locke did not record her interviews, meaning Desmond's lawyer, James Johnson, had to highlight other elements that would suggest a reckless disregard for the truth. The *Columbia Journalism Review* (*CJR*) reported on October 25 that Johnson focused on several notes and e-mails passed among *The News & Observer* staff found during the discovery process in order to boost the case against the paper. Among the messages were passages that appeared to poke fun at Desmond, such as one between Locke and assistant features editor Brooke Cain noting that Desmond previously had been a ballet dancer with the Juilliard Dance Ensemble. "How in the world this woman went from ballet to firearms identification work is beyond me," Locke wrote about Desmond in the e-mail. Additionally, a story folder had also circulated around *The News & Observer* newsroom, including the statement, "Either Desmond has no idea how to evaluate firearms evidence or, worse, she ignored all the rules of the trade and fabricated the results to help police secure their victory," according to Bethel.

The Associated Press reported that after the three-week trial, the jury awarded Desmond $1.5 million in compensatory damages. The following day, the jury awarded Desmond an additional $7.5 million in punitive damages. *The News & Observer* reported on October 19 that the $7.5 million award exceeded North Carolina's cap on such punishments, which the state limits to three times the amount of any compensatory damages. As a result, the paper will face a $6 million penalty if the verdict is upheld on appeal rather than the $9 million originally awarded by the jury

The jury had found that all six statements at issue in the case were materially false, meaning that the sources never actually said what Locke had attributed to them, according to *The News & Observer*. The jury also found that there was "strong, clear and convincing evidence" that both Locke and *The News & Observer* either knew the statements were false or had serious doubts about their truth. Desmond's attorney Johnson told *The News & Observer* on October 19 that he believed the e-mails and memos from the journalists at the newspaper impacted the jury. "You get to the point when you're on the jury that enough's enough," Johnson said. "It would be nice to see the light shine on the [*The News & Observer*] for once and force them to think about the way they treat people." *The News & Observer* also reported that the jurors declined to provide any further information about their decisions and would not provide statements to the press.

However, *CJR* reported that several journalists around the country expressed concerns that the use of *The News & Observer*'s staff e-mails in the

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State Law, *continued from page 43*

case was a troubling way to understand journalists' motives. North Carolina freelance journalist Barry Yeoman said that investigative work, like that done at *The News & Observer*, is a collaborative process that requires several casual and speculative e-mails sent back and forth. "So if somebody looked at my emails out of context, they may see a point in my thinking where either I have proposed something beyond where the facts may go, or I've proposed something that is too timid," he told *CJR*. "It is in the honest conversation that I can push the boundaries and an editor can push me back. Or I can arrive short of the line, and an editor can beckon me forward. And it is a dance that happens backstage so that the final product is absolutely true.. . . You need to put your thoughts out there if you're going to get the feedback and the dynamic back and forth that story development needs." Trevor Hughes, a Denver-based correspondent for *USA Today*, said that he was concerned about e-mails being used during trial by people who do not understand the thought process that goes into investigative reporting. "Technology has made it incredibly easy for me to stay in touch with my bosses around the country, but it also leaves an electronic trail," Hughes said. "As a reporter, I certainly wouldn't want internal discussions with my editors about how to approach a story laid bare to the public."

In a November 4 interview with *Crain Communications Charlotte*, Director of the North Carolina Open Government Coalition Jonathan Jones explained that the public's hostility toward the press seemed to be playing a factor in large jury awards in lawsuits filed against news organizations. "It's coming out of the political world, and it's been heightened in the last 18 months," Jones said. "People think there's some sort of secret agenda, and their beliefs are confirmed by websites and other outlets, which makes them feel there's a bias in traditional media." Several other news organizations, such as *Gawker* and *Rolling Stone*, have also recently lost cases that were decided by a jury, who have granted plaintiffs large awards. (For more information on *Gawker*'s loss, see "*Gawker* Faces $140 Million Judgment after Losing Privacy Case to Hulk Hogan in the Winter/Spring 2016 issue of the Silha *Bulletin*, "*Gawker* Shuts Down After Losing Initial Appeal of $140 Million Judgment in Privacy Case" in the Summer 2016 issue, and "*Gawker* and Hogan Reach $31 Million Settlement in Invasion of Privacy Suit" on page 30 of this issue. For more information on *Rolling Stone*'s loss, see "News Organizations Backpedal after Failures to Fact Check, Anchor's False stories" in the Winter/Spring 2015 issue, "Update: *Rolling Stone* Continues to Face Backlash for Campus Rape Story" in the Summer 2015 issue, "*Rolling Stone* Faces New Reporting Controversy, Continues to Face Questions over Retracted Story" in the Winter/Spring 2016 issue, and "*Rolling Stone* Found Liable for Defaming Dean in Now-Retracted Campus Rape Story" on page 27 of this issue.)

> "Technology has made it incredibly easy for me to stay in touch with my bosses around the country, but it also leaves an electronic trail. As a reporter, I certainly wouldn't want internal discussions with my editors about how to approach a story laid bare to the public."
>
> **— Trevor Hughes, *USA Today* correspondent**

University of North Carolina-Chapel Hill Center for Media Law and Policy Co-director Cathy Packer also told *Crain Communications Charlotte* that the jury's decision was alarming because *The News & Observer* had traditionally taken care to ensure that its reporting was accurate. "[The verdict is] really shocking for people in the media. [*The News & Observer*] has a great track record for its investigations. They cross their T's and dot their I's, and this reporter had multiple sources," Packer said. "The law is pretty complicated, and when I teach it, my students are astounded by it. The judge explains it to the jury, and then the jury decides. If it's complicated to them, they may just go with their gut." Packer noted that news organizations often win libel cases on appeal because judges, rather than jurors with little familiarity of the judicial system, are better equipped to deal with the complexities of libel law.

Nonetheless, *The News & Observer*'s lawyer Mark Prak said he was troubled by the decision in his comments after the trial, suggesting that large jury awards would hinder free expression. "At the end of the day, the idea that in a democratic republic people can't talk about the work of public figures without risking a libel award in the seven figures is anathema to democracy," he said, according to an October 19 story by *The News & Observer*. "Don't you know, in an already financially challenged business, moving from the print world to the digital world, it'll have a speech-suppressive effect on journalists, editors and publishers to inform, check, question and report on the government."

The News & Observer vowed to appeal the verdict, though it had not yet been filed as the *Bulletin* went to press. According to the *Carolina Journal* on November 18, the paper has declined to publish a correction or an apology. Additionally, *News & Observer* editor John Drescher continued to stand by its coverage in the wake of the jury decision in an October 18 statement. "Our 2010 stories about the SBI raised important questions about how that agency investigates and how agents testify at trial," Drescher said in the statement. "After the stories were published, numerous changes were made in how the SBI and the state crime lab work.. . . Our reporters and editors worked hard to tell the stories fully and accurately. We appreciate the hard work of the jury but we respectfully disagree with its decision and plan to appeal."

Scott Memmel
Silha Research Assistant

31st Annual Silha Lecture Examines Freedom of Expression and Racial Justice Tensions on College Campuses

During the 31st annual Silha Lecture, Harvard Law Professor Randall Kennedy rejected the notion that there must be conflict between champions of free expression and champions of racial justice in the United States. Kennedy instead argued, "The camps of freedom of expression and the camps of racial equality, the champions of those two ideals, have historically marched hand-in-hand in our country. And that's a good thing.. . . [I disagree] with those who make the argument that a keen attentiveness, a keen commitment, a wholehearted commitment to racial justice requires a change, a rather deep-seated change, in our view of the First Amendment and our view that ideas, even racist ideas, need protection."

SILHA CENTER EVENTS

Kennedy's lecture, "The Politics and Law of Culture Wars in American Higher Education, 1950-2020," argued that despite contemporary tensions between free expression and racial justice on college campuses, court cases examining racial issues in America have provided a framework for greater protections of expression in the United States. The lecture took place on Oct. 3, 2016 at the University of Minnesota's Cowles Auditorium with approximately 200 people in attendance. Kennedy, formerly a clerk for United States Court of Appeals Judge J. Skelly Wright and United States Supreme Court Justice Thurgood Marshall, discussed the debate over freedom of expression on campuses that has been ongoing since the 1950s and 1960s. Kennedy explained that an important lens to view this topic was through race. "It's a big subject," he said to begin his remarks. "To illuminate parts of it, I'm going to follow and comment upon a line that leads to controversy wherever it is found in American life. Namely, the race line."

Kennedy began the lecture by discussing three cases decided during the 1960s that demonstrated a shift in how courts viewed First Amendment protections for students. The first, *Dixon v. Alabama State Board of Education*, arose when African American students at Alabama State College refused to leave a segregated restaurant on campus. *Dixon v. Alabama*, 294 F. 2d 150 (5th Cir. 1961). The students eventually left when police arrived, but they remained outside the restaurant and were later involved in large demonstrations. Although there were no arrests nor any violence at the restaurant, according to Kennedy, the governor of Alabama called for the college president, Dr. Harper Councill Trenholm, to expel the six students identified as the "ring leaders" for having a "disruptive influence on the work of the other students at the college and upon the orderly operation of the college in general." The college president acquiesced to the governor's demands, which led the six students to challenge the constitutionality of the president's decision in court. The students lost when the federal district court upheld the expulsions, finding that the students' Constitutional rights had not been violated. However, despite many doubts, the U.S. Court of Appeals for the Fifth Circuit reversed on appeal because, according to Kennedy, the court concluded that, at the very least, the students were entitled to a hearing. Kennedy said that this case "open[ed] up the door to a recognition of federal Constitutional rights on behalf of students."

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>
> **— Randall Kennedy, Harvard Law School professor**

Kennedy then discussed *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). The case arose when students at Booker T. Washington High School in Philadelphia, Miss. wore small buttons to school opposing segregation, including one that said, "One man, one vote." The students were told to remove the buttons. Several students who did not remove the buttons and returned to school the next day wearing them were suspended. The students brought a lawsuit against the school, arguing that the school's decision violated their freedom of speech. The school principal countered by saying it was to maintain discipline at the school, according to Kennedy. Similarly to *Dixon*, the district court judge sided with the school before the Fifth Circuit reversed in favor of the students. In this case, the court found there was a "students' right to free and unrestricted expression as guaranteed to them under the First Amendment . . . in the school's buildings and schoolrooms." Further, the students "did not hamper the school in carrying on its regular schedule of activities." Rather, the students were simply expressing their point of view.

The third case presented by Kennedy was in the 1969 case of *Tinker v. Des Moines*, 393 U.S. 503 (1969). The case arose when students wore black armbands to class in order to protest the Vietnam War. However, the school district had established a policy in anticipation of the protest that prohibited the wearing of armbands. The students refused to remove the armbands and were suspended. The students brought a lawsuit against the district, which ultimately reached the U.S. Supreme Court. Like the Fifth Circuit had done three years earlier, the Supreme Court ruled in favor of the students because they did not disrupt the school day or the school's daily activities. Kennedy focused on a particular statement in the majority opinion by Justice Abe Fortas, who famously wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to

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freedom of speech or expression at the schoolhouse gate."

Kennedy explained that these cases were important to understand the context of his discussion. "The reason why I am beginning my remarks focusing on those cases is because I want people to remember that struggles for racial justice have repeatedly created the seedbed for rulings that expanded the rights of Americans to engage in protests, to express their beliefs, to use their freedom of expression," Kennedy said. "This has come up over and over again.. . . The fight for black liberation has helped to create a panoply of newly-recognized rights with respect to freedom of expression."

Kennedy then gave examples, including the efforts to protect news organizations that cast a critical light on segregationist policies in the American south. Specifically, Kennedy noted that the high court's decision in *New York Times v. Sullivan*, which involved an advertorial critical of Alabama law enforcement officials' treatment Martin Luther King, Jr. and other civil rights protests, revised libel law to require that, under the First Amendment, public officials must prove actual malice, defined as a journalist having "knowledge that the information was false" or that the information was published "with reckless disregard of whether it was false or not," before recovering damages for libel. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Kennedy noted that lawsuits brought by the National Association for the Advancement of Colored People (NAACP) were instrumental in expanding protections for free association, protection of civil rights lawyers, and protection of mass protests or dissent. He added that these battles had a significant impact on American politics and society. "The 50's and 60's, the era of the Second Reconstruction, witnessed a remarkable mutual reinforcing emergence of both racially yet egalitarian reform and libertarian sentiment, practice policy, and law," Kennedy said.

Kennedy then moved forward in history to discuss *Doe v. University of Michigan*, decided in 1989. 721 F. Supp. 852 (E.D. Mich. 1989). The case involved an anonymous graduate student at the University of Michigan who filed a federal lawsuit against the institution for its new discrimination policy barring racial harassment, asking for it to be invalidated. The student argued that the code violated his First Amendment rights because he felt his research, which involved studying biological causes for differences in individuals' mental abilities, and resulting conversations with colleagues was chilled by the policy. United States District Judge Avern Cohn sided with the student, relying upon the precedents established in the cases previously mentioned by Kennedy as well as two other cases, *Healy v. James*, 408 U.S. 169 (1972) and *Papish v. Board of Curators of The University of Missouri*, 410 U.S. 667 (1973). Judge Cohn was concerned that students could be investigated for statements that they made in the classroom, and believed that such policies could chill speech important to the school setting. "This arrangement, this circumstance clearly, reasonably gives people pause," said Kennedy, paraphrasing Cohn. "Am I going to get in trouble if I say this? In a classroom? Cafeteria? We can't have this. [Judge Cohn] struck it down." Kennedy added that the decision in *Doe*, as well as the other cases that he previously mentioned, led to "scores of judges follow[ing] suit" in expanding free expression protections on campus.

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With this background established, Kennedy then moved to "Act Three of this talk," as he called it, where he would "let [his] cards out on the table." Kennedy did so through three arguments answering the question, "What do we make of this?" First, Kennedy said that "the trajectory of the law has been in good direction" when it came to protecting expression. "This is one area where it seems to me the courts, particularly the federal courts, have actually distinguished themselves," said Kennedy. "I think some of the finer moments in our courts are the moments in which the courts have stepped up and have protected freedom of expression."

Second, Kennedy cautioned that despite that optimism, it was not enough for activists seeking racial justice to merely have the law on their side. They also needed to solicit positive public opinion for their causes. He cited problems with the legal system, including that the law is often not enforced, lawsuits are expensive to pursue, and that the judicial system often works slowly. Thus, Kennedy argued, relying upon the law for change was not always practical. Kennedy also argued that there was a big difference between "law on the books" and "law on the streets," the latter being distinct from and often more important than how the law worked in practice. As a result, it was more important to "hav[e] public opinion on your side" when it came to pursuing racial justice, according to Kennedy.

Third, Kennedy emphasized that champions of free expression and champions of racial justice need not clash. Kennedy added that he was skeptical of recent claims that there has been an "upsurge" in racist speech. "I want to know, when were things so much better? Is it really the case that one encounters more racist hate speech on campuses today than at some point in the past," asked Kennedy. "I've heard the assertion that things are worse, but I am skeptical of that."

"It's often said that we need new policing mechanisms because, after all, we have these bitter conflicts on campus, we have this friction. Is conflict, is even bitter conflict, attended by nasty, vicious, vile, racist language necessarily a sign of racial deterioration? I want to challenge that," Kennedy added. "In 1950, there was very little racial conflict at the University of South Carolina. There

was very little racial conflict at the University of Mississippi. There was very little racial conflict at the University of Michigan or at practically any other public institution. You know why? To have friction, to have conflict, you need the presence of people from, you know, various groups. Well, on a racial homogenous, all-white campus, you didn't have friction. You didn't have conflict. Now we do. Thank goodness!"

"Now we do. Now on many of our leading public campuses, most, probably all, there are an appreciable number of students who are racial minorities for there to be groups, for you to have friction, for you to have conflict," Kennedy added. "Well, as far as I'm concerned, given the history of our country, far from that being a sign of retrogression, far from that being some sort of baleful thing, that is progress. Does it mean we don't have work to do with these various conflicts, with these frictions? We have work to do, but let's keep things in perspective."

Turning to a separate but related issue, Kennedy considered two options for how a student can respond if someone does or says something that could be perceived as racist, sexist, or homophobic. A student can get in the habit of calling on state authority figures, such as a dean, the police, or others, to discipline the person who committed the offensive act. However, Kennedy cautioned against this approach, arguing that students are "disempowering" themselves by relying on authorities to punish these actions. Such reliance could ultimately be "destructive to the interests of the people who are actually upset" when authorities turn their attention upon activists.

Kennedy proposed and emphasized a second option. "What about getting in the habit of turning to your own powers, for instance, your own powers of speech," Kennedy suggested. He argued that students should learn not to be traumatized, because bad things happen daily. Instead, Kennedy suggested that individuals should seek to empower themselves, including by employing their First Amendment rights. "How do you arm yourself, how do you create a person who is able to get out into the world and hopefully make things a little bit better? I don't think you do that by, in a sense, wallowing in the sentiments, in the language of trauma," he said. "You want to change the world? Great! The world is a very difficult place to change. And you have to be tough, you have to be tough minded, you have to be willing to confront all sorts of things in order to make things a bit better. And you are not going to become that person unless you develop habits of the sort that are actually facilitated by our First Amendment, habits of autonomy, habits of patience, habits of listening to people who are saying things that you hate. And yet then, appealing to public opinion." Kennedy argued that students should and do have the right to say what they believe. At the same time, students should recognize that they also have a right to respond, which they should regularly exercise when it comes to statements they find disagreeable, he said.

> "Underneath the politics, though, underneath the jockeying, is something more fundamental. And that thing that is more fundamental is our commitment, as a society, to openness, to debate, to persuasion, to a deep-seated reflexive resistance to the imposition of orthodoxy."
>
> **— Randall Kennedy, Harvard Law School professor**

Kennedy concluded with a final statement addressing the values that he felt all Americans should be proud of. "Underneath the politics, though, underneath the jockeying, is something more fundamental. And that thing that is more fundamental is our commitment, as a society, to openness, to debate, to persuasion, to a deep-seated reflexive resistance to the imposition of orthodoxy," he said. "These are aspects of American society that I think all Americans — conservatives, liberals, radicals, socialists, anarchists, all Americans — I think we should all be proud of those aspects of our political culture and that we should all do all that we can do to protect and nurture those features of our political culture. And there is nowhere that it is more important than on our colleges and university campuses."

A Q&A session followed the lecture with Kennedy first answering a question about self-censorship and the role euphemism can play in scholarly discourse. The session also included a lively debate with Kennedy about trigger warnings and safe spaces on college campuses.

A video of the lecture is available on the Silha Center website at silha.umn.edu. Silha Center activities, including the annual lecture, are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

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