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Supreme Court Strikes Down Virtual Child Pornography Law

It is unconstitutional under the First Amendment to ban the production, possession or distribution of virtual child pornography, the Supreme Court ruled on April 16, 2002. *Ashcroft v. Free Speech Coalition* (122 S.Ct. 1389) challenged the constitutionality of sections 2256(8)B and 2256(8)D of the Child Pornography Prevention Act, passed in 1996. These sections define child pornography as any visual depiction where "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct" (§2256(8)B) and "such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impressions that the material is or contains a visual depiction of a minor engaging in sexual explicit conduct." (§2256(8)D).

Previous statutes, such as the Protection of Children Against Sexual Exploitation Act (1977), Child Protection Act (1984) or the Child Protection and Obscenity Enforcement Act (1988) applied only to actual children. Congress expanded the application of the CPPA because it found that the new photographic and computer imaging technologies could make it possible to produce visual depictions that would be indistinguishable from pictures of real children engaged in sexual conduct.

On January 27, 1997, the Free Speech Coalition, a trade association of businesses involved in the production and distribution of adult-oriented materials, challenged the constitutionality of the CPPA in the Federal District Court for the Northern District of California. They argued that "appears to be a minor" and "conveys the impression" clauses are too vague and overbroad to pass constitutional muster. On August 12, 1997, the court upheld the constitutionality of the CPPA, granting summary judgment to the government (*Free Speech Coalition v. Reno* (25 Media L. Rep. 2305 (1997))). The court ruled that the CPPA is a content-neutral law aiming to reduce harmful secondary effects of virtual child pornography including "the exploitation and degradation of children and the encouragement

of pedophilia and molestation of children." The district judge also ruled that the wording of the challenged sections is not unconstitutionally vague.

On December 17, 1999, a three judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed that decision, ruling that the challenged clauses of the CPPA are indeed vague and overbroad (*Free Speech Coalition v. Reno*, 198 F.3d 1083 (1999)). The majority did not follow the "secondary effects" doctrine invoked by the government, because it deviates from traditional First Amendment jurisdiction in which speech cannot be restricted merely because it might cause some individuals to behave in a certain way. "Such a transformation, how speech impacts the listener or viewer, would turn First Amendment jurisprudence on its head," wrote U.S. District Judge Donald W. Molloy, who was sitting by designation. He relied on the majority opinion by Justice Byron White, in the 1982 Supreme Court case *New York v. Ferber* (458 US 747(1982)).

In *Ferber*, the high court held that New York could ban the production and dissemination of non-obscene child pornography to prevent harm to the children involved. But the Court also offered an alternative to pornographers by suggesting that a person who was over the statutory age but looked younger could be legally portrayed in the images, thus clearly stating that the ban only referred to real under-aged children. "This is exactly what the CPPA seeks to forbid. While *Ferber* holds that child pornography must involve real children, the CPPA expands this category to depictions of children," Molloy wrote.

The government appealed to the Supreme Court, which reaffirmed that for speech to be banned as child pornography, real children must have been involved. Seven Justices agreed that it is unconstitutional to ban materials that merely "convey the impression" that they contain pornographic depictions of real children when in reality adults are being depicted.

Virtual Pornography, continued on page 3

University of Minnesota Press Publication Center of Controversy

Other publishing houses had rejected Levine's manuscript because of its controversial content.

The University of Minnesota Press has been in the eye of a media storm surrounding its publication of *Harmful to Minors: The Perils of Protecting Children from Sex* by New York journalist Judith Levine. According to many news sources, the book's central message is that sex is not harmful to minors *per se* and that traditional sex education programs that focus on sexual abstinence rather than informing young people of all aspects of sexuality do more harm than good.

The book has been subjected to a barrage of criticism, both nationally and locally. Dr. Laura Schlessinger, the Concerned Women of American, Tim Pawlenty, the Republican majority leader of the Minnesota House of Representatives (who called for the University to cancel the book) and various talk show hosts all joined ranks in denouncing the book. Bill O'Reilly, host of the Fox News Channel's "The O'Reilly Factor," called the book a "vile piece of work" that is "subversive and offensive," during a debate with former U.S. Surgeon General Joycelyn Elders, who wrote the foreword to the book. The criticism began even before the book hit the shelves in mid-April. Some critics, such as Pawlenty, admitted not having read the book when he first took issue with it on April 5, 2002.

On April 4, in response to the criticism surrounding the book, Christine Maziar, Vice President for Research and Dean of the University of Minnesota's Graduate School announced an external assessment of the U of M Press' review procedure. She said that the University wants to ensure that the publishing criteria and processes of the U of M Press are consistent with other academic presses' policies. The review will take approximately two months and will be conducted by people from other academic presses.

Before the book was published by the U of M Press, other publishing houses had rejected Levine's manuscript because of its controversial content. The U of M Press had five, instead of the usual two, external experts review the manuscript. The Committee of the Press, an advisory board composed of tenured faculty at the University of Minnesota, then reviewed and voted on the work, based upon the peer review and the quality and importance of the academic content.

Some have argued that submitting the review process to an examination as ordered by Maziar could have a chilling effect on the U of M Press and prevent it from taking on other controversial materials in the future. In an article in *City Pages* newspaper on April 24, 2002, James Kincaid, an English professor at the University of Southern California and one of the U of M's external reviewers echoed these concerns: "Among

academics, the University of Minnesota Press has had this wonderful reputation for doing work that other presses might find too controversial or not mainline enough to be marketable." He fears that ordering the review "certainly sends out signals that they are suspicious, or they at least doubt the care of the press. It's a knuckling under. It's really disgraceful." In the same article, Maziar denied that the review will have such effects. Pawlenty, who was also quoted in the *City Pages* article, stated that he is considering holding legislative hearings on the subject of the U of M Press' publishing policies and finances.

Because the University's publishing house receives some of its funding (\$300,000 or 6% of its total budget) from the University, and hence from taxpayers, some have argued that it should not publish books that might offend the general public. A similar rationale prompted legislators in Missouri to cut \$100,000 from the University of Missouri's budget because of a 1999 journal article by a political scientist promoting an argument similar to the one Levine makes in her book.

Levine maintained in a recent interview with salon.com that her book promotes a healthy approach to sexuality. But Bryan Dowd, professor at the University of Minnesota's School of Public Health, disagrees. In an opinion piece in the Minneapolis *Star Tribune* appearing on April 27, 2002, Dowd wrote that the U of M Press should not have published the book because it promotes hedonism, a lifestyle incompatible with public health. That, he argued, runs contrary to the mission statement of the University which declares that the University should be devoted to the welfare of the state of Minnesota. Promoting unhealthy lifestyles such as those described in Levine's book is not consistent with that policy, Dowd contended.

The controversy has caused sales of the book to soar. The U of M Press has already printed another 10,000 copies above the initial 3,500, which is an unusually high number for any university publication. History has shown that when authorities try to or actually do ban a book, it only increases its sales. Books such as Gustave Flaubert's *Madame Bovary*, Thomas Hardy's *Jude the Obscure*, James Joyce's *Ulysses*, D. H. Lawrence's *Lady Chatterley's Lover*, and Vladimir Nabokov's *Lolita* were all on a censor's list at some point, yet it did not harm their popularity in the long run. Ironically, Levine's critics indirectly ensured that a message that might otherwise have been limited to academic discussion has taken center stage in the local and national media.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

Silha Center Staff

Jane E. Kirtley
Director and
Silha Professor
Elaine Hargrove-Simon
Bulletin Editor
Bastiaan Vanacker
Research Assistant
Lynn Palrud
Program Associate

In the majority opinion, Justice Anthony Kennedy wrote that the CPPA was overbroad because it could prohibit speech of literary, artistic, political, or scientific value and would therefore not pass the test for obscenity statutes set out in *Miller v. California* (413 U.S. 15 (1973)). This test states that (1) the materials must depict or describe sexual conduct in a patently offensive way, (2) the conduct must be specifically described in the law, and (3) the work must, taken as a whole, lack serious value and must appeal to the prurient interest. The majority referred to movies such as “Traffic” and “American Beauty,” as examples of materials with value that do not appeal to prurient interest but that could be forbidden under the CPPA, although they would not be considered obscene under the *Miller* test.

The majority also stated that the government could not rely on *Ferber* and *Osborne v. Ohio* (495 U.S. 103 (1990)) to justify the CPPA. In *Osborne* the Court had applied the same justification as had been used in *Ferber* to ban not only the production and dissemination, but also the possession of child pornography: the government interest to root out child pornography at all levels of the distribution chain. However, the majority ruled that *Osborne* anchored its holding “in the concerns for the participants, those who it [the majority in *Osborne*] called the ‘victims of pornography.’” *Ferber*, Kennedy wrote, “was based upon how it [child pornography] was made, not on what it communicated,” reaffirming the lower court’s ruling that without actual children involved, non-obscene speech depicting or dealing with the theme of teenage (under 18) sexuality cannot be placed outside the realm of protected speech. This ruling does not put obscenity that was previously banned within the scope of First Amendment protection.

After having established that the CPPA is inconsistent with *Miller* and cannot be supported by *Ferber* (or *Osborne*), the high court also addressed the justifications the government had offered for the CPPA.

1. *Child pornography is often used as a technique to lure children into sexual activity.* Citing, among others, *Reno v. ACLU* (521 U.S. 844 (1997)), the Court argued that the government cannot ban speech for adults merely because it might fall into the hands of minors.
2. *Child pornography is used by pedophiles and child sexual abusers to “whet their appetite.”* The majority concluded that this is a case where the government tries to control conduct by regulating thoughts, which is one of the greatest threats to First Amendment freedoms.
3. *Because computers can make it almost impossible to determine whether or not real children were used in an image, it would become very difficult for the government to meet its burden of proving that real children were used in the production of a pornographic image.* The majority ruled that the First Amendment would be turned upside down if one were to forbid computer-generated images as well as images of real children, merely because it is difficult to distinguish between the two.
4. *Because virtual child pornography helps to sustain the market for production of visual depictions that involve real children, the market for pornography involving real children can only be dried up by also eliminating virtual pornography.* This argument relies on the assumption that real and virtual images are indistinguishable and are exchanged on the market. This assumption was rejected by the majority, who stated that if this were the case, real images would be replaced by virtual images, since nobody would risk producing real images if virtual computer generated images would suffice.

Justice Clarence Thomas concurred in a separate opinion. Justice Sandra Day O’Connor also wrote separately, concurring in part and dissenting in part. She agreed with the majority that the portion of CPPA prohibiting material that presents youthful-looking adults in the guise of children is unconstitutional, but she would have upheld the ban on virtual child pornography. Chief Justice William Rehnquist and Justice Antonin Scalia joined that part of her opinion. Rehnquist also wrote a separate dissent, joined in part by Scalia, which acknowledged that although the impermissible applications of the CPPA anticipated by the majority were possible, the statute could also be read to address only computer-generated images that are very similar to real children. “The aim of ensuring the enforceability of our Nation’s child pornography laws is a compelling one,” he concluded, rendering the statute constitutional.

Programs such as Photoshop have made it easy to take a picture or part of a picture (for example, one of a young celebrity’s head) out of its original context and superimpose it onto other photos to make it appear as if that person is engaged in a sexual act. This practice is called “morphing” and, provided it involves minors, remains illegal, because it is outlawed by a section of the CPPA that was not challenged.

Movies such as
“Traffic” and
“American Beauty”
. . . could be
forbidden under
the CPPA.

Colorado Bookstore Wins Battle To Protect Customers' Privacy

Colorado Supreme Court Justice Bender outlined a balancing test stronger than the one in the case arising from attempts to subpoena Monica Lewinsky's book purchases.

In April 2002, the Colorado Supreme Court ruled that The Tattered Cover Bookstore would not be required to hand over information regarding customer purchases to investigators. In March 2000, police and a Drug Task Force agent were observing a trailer home where they suspected a methamphetamine lab was operating. One of the investigators searched through the garbage left outside the trailer for collection and found evidence of the operation of a drug lab as well as an envelope from The Tattered Cover bookstore. The envelope was labeled with the invoice number, order number, and the customer's name, who was one of the residents of the trailer.

The police obtained a search warrant for the trailer. When they entered the trailer, they found evidence of four people living there, and a methamphetamine lab in the master bedroom. They also found two books describing drug manufacturing: *Advanced Techniques of Clandestine Psychedelic and Amphetamine Manufacture* by Uncle Fester, and *The Construction and Operation of Clandestine Drug Laboratories* by Jack B. Nimble. Following the search of the trailer, authorities informally sought records from The Tattered Cover to verify the purchase of the two drug-related books, in order to determine which of the residents of the trailer could be connected to the construction of the meth lab. When the bookstore's owner, Joyce Meskis, refused to cooperate, the Denver District Attorney was asked to approve a search warrant, which requested any and all titles ordered by the one suspect who lived in the master bedroom.

The lawyer for The Tattered Cover asked the Denver District Attorney to delay the execution of a search warrant and obtained a temporary restraining order pending a hearing in the Denver District Court. Judge J. Stephen Phillips ultimately narrowed the scope of the warrant, but ordered Meskis to reveal the titles relating to the invoice found in the garbage at the trailer home.

The case (*Tattered Cover v. The City of Thornton*, 2002 Colo. LEXIS 269 (2002)) was decided by the Supreme Court of Colorado on April 8, 2002. The unanimous opinion by Chief Justice Michael L. Bender cited *United States v. Rumely* (345 U.S. 41 (1953)): "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of anyone who reads. . . . Fear of criticism goes with every person into the bookstall. . . . Some will fear to read what is unpopular, what the powers-that-be dislike. . . . Fear will take the place of freedom in the libraries, book stores, and homes of the land. Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press."

Relying on the Colorado Constitution, which he said provides greater protection for free expression than the First Amendment to the U.S. Constitution, Bender outlined a balancing test even stronger than the one set forth in *re: Grand Jury Subpoena to Kramerbooks & Afterwards Inc.* (26 Med. L. Rptr. 1599 (D.D.C. 1998)), the case arising from Kenneth Starr's attempts to subpoena Monica Lewinsky's book purchases. The first prong of the test provides that the government must not do anything that abridges fundamental rights unless there is an appropriate connection to a compelling government interest. That connection must be direct and significant. The second prong requires that there must be a "significant connection" between the criminal investigation and the information being sought. Finally, "officials must exhaust [other] alternatives before resorting to techniques that implicate fundamental expressive rights of bookstores and their customers."

The ruling in this case is notable, particularly in the wake of the passage of the USA PATRIOT Act. The Act has given greater latitude to law enforcement officials in searching retail records hoping to link suspects with purchases of items that played a role in terrorist activities. But when retail records are for items such as books, the Act creates a chilling effect on the right of all Americans to receive information and to express ideas. (See "The USA PATRIOT Act: How Patriotic Is It?" Winter 2002 *Bulletin*.)

Meskis, who is one of the founders of American Booksellers Foundation for Free Expression, as well as Colorado Citizens Against Censorship, was supported by booksellers nationwide, some of whom have aided in raising \$30,000 to help pay her legal fees. She has owned the bookstore since 1974.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

"Great Conversations," an evening's conversation with Jane Kirtley, Director of the Silha Center and Silha Professor, and Brian Lamb, creator and CEO of C-SPAN, was taped live on April 2, 2002 at the Ted Mann Concert Hall on the University of Minnesota Twin Cities Campus. It was part of a series sponsored by the University of Minnesota's College of Continuing Education. The videotape aired on TPT, Twin Cities Public Television, channel 17 on May 12. Copies of a videotape of the conversation may be borrowed from the Elmer L. Andersen Library at the University of Minnesota's Twin Cities Campus. To contact the library, call (612) 626-8969.

Los Angeles Newspaper Offices Temporarily Shut Down in Effort to Find Invoice

On May 2, 2002, investigators from the Los Angeles County District Attorney's office shut down operations at a small newspaper for three hours while they searched files for an invoice for an advertisement that was placed three months earlier. Armed with a search warrant, which enabled them to search "all rooms, safes, locked boxes, desks," the investigators ordered everyone out of the offices of Metropolitan News Company while they searched for records that would reveal the name of the entity that placed the advertisement. The advertisement had given notice of intent to circulate petitions for a recall election in the suburb of South Gate.

Co-publishers Roger and Jo-Ann Grace had originally maintained that they would not reveal the name of the law firm that had placed the advertisement. When Roger Grace refused to cooperate with investigators, the newsroom and business offices were shut down. According to the *Los Angeles Times*, Jo-Ann Grace finally turned over the documents related to the advertisement when she learned that investigators already knew the name of the law firm. In a story posted on the Reporters Committee for the Press Web site, Roger Grace is quoted as saying, "Our reason for resistance was that we wanted to protect the privacy interest of the customer. If [the investigators] already knew the name of the customer, there was no privacy interest to protect."

The newsroom and reporters' desks were not searched.

Roger Grace has said that he might file a lawsuit claiming violation of his civil rights. An article appearing on the Web site for The Reporters Committee for Freedom of the Press speculated that the search may have violated California state law. The laws (Cal. Penal Code § 1524(g) (West 2002) and Cal. Evid. Code § 1070 (West 2002)) forbid search warrants for items described in the state's journalist's shield law. "Unpublished information" is defined in the statute as information that includes, but is not limited to, notes, outtakes, photographs or other data. But Jane Robison, press secretary for Los Angeles County District Attorney Steve Cooley is reported as saying that "unpublished information" does not include a bill for an advertisement; therefore the search warrant was legal. She also said that a search warrant, which is more intrusive than a subpoena, had been issued because California law allows subpoenas only when a case has been filed. Although charges have been filed against one South Gate official, the investigation includes others against whom no charges had yet been filed.

The *Los Angeles Times* reported that Cooley had offered Roger Grace a chance to settle the matter over dinner before the search warrant had been issued. "But now I don't think he's the kind of man I would like to go to dinner with," Grace said.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

"Our reason for resistance was that we wanted to protect the privacy interest of the customer."

-Roger Grace

Journalism Ethicist Louis W. Hodges Will Retire in 2003

Louis W. Hodges will retire as Knight Chair in the Ethics of Journalism at Washington and Lee University at the end of the 2002-2003 academic year. Hodges started his school's groundbreaking Society and Professions program in professional ethics in 1974, and became the first holder of the Knight Chair in journalism ethics in 1996. The two programs comprise the country's longest-standing scholarly exercise in journalism ethics.

In 1998, Hodges participated in the Silha Center's 1998 National Law Conference for the Study of Media Ethics and Law. As a panelist in the "Convergence of Legal and Ethical Issues" session, he delivered a paper entitled, "Ethics Always Trumps Law: Or Why Have Ethics Anyway?" (See Spring 1998 *Bulletin* for full conference coverage.)

A native of Eupora, Mississippi, Hodges received his bachelor's degree in history from Millsaps College in 1954. He earned a B.D. from Duke Divinity School in 1957 and was ordained by the Methodist Church in 1958. He earned his doctorate in Christian thought, with special emphasis in Christian ethics, from Duke in 1960. Hodges joined the Washington and Lee faculty in 1960. He has been a Fulbright scholar in India and a visiting faculty member at the Hastings Center, the University of Missouri Graduate School of Journalism, and the Poynter Institute.

Italian Prime Minister's Media Holdings Running Risk of Becoming A Monopoly

As Prime Minister, Berlusconi is also able to influence the three stations of the state-owned public television. . .

Ever since the election that resulted in media mogul Silvio Berlusconi becoming Prime Minister of Italy, questions have been raised about his ever-increasing control over the media. Berlusconi is not only the Italian Premier and the owner of one of Italy's best soccer teams, but his Fininvest group is also the main shareholder in Mediaset, which operates Italy's three biggest private TV stations (Canale 5, Italia 1, Rete 4), totaling 43% of the market share. This fact alone has been one of the most hotly debated topics in Italian politics during the last decade. Since Berlusconi came to power, fears about his media monopoly have grown because as Prime Minister he is also able to influence the three stations of the state-owned public television (RAI) whose three channels take up 47.4% of the market share. Berlusconi had vowed to resolve this apparent conflict of interest in the first one hundred days of his premiership, but he did not do so. He also failed to install a panel of independent advisors to investigate the issue.

The conflict of interest issue arose in October 2001, when his coalition blocked a commercial deal, agreed to by the previous government, that would have been very lucrative for the state-owned RAI. Opposition leaders stated that the action benefitted Berlusconi's Mediaset group, RAI's competitor in Italy's television market. On April 17, 2002, Berlusconi's government appointed incoming news executives for the RAI channels. The newly-appointed heads of news for the first and second RAI channels both have ties to Berlusconi's right wing government. As a result, Berlusconi's influence reaches over five of the six biggest Italian channels, or about 85-90% of the television market. Only the third RAI channel is still in the hands of a news executive appointed by a party from the left. Although the Italian Prime Minister typically appoints the head of news and programming of the RAI channels, in light of Berlusconi's already dominant media position, serious conflict of interest issues arise. Observers hope that this situation might prompt Italy to make some long overdue changes in the way it organizes its public television.

Two days after making the appointments, Berlusconi publicly criticized two highly respected RAI journalists as well as a comedian who had been critical of him. He stated that the three had made a criminal use of public television and that the RAI management should make sure that this would not happen again, although this time, the three should not be fired as long as they changed their attitude. Italy's head of state, President Carlo Azeglio Ciampi, sharply rebuked Berlusconi for his statement. Even newspapers that had been very supportive of Berlusconi's coalition were highly critical. On January 29, 2001, even before the latest controversy had taken place, the International Federation of Journalists sent a letter to European Union president Romano Prodi asking that something be done about Berlusconi's unbridled media power, stating that "The conflict of interest in Italy would not be tolerated by the European Union in any country being considered for EU membership. It should not be tolerated in a member state."

—BASTIAAN VANACKER
RESEARCH ASSISTANT

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**The Silha Center
for the Study of
Media Ethics and Law**

School of Journalism and
Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
Phone: (612) 625-3421
Fax: (612) 626-8012
E-mail: silha@tc.umn.edu

*Please contact the Silha Center at the
above phone numbers or e-mail to be
added to our mailing list.*

Pending Bills May Hamper Freedom Of the Press For Japanese Media

Japanese journalists are worried that two bills currently being considered by the Japanese Parliament, the Diet, could seriously hamper freedom of the press.

The first bill, drafted by the justice ministry, would establish a human rights commission that would deal with "human rights violations." The bill is aimed at curbing excessively intrusive reporting to protect the rights of crime suspects and their victims. The bill defines excessively intrusive reporting as "repeatedly and continuously following and ambushing crime victims and others who refuse to be interviewed." The bill raises concerns that journalists will no longer be able to investigate and report themselves but will have to rely solely on police reports for their coverage of certain news events.

The five members of the human rights commission would be appointed by the Prime Minister, with the approval of both houses, and would be under the jurisdiction of the Ministry of Justice. This is problematic because the commission is supposed to be independent, and critics fear this bill will open the door to government intervention in the media. News organizations have already begun to set up self-regulatory mechanisms including bodies to monitor complaints against the press, and news organizations such as the Japan Newspaper Publishers and Editors Association and the National Association of Commercial Broadcasters had crafted guidelines for dealing with the issue.

Yohtaro Hamada, a journalist at the *Asahi Shimbun* and a visiting Fulbright scholar at the School of Journalism and Mass Communication at the University of Minnesota, says that the relationship between media and government became strained after the elections of 1998, when the ruling Liberal Democratic Party felt that their disappointing results were partly due to biased press coverage. According to Hamada, problems of perceived press insensitivity were highlighted following last year's accident when a U.S. submarine collided with a Japanese fishing boat, killing nine Japanese citizens. During this incident, the news media were very aggressive in soliciting comments from the victims' families.

A second bill is designed to protect individual information, to ban information collection without consent from those involved, and to limit dissemination of this information to third parties. The news industry believes that this bill specifically

targets the news media. Though news organizations are excluded from the ban, they must abide by the bill's general principles. For example, under these rules, newspapers would have to reveal how they will use an individual's personal information and they would have to obtain this information by "legitimate and appropriate means," according to the wording of the bill. This could seriously hamper the ability of the press to conduct investigative reporting. The Japanese Newspapers Publishers and Editors Association wants the bill abolished because it would discourage news reporting.

A third bill which would obligate newspaper, broadcasting and publishing industries to create an association to protect children from viewing "harmful" images, including obscene and violent scenes, will not be presented to the Diet after a coalition party found problems with the bill regarding free speech.

On April 13, about 250 journalists protested the three government bills. Some carried portraits of freedom of speech activists, while others were dressed in formal attire to mourn the death of freedom of speech. Japanese Prime Minister Junichiro Koizumi told reporters that he thought that freedom of the press and privacy protection can be reconciled and has given his support to the bills.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

The relationship between media and government became strained after the elections of 1998, when the ruling party felt that their disappointing results were partly due to biased news coverage.

Silha *Bulletin* available online.

The current Silha Center
Bulletin is available online
at www.silha.umn.edu

Previous issues of the
Bulletin are also available
on the Web site,
along with information
about other activities
and Internet links.

Harvard Business Review Faces Ethical Challenges

The reputation of the prestigious *Harvard Business Review* has been tainted by questions of credibility and ethics in the wake of a high profile incident that led to the resignation of the editor, Suzy Wetlaufer. According to newspaper accounts, Wetlaufer had become romantically involved with an interview subject, former General Electric chairman Jack Welch.

According to an article in *The Washington Journal*, Wetlaufer asked that her story be killed after having received a call from Welch's wife who asked whether Wetlaufer could still be objective. Two other reporters were assigned to do the story and to re-interview Welch. The rewritten article appeared in the February 2002 issue. A number of staffers questioned the fact that Wetlaufer had waited until the very last moment to reveal the relationship, and asked for her resignation. Initially, Wetlaufer was to take a vacation and return in a demoted position as editor-at-large, an agreement that prompted two other editors to resign in protest. On August 24, 2001, Wetlaufer decided to step down from the editor-at-large position as well.

But the story might have further implications for the *Harvard Business Review*. In the wake of the turmoil, several newspapers (*Boston Globe*, *Newsday*, the *Los Angeles Times*) reported that the *Harvard Business Review* allowed its subjects as a matter of policy to read and edit stories about themselves. For example, upon Welch's request, the headline above his article was changed from "Jack Bites Back" to "Jack on Jack." Giving a subject editorial control raises serious questions about accuracy and editorial independence, especially if the reader is unwittingly presented with a story that is the result of editorial collaboration between interviewer and interviewee. Such practices may deceive the reader and blur the line between journalism and public relations.

Other conflict of interest issues have been raised as well. Bain & Company, a consulting firm where Wetlaufer had previously worked, received frequent and positive coverage. Though there was no indication of a direct connection, according to a former editor who was quoted in the *Boston Globe* on March 11, 2002, "it didn't look good." As a result, Walter Kiechel, the publishing director of Harvard Business School Publishing, appointed a company-wide task force to review ethical guidelines and come up with a code of ethics.

The decision surrounding Wetlaufer's editor's position has been criticized because it raises questions regarding how concerned senior management is with policies surrounding an ethical lapse. Business ethicist Jeffrey Seglin wrote in his column in the *New York Times*, "By keeping Ms. Wetlaufer on staff . . . Harvard Business School Publishing is sending the message that either she didn't violate the norms of the 'community' and the trust of her colleagues, or that she did and management didn't have the backbone to take action. If weak management is the case, then a new code of ethics, no matter what you call it, will ring hollow."

At the time the *Bulletin* went to press, the task force had not yet released its conclusions.

—BASTIAAN VANACKER
RESEARCH ASSISTANT

Minnesota Governor Signs New Privacy Bill into Law

Minnesota Governor Jesse Ventura signed a bill on May 22, 2002 making Minnesota the first state in the nation to give Internet users control over whether or not their service providers can disclose or sell their personal information. Under this bill, which was overwhelmingly approved by the Minnesota Senate and House on May 18, 2002, service providers must inform customers in Minnesota whenever they plan to disclose personal information such as the Web sites they have visited, their home and e-mail addresses, and phone numbers.

A major point of discussion was whether the burden should be on consumers to declare their preferences to the providers (opt-out), or on service providers to seek the permission from their consumers to share information (opt-in). Lawmakers found a compromise between the two approaches, requiring service providers to state in a conspicuous manner whether they apply an opt-in or opt-out regime.

Meanwhile, legislation on online data practices is also shaping up on the federal level. On May 16, 2002, the Senate Commerce Committee voted to approve legislation that would give consumers control over how their personal information is used by Internet companies, both service and content providers. The bill, the Online Personal Privacy Act 2002 (S2201), sponsored by Senator Ernest Hollings, D-SC, would require Internet companies to (1) obtain consent to the collection and disclosure of sensitive personally identifiable information (i.e., health, race, political party, religious beliefs, sexual orientation, social security number, or financial information); (2) provide robust notice, in addition to clear and conspicuous notice, of the opportunity to opt-out of the collection or disclosure of personally identifiable information. The bill also requires that users be notified of any change in policy; that users be granted access to their data, and that procedures be put in place to guarantee the security of these data.

An amendment that would bar consumers from suing companies that violated their privacy policies was killed. Democrats on the panel argued that legal liability is necessary to prevent a fiasco like the Eli Lilly pharmaceutical company's accidental violation of customers' privacy. Lilly had accidentally disclosed 700 e-mail addresses of Prozac users but was not fined because the Federal Trade Commission claimed it lacked the authority to impose one.

Senator George Allen, R-Va., who had proposed the amendment, is quoted in a May 16 *Washington Post* article as saying that the right to litigate would open "a floodgate of class action lawsuits." The bill would also preempt existing state privacy laws, such as the one signed by Ventura. It is expected that it might take some time before the bill will be voted upon in the Senate and that Senate Republicans will try to stall the bill once it reaches the floor. Senator Cliff Stearns, R-Fla., has proposed a more industry-friendly bill in the House of Representatives. This bill would allow businesses to trade consumer information unless consumers object (opt-out.)

—BASTIAAN VANACKER
RESEARCH ASSISTANT

Giving a subject editorial control raises serious questions about accuracy and editorial independence.

Silha Center Comments on Model Policy Governing Electronic Access to Court Records Developed by National Center for State Courts

The National Center for State Courts has developed a Model Policy on Public Access to Court Records. The proposed draft provides guidelines that state systems and local courts might use in developing their policies for electronic access to their court records. The policy was prepared on behalf of the Conference of Chief Justices and the Conference of State Court Administrators and is being funded by the State Justice Institute (SJI) and the Government Relations Division of the National Center for State Courts.

Most court case files are currently available to the public in paper format, which can make sorting through information and connecting facts or trends difficult. Additionally, requests for information must be filed by going to the courthouse during business hours and making a request in person. Electronic access could make access to records more convenient. Electronic archiving also has the potential of becoming more cost-effective than the maintenance, retrieval, and copying of paper records.

On the other hand, electronic access to court documents raises privacy concerns. Information such as victims' names, social security numbers, financial information, and trade secrets are considered by many privacy advocates to require additional protection. The NCSC draft policy has taken many of these concerns into consideration in an effort to balance the public's need for openness with an individual's need for privacy. Aspects of the policy, however, raise significant constitutional issues, and may run afoul of state open records laws.

Among other things, the policy discusses who will be allowed electronic access to court records, what uses may be made of them, and how costs should be assessed. Presumably researchers and journalists would be allowed access, but these categories have been left undefined.

Written comments were accepted, and a public hearing was held on May 17, 2002 in Washington D.C., where individuals and organizations' representatives were invited to testify regarding the proposed policy. The Silha Center filed written comments on April 15, 2002 (available online at <http://www.silha.umn.edu/resources.htm>) which were presented to Advisory Committee members the day of the hearing.

A complete draft of the Model Policy on Public Access to Court Records, together with the text of the comments received, is available at <http://www.courtaccess.org/modelpolicy>. Phase II of the project will allow further refinement of the policy, with the aim that it receive endorsement by the Conference of Chief Justices and the Conference of State Court Administrators. Ultimately, the policy could provide state officials with a framework that will enable them to make decisions regarding electronic access to state court records.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

The Model Policy discusses who will be allowed electronic access to court records, what uses may be made of them, and how costs should be assessed.

Pilot Program Approved by Judicial Conference To Allow Public Access To Criminal Case Files

On May 7, 2002, the Judicial Conference of the United States, the principal policy-making body for the federal court system, announced the approval of a pilot program that will allow public online access to criminal case files. The announcement marks a reversal of earlier conference policy, which permitted access to many civil and bankruptcy case files online but prohibited electronic access to criminal case laws, citing concerns for the safety of victims, witnesses, and law enforcement personnel. (See "Judicial Conference Casts Vote on Accessibility of Electronic Files," Fall 2001 *Bulletin*.)

Journalists, researchers, and freedom of speech advocates are applauding the decision to allow access to criminal case files. Even though the same information is available in paper format from a courthouse, having it available online saves time and eases the difficulty of performing searches for information. Comments filed by the Silha Center in January 2001 (available online at <http://www.silha.umn.edu/resources.htm>) outline the benefits of such a policy and cite case law to support it.

Access to criminal files is not without its limits, however. According to a news release from the Administrative Office of the U.S. Courts, the Conference voted to limit Internet access to certain "high profile" cases, when the requests for information place extraordinary demands on a court's resources. In addition, access would be permitted only if all parties consent and if the judge finds that access to the records is warranted.

The Federal Judicial Center will track the course of the pilot project. Its findings will be reported to the Judicial Conference when it revisits the issue in September 2003. For additional information, go to <http://www.pacer.psc.uscourts.gov/cgi-bin/links.pl>.

—ELAINE HARGROVE-SIMON
BULLETIN EDITOR

Pulitzer Prize Winner Anthony Lewis to Deliver Silha Lecture

First Amendment scholar, two-time Pulitzer Prize winner, author, and former *New York Times* columnist Anthony Lewis will deliver the seventeenth Annual Silha Lecture on Tuesday, October 8, 2002. He has entitled his lecture, "Terrorism and Freedom."

Lewis won his first Pulitzer Prize in 1955 for a series of articles in the *Washington Daily News* about a U.S. Navy employee who was dismissed for being a security risk. From 1956-57 he was a Nieman Fellow and spent the academic year studying at Harvard Law School. When he returned to Washington, he covered the Supreme Court, the Justice Department and other legal events including the government's handling of the civil rights movement. In 1963, he won his second



Anthony Lewis

Pulitzer for his coverage of the Supreme Court for the *New York Times*. In 1964, Lewis became the chief of the *Times* London bureau, and began writing his column from there in 1969. Since 1973 he has been based in Boston.

Lewis is also the author of three books dealing with First Amendment and civil rights issues: *Gideon's Trumpet*; *Make No Law: The Sullivan Case and the First Amendment*; and *Portrait of a Decade*.

Lewis has taught a course entitled "The Constitution and the Press" at Harvard Law School for 15 years, and has been a visiting professor at numerous other universities.

The Silha Lecture will begin at 7:30 p.m. at Cowles Auditorium, located in the Hubert H. Humphrey Center on the West Bank of the University of Minnesota's Twin Cities campus. The lecture is free and open to the public.

For further information, contact the Silha Center at 612 625-3421.

Silha Center for the Study of Media Ethics and Law
School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612)625-3421

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