

MEDIA LAW NOTES

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Head Notes

Who's Been Guarding *Your* Speech Rights?

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I love my bulletin board. It's the old-fashioned kind, cork, located outside my office door in Laurie Auditorium on Trinity University's campus. I like to use thumb-tacks and paper to post my ideas so those who come to performances can not only see my thoughts if they like, but can touch them, too. Right now, there is a comic posted about vending-machine justice, another about ethics in the book publishing industry, and a drawing by my six year-old daughter. Nothing too offensive, really. Just opinions. Art.

Visitors to the auditorium, though, don't seem to like my bulletin board so much. During a recent naturalization ceremony, a U.S. Citizenship and Immigration Services official strategically covered my American Society of Newspaper Editors poster that reads "secrecy is the beginning of tyranny" with an official U.S. government sign. I say strategically because at least half of the board was empty, and still his poster was placed directly over mine.

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Henderson

Legal Currents

Declaring War On the Press

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The United States has been involved in a lot of "wars" on concepts – the war on poverty, the war on drugs, the war on terror. Traditionally, these wars have always been against concepts that were, to say the least, undesirable. But now there may well be a war on one of the nation's most important institutions: the press. A recent Google search on the phrase "war on the press" yielded 26,500 hits. Among others, Eric Alterman in *The Nation*, James C. Goodale in the *New York Law Journal*, Jack Schafer on *Slate.com*, and *The San Francisco Chronicle's* editorial page have all discussed the subject.

Editor's Note: This issue's Legal Currents column features two articles on journalism, national security, and war coverage. Both articles were written by graduate students who presented papers last August at the annual AEJMC conference in San Francisco.

The PBS documentary program *Frontline* has produced a four-part series, *News War*, on the topic. Adversarial, even acrimonious, relationships between government officials and the press are certainly nothing new, but those who suggest that there is a "war on the press" argue that the news

media currently face unprecedented and unjust pressures that are undermining their civic contribution. As scholars concerned with media law, we should certainly consider these issues.

Defense-, intelligence-, and security-related coverage is the main front in the "war on the press." On the eve of the war in Iraq, the administration issued directives barring journalist access to many of the activities and

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ceremonies involved in transporting and repatriating the remains of fallen U.S. service personnel, and stipulated harsh penalties for those who released photographs of such events to the press (the government has since agreed to release it's own photographs of these events in response to FOIA requests). The government's argument was that this policy served to protect the privacy of the deceased and their families, while critics charged that the administration was attempting to hide the human cost of the war from the public.

The press has revealed the existence of secret government programs that track some international phone calls placed from the United States (some of them by U.S. citizens) and banking transaction records. President Bush has referred to such disclosures as "disgraceful," and Congressional representative Peter King called on the U.S. attorney general to prosecute the *New York Times* for disclosing the existence of the bank transaction tracking program under the Espionage Act of 1917. Journalists argued that they were presenting information about programs of questionable legality so that the public can make informed decisions.

Journalists Compelled to Testify

During the Grand Jury investigation into who disclosed an undercover CIA officer's name to columnist Robert Novak (who subsequently included the name in a published article he authored), and the ensuing trial of Lewis Libby Jr., a number of prominent journalists were subpoenaed and compelled by the court to disclose the identity of their confidential sources. Judith Miller and Matt Cooper both spent time behind bars for refusing to do so. One argument here, often made by administration critics, was that the journalists and their sources had committed a potentially treasonous act by disclosing an undercover officer's identity, thereby potentially putting her life at risk. Others contended that the reporters endured harsh punishment at the hands of the government for maintaining their journalistic integrity and protecting important confidential sources.

Part of the justification for the state secrets privilege, which has been used to block cases against the government for its treatment of detainees and alleged terrorism suspects, has been that the disclosure of information at trial would jeopardize national security, regardless of the merit of defendants' claims. Administration critics argue that the privilege is being abused to cover up embarrassing, and potentially illegal, acts by the government.



Reineke

The above are just a few examples of a few of the daunting issues the traditional news media now face. Clearly, media law scholars should be able to provide valuable perspectives on these contemporary issues of access, disclosure, reporter privilege, and trial coverage. In addition to the national security, defense, and intelligence issues touched on above, there are also concerns about the tensions between business and news departments, and the traditional news media's rapid loss of audience to other venues, such as news comedy and a cornucopia of varied news sources on the Internet.

Some argue that all of these pressures constitute contribute to the "war on the press," while others view them as contemporary examples of perennial issues. Regardless of the appropriateness of the label, the current discussion of the "war on the press" provides ample opportunities for research, teaching, and public service. Media law issues abound, and there's also plenty of work for political communication and public opinion researchers as well. What do the people think about all of these strains on the press? Do they care? How do their opinions about these issues relate to the increasing antipathy that the public has for the press? How do elected officials react to these opinions? How might the courts respond to legislation that results? These are all questions that seem pertinent for us to address through our research, discussions with our students, and expert opinions that we might be able to offer the public in this time of "war on the press."

Jason Reineke, *The Ohio State University*, won the Whitney and Shirley Mundt award for the Law & Policy Division's top student research paper at AEJMC's 2006 conference.

Legal Currents

Embedded Journalism: Cheers or Jeers?

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The development of the Embedded Media Program (EMP) has given the media a front row ticket to the Iraq War. Critics of the revolutionary media-military partnership warn that embedded journalists may fall victim to the Stockholm Syndrome, unable to report

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Marion Brechner
Citizen Action Project

Using MBCAP To Teach Wide Range of Classes

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The Marion Brechner Citizen Access Project (MBCAP) offers a wonderful opportunity to both teachers and students as a learning tool. The site provides opportunities for many more classes other than law.

Law

MBCAP provides wonderful study opportunities and terrific fodder for research projects at both the undergraduate and graduate levels. Students can look up many of the access laws from their state as well as others. They can compare laws. They can discuss the impact of laws in states that have audited the official's responses to being asked to disclose records.

Students may use the Web site for legal citations, secondary sources listed on the site, FOI organizations mentioned on the site, state audits, and links to official electronic versions of the law. Students can do research without access to legal research data bases. They can do research at several different levels of sophistication.

Instructors may use the Web site to discuss the state laws, compare state laws to the federal *Freedom of Information Law*, discuss our federal system of laws, and compare laws to actual behavior. Research teachers are welcome to use the site to critique either the legal research or the social science research methods, or both. Instructors can share these evaluations with MBCAP if

they want to. Classes can second guess how MBCAP approached the project and send these critiques to the project headquarters. Students also can discuss inferences that can be drawn from the site, such as whether the state audits made a subsequent difference in state law.

A statement of the site's methodology is on the Web site on the project page, a page that also lists the project's review board members. Instructors may want to discuss the myriad of research techniques used by the "state audits" that can be accessed directly from the resource page. In the "audits" a large number of states used a variety of research techniques to learn whether officials in those states are obeying the state laws.

Beginning Writing and Reporting

Instructors who want their students to be able to write their own stories from a ready source of verifiable information may find the site useful. The site also provides a variety of story possibilities for instructors seeking a tool for a discussion of news value.

MBCAP makes available information from more than 100 stories. Students can write about the access laws in any state or across several states. Not only does the site provide legal provisions of all the states, organized so they can be easily found, it also provides direct links to the statutes themselves and to sources the students can call for follow up. Some teachers may appreciate that the project allows the students to work with original research data and a carefully developed research technology.

MBCAP welcomes students who want to use the Web site for writing news stories or research reports. Publication is encouraged. MBCAP only asks students to credit the MBCAP project and Marion Brechner and the Knight Foundation.

Public Relations

MBCAP provides the data that can be checked against news stories online. Students can write stories as if they represented MBCAP. Teachers can use the site to discuss source credibility, use of research methods, rewriting "canned" information, and use of sources to further develop a story.

Mass Communication and Society

A variety of resources discussed above can be used to discuss access issues and the impact of the media. A wide range of research projects, many discussed above, can be developed from information on the site.

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Head Notes

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A week or so ago, Trinity University hosted rapper Chuck D. On each entrance to the auditorium, event organizers had placed signs reading: “mature subject matter and adult language may be used.” The day after the speech, I found one of these signs had fallen just outside my office door. Seeing this as a sign (maybe literally) from the free speech gods, and pretty humorous to boot, I posted it on my bulletin board.

Enter conference coordinators for “The Truth Project,” sponsored by Focus on the Family. Now, I may not agree with the beliefs articulated by Focus on the Family, but I strongly support in their right to publicly speak about what they believe. They didn’t seem to have the same view of my rights, however.

When I returned to my office from class the next day, there was my “adult language” sign...turned around...just a plain, red piece of paper now in view. It was not removed, as often is the case with my bulletin board speech, but essentially deemed inappropriate.

Small Act of Censorship

This small act of censorship troubled me, not just because someone was silencing my speech, but even more so because historically religious organizations and by extension those affiliated with religious causes have been great champions of free speech in the United States. Understanding it is impossible to freely exercise one’s religion without the right to speak, such diverse religious voices as the Jehovah’s Witnesses, the United Church of Christ, the B’nai B’rith, and the United States Conference of Catholic Bishops have challenged censorship in the courts and media consolidation in federal agency hearings.

In the 1940s, the Jehovah’s Witnesses undertook a systematic campaign to challenge local govern-

ment ordinances that restricted their right to distribute literature door-to-door. By the mid-1950s, they had argued 19 cases before the United States Supreme Court, winning victories in 14. Because of the Witnesses, the right to distribute information of all kinds though any medium was secured. This right to distribute freely is more important now than ever. In an age of digital communication, suppressing distribution would essentially mean the end to global connectivity.

In 1963, the United Church of Christ convinced the Supreme Court that all citizens should have the right to participate in hearings before the Federal Communication Commission (FCC), not just those who owned broadcast media. The case was significant, not just because it gave “average” citizens a voice in the halls of power, but also because it empowered them to speak out against those things they found unacceptable – in this case, racist programming.

Opposing Deregulation

More recently, the Conference of Catholic Bishops was a participant in FCC hearings regarding the consolidation of media ownership. Fearing that the increased consolidation of broadcast media in the hands of fewer corporations would lead to the loss of channels now available for religious programming, the Conference was a vocal opponent of FCC efforts in 2003 to further deregulate media ownership.

While these cases may have originated from self-preservation, or at the very least, self-interest, the decisions they produced expanded the breadth of First Amendment protections for all of us.

So, the next time you catch someone taking down *your* cartoons, tell them emphatically to step away from the bulletin board. It is in your best interest. And mine.



Marion Brechner Citizen Action Project

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Graphics and Web Design

Instructors could use the site as an example of web design. Discussion topics could include strengths and weaknesses of the site, alternative design options, and possibilities for improvement. The MBCAP staff welcomes feedback regarding the site’s web design and ease of navigation.

Important notes about the site:

The project is not complete. However, when one category is examined, it is examined for all states at the same time. Not necessarily will all sources of law – all state, constitutional provisions, and court cases can be researched together. However, an examination of the “one category, all states” page and a click on “courts” will indicate whether the research staff has examined court decisions of all states. MBCAP welcomes reports of errors on the site. The staff does its best not to make them, but the project involves many people and a lot of complicated data.

Judges in 'J' School

Need to Train Courthouse Reporters

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Mauro

Ask a roomful of judges what they think of the news organizations that cover their courtrooms, and one of the first complaints you will hear is some variation of this:

“They send the greenest reporter they have down to the courthouse, someone who doesn’t know a TRO from a BLT. As soon as the reporter starts to figure things out, he or she is gone, off to another beat.”

It’s a hard criticism to answer, because it is so often true. Reporters who cover the courts fulltime or parttime are often randomly picked, under-trained, and quick to move on. This unfortunate truth creates unnecessary tension with judges, too often confirming their fears about sloppy or even biased reporting.

A Modest Step Forward

Last fall, a program was launched by the Donald W. Reynolds National Center for Courts and Media in hopes of taking a modest step toward tackling this problem. Informally called “Judges in J-schools,” the program brings real judges into journalism schools to talk with the students who someday might be covering the next “trial of the century” in their courtrooms. The program was funded by the Rollan D. Melton Chair at the center.

In addition to providing students with a quick and early dose of useful information about how the courts work, the program is aimed at demystifying the judicial system for students whose only prior exposure has been through TV dramas. Another goal is to increase dialogue between journalists and judges in hopes, later on, of reducing the intensity of the inevitable conflicts that arise over issues of access and fair trials. In the process, if even a few students are enticed into specializing in court coverage in their professional careers, that’s all to the good.

Based on the experience of the three journalism schools where the program was tested, it appears to have

been a success. Students, faculty and the visiting judges themselves all seemed to benefit from the dialogue.

Indiana University, Bloomington: Colorado District Judge W. Terry Ruckriegle, probably best known for presiding over the Kobe Bryant rape trial in 2004, visited Indiana, his alma mater. The judge spoke with four classes at the School of Journalism and discussed the challenges he faced in dealing with the dozens of media organizations covering the trial. He even showed video clips of coverage of the trial. “A professor can tell the students how the media and the courts interact, but it really helps to hear it from a judge,” said journalism professor Tony Fargo, who hosted the visit. Ruckriegle also saw long-term benefits in the vigorous discussion his visit sparked. “Once you are face to face with somebody, it’s a little harder to rip them apart.” He also encouraged students to continue the contact when they are assigned the courthouse beat.

University of Minnesota: Another judge who knew a thing or two about high-profile trials spent a day meeting journalism and law students. California trial judge Rick Distaso – who had been the prosecutor in the high-profile Scott Peterson murder trial of 2004, told the students, “It’s not us against them; we all have a job to do.” Jane Kirtley, Silha Professor of Media Ethics and Law at Minnesota, said Distaso’s visit was a success. “It was really important for our students -- students of the



Jane Kirtley with Judge Rick Distaso

television generation – to get a sense of what it is like to be the object of such heavy television coverage.”

Brigham Young University: Nevada federal district court judge Lloyd George, an alumnus of the school, visited three journalism classes, toured the

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Legal Currents

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objectively, and that they provide a “soda straw” view of the war, offering only one slice of a complex issue. Proponents of the program point to the public’s right to know. The law, however, reminds us that there is no First Amendment right for the media to enter the battlefield and that any access the media does have depends on the political powers that be.

So, today, as the war knocks on the doorstep of its fifth year, we cannot take media coverage of the battlefield for granted. The current embedded coverage of the conflict has dropped to an all-time low. There were more than 600 embeds covering the U.S. invasion in 2003, but just 11 embeds were in Iraq in October 2006. Even scholarly reviews of the program are scarce. A few books and even fewer studies have been published on the subject.



Hering

Phillip Knightley, *The First Casualty: The War Correspondent as Hero, Propagandist and Myth-Maker from the Crimea to Iraq* (André Deutsch, 2003) (1975). The author contends that the Coalition believed that its efforts depended on the content, immediacy and redundancy of the media message. Knightley summarized his interpretation of the EMP’s objectives: 1) Emphasize the dangers posed by the Iraqi regime; 2) Dismiss and discredit those who cast doubt on these dangers; 3) Do not get involved in appeals to logic but instead appeal to the public’s hearts and minds; 4) Drive home the message: “Trust us. We know more than we can tell you.”

Greg McLaughlin, *The War Correspondent* (Pluto Press, 2002). The author provides an abbreviated history of war correspondence and chronicled when the basic concept of embedding emerged. He noted that modern-day war correspondents were more likely to censor themselves as a result of external pressures. Modern war coverage, he said, is motivated by “the tyranny of the satellite uplink and the demands of the 24-hour ‘real-time’ news agenda.”

Judith Sylvester and Suzanne Huffman, *Reporting from the Front* (Rowman and Littlefield Publishers, 2005). The authors captured the experiences of the EMP in more than 25 interviews with embedded journalists and DOD officials and constructed vivid, individual synopsis of each experience and the issues faced, such as politicking with the military chain of command.

Life Books, *The War In Iraq: An Illustrated History* (2003). This book includes a section devoted to

the role of civilian media during the Iraq War. It depicts the threat that journalists endured while covering the Iraq War, such as when the U.S. fired upon on the Palestine Hotel, which served as headquarters for the press in Baghdad.

America at War: The Battle for Iraq: A View From the Frontlines (Simon and Schuster, 2003). Dan Rather and other reporters, photographers, and broadcast journalists of CBS News described their embedded experiences in Iraq in short, diary-style entries.

Bill Katovsky and Timothy Carlson, *Embedded* (The Lyons Press, 2003). The authors provide an oral history of the embedded media’s coverage of the Iraq War, including dozens of interviews with seasoned journalists from leading media outlets. The authors said it was “impossible . . . to synthesize all their disparate oral histories into a single, overarching view of the war. Their personal narratives are as varied as their experiences on the battlefield.”

Stuart Allan and Barbie Zelizer, ed., *Reporting War: Journalism in Wartime* (Routledge, 2004). The authors examined the nature of contemporary war reporting— both embedded and unilateral — in a range of locales and explored the idea that embedded journalists lose their ability to be objective as they build personal relationships with the service members about which they report.

Nathaniel Fick, *One Bullet Away: The Making of a Marine Officer* (Houghton Mifflin Company, 2005). Evan Wright, *Generation Kill* (G.P. Putnam’s Sons, 2004). Two books – one written by a Marine, the other written by the journalist covering his unit – offer a unique dual perspective on the same slice of the war. Their stories demonstrate the unique relationship between a service member charged with waging war and the journalist risking his life to cover it.

Alicia C. Shepard, *Narrowing the Gap: Military, Media and the Iraq War*, Catigny Conference Series Conference Report (Robert R. McCormick Tribune Foundation, 2004). The report presents the optimistic findings of a 2003 conference held three months after the combat phase of the Iraq War ended. Participants include 42 representatives of the media and military who reported that the EMP broke down stereotypes and fostered communication and understanding between the media and the military.

The Military-Media Relationship 2005: How the armed forces, journalists and the public view coverage of military conflict (McCormick Tribune Foundation, 2005). Just two years after the McCormick Tribune Foundation’s boasted positive comments about the EMP, a second conference revealed new tensions. Participants blamed the encroachment of military deception, psychological operations and electronic warfare

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Judges in 'J' School

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broadcast facilities and ate lunch with faculty members. "I learned as much as the students," said George, who is on senior status. "A lot of students said it was a real eye-opener," said Ed Carter, a professor in the communications department. "People don't realize that judges have feelings and past experiences. It has always seemed to me that you could solve a lot of the misunderstandings between courts and the media if you could just get together and talk."

The AEJMC Law & Policy Division was instrumental in the program's launch. Members of the division interested in participating in the program came forward at the 2004 convention in Toronto. Then Gary Hengstler, director of the NCCM, paired judges to the schools. The judges who were recruited for Brigham Young and Indiana were alumni of the respective universities, which turned out to be a good way of making the person-to-person connection more quickly. In the trial runs, all of the judges were "out of state," but in the future, it is expected that a mix of judges, including in-state, federal, state, trial and appellate judges will visit participating campuses. The Melton Chair paid for the judges' expenses related to the program.

Judges Open and Plain-spoken

Before they went to campus, judges were encouraged to be open, plain-spoken and challenging in their interactions with the students. Most of the conversations were on the record, and student media covered the visits.

The hosting professors were also encouraged to prepare their students for the visits by asking them to

read up on the judges and their opinions beforehand and to think about issues they wanted to discuss. Some had just been taught about courtroom access issues.

In post-visit comments, some judges were struck by the students' naivete about free press and fair trial issues as well as the workings of the court system. "I asked one class if they knew what prior restraint was, and only a few hands went up," said one judge.

"It's no reflection on the students, but you kind of forget how little contact most people have with the courts," said Judge Distaso. The judges expressed hope that the program would contribute to increasing students' knowledge about the courts.

"The Ultimate Benefit"

All the judges and all the journalism professors urged that the program continue. "The ultimate benefit is to open up the lines of communication," said Ruckriegle. Even if judges and journalists are sometimes at odds over issues of access, he said, "We can treat each other with a little more understanding and sensitivity."

The program had some unexpected side benefits as well. When Ruckriegle visited Indiana, he and Fargo had dinner with a local news reporter who covered the courts. Unfortunately, says Fargo, not long after Ruckriegle's visit the reporter left the newspaper. The turnover of court reporters continues.

Mauro, U.S. Supreme Court correspondent for Legal Times and American Lawyer Media, was a member of the advisory board of the National Center for Courts and Media, and a creator of the Judges in J-Schools program. Mauro invites journalism professors to contact him if they are interested in participating in the program in the future.

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into mainstream public affairs and a lack of concrete information from civilian leadership about the conduct of the war, the reasons for it, and its future.

Richard K. Wright, *The Assessment of the DoD Embedded Media Program*, Institute for Defense Analyses, Joint Advanced Warfighting Program, IDA Paper P-393, September 2004, <http://www.militaryreporters.org/pdfs/embed%20study.pdf>. The findings of this study were drawn from extensive interviews with 244 military and media personnel and from analysis of program data and documents. The study credited the success of the EMP to the trust and

confidence established between the commanders and the embeds assigned to their units.

Christopher Paul and James J. Kim, *Reporters on the Battlefield: Embedded Press System in Historical Context* (RAND Corporation, 2004). The authors provide a comparative historical analysis of several U.S. military conflicts and present findings from public opinion surveys and other poll data. The authors also focused on the interim periods between military conflicts in which events drive eventual military policy towards the media.

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