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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through February 25, 2019

FIRST AMENDMENT

ACCESS

MLRC Media Law Resource Center

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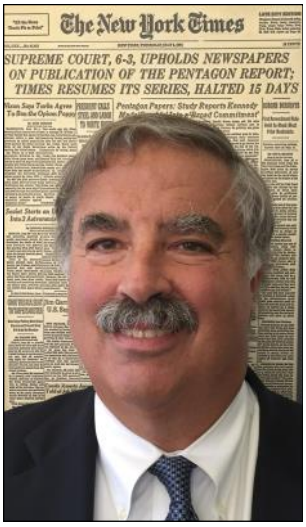
From the Executive Director's Desk

Because He Threatens and Wounds the First Amendment and Our Free Press: *Anybody But Trump*

Amidst the quotidian lying of this President, his prioritizing his ego and pocketbook above all else, and his utter disregard for the rule of law and so many vaunted American institutions, it's easy to allow one outrage or another scandal to get lost in the mix. Indeed, he is genius at distracting us with so much craziness that nothing seems to stick in the minds of the populace. But despite that, I couldn't help but hold my gaze on, and then come back to thinking about, the following lede of a New York Times article of February 20:


The New York Times

SUPREME COURT, 6-3, UPHOLDS NEWSPAPERS ON PUBLICATION OF THE PENTAGON REPORT; TIMES RESUMES ITS SERIES, HALTED 15 DAYS

Pentagon Papers: Study Reports Kennedy

George Freeman

Even by his standards, President Trump's biting attacks on the press this week stand out.

He has praised a libel lawsuit against The Washington Post, called for "retribution" against NBC for satirizing him on "Saturday Night Live" and, on Wednesday, issued his sharpest words yet against The New York Times, calling the newspaper "a true ENEMY OF THE PEOPLE!"

Earlier, First Amendment scholars were taken aback by remarks from Justice Clarence Thomas, who on Tuesday urged the Supreme Court to peel back longstanding libel protections for American news outlets. And a global crackdown against journalists continues apace, as the Egyptian authorities on Monday detained and deported a Times journalist trying to enter their country.

They have added up to a rough few days for freedom of the press, a once-sacrosanct American notion that has been under sustained assault since Mr. Trump made fiery denunciations of journalists — and the rallying cry "Fake news!" — into hallmarks of his campaign and presidency.

Let's go through these seriatim, but cognizant that they are all part of a concerted and intentional offensive against our independent press. It's not an occasional blast or pique which all presidents have expressed. (Even Nixon, no great admirer of an unfriendly media, delegated his Vice President to criticize the "nattering nabobs of negativism" – and never repeated that slogan.) No, it's more than a campaign aimed at solidifying his base and it's more than his compulsion, in the absence a positive narrative, to speak negatively about all his perceived enemies. It is a strategy aimed at minimizing and impugning the credibility of the institution which most stands in his way of doing what he wants.

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Trump's praise for the lawsuit brought by Nick Sandmann, the Covington Catholic High School student, through Lin Wood, against the Washington Post seems to be based on little else than that the boy, filmed wearing his red MAGA cap, appears to be a Trump supporter. In stark contrast, as played out in numerous instances in the last year, and capped by his gratuitous comments on the Jeff Bezos affair, WaPo, by dint of its comprehensive reporting, is a thorn in his side. His support has little to do with his views of libel law, about which he has admitted he knows not much; and with respect to his oft-repeated promise "to open up the libel laws," he still seems blissfully ignorant that given his proclivity for tearing into others, he is much more likely a libel defendant in need of *Sullivan* and all the libel defenses, than a libel plaintiff.

The Sandmann case is troublesome, not because of the needless Trumpian intercession, but because it illustrates more fundamental problems with libel law – and is an example of where good journalism and good law are not consistent.

I would much rather see the recognition of a neutral reportage principle where the media neutrally reports on the statements of people central to such a newsworthy incident than an artificially broad interpretation of the opinion privilege, but, especially in today's environment, that seems too much to ask.

But the Sandmann case is more troublesome, not because of the needless Trumpian intercession, but because it illustrates more fundamental problems with libel law – and is an example of where good journalism and good law are not consistent. First, of course, a critical question in the case will be whether Sandmann is a private or limited purpose public figure. He was in D.C. for a demonstration, but it was about abortion, not racism which was the subject of the incident and dispute at issue. And he gave an interview to NBC, but its timing, and whether it came only as a response to the alleged defamation, will be hotly argued.

More interesting is whether what was said about Sandmann by Native American activist Nathan Phillips, his antagonist at the scene, as reported by a major newspaper covering the entire incident, should be actionable. Put another way, how else was the Washington Post supposed to cover this dispute but by reporting on what the principals it could find said and on what the video available to it showed. It is not realistic from a journalism point of view to decree that a newspaper not run anything on an incident that has gone viral before interviewing every last participant. This is another example of the overbroad application of the republication doctrine and an underutilization of the neutral reportage theory. This is not to say that this

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scenario fits perfectly into the neutral reportage cubby – it does not – but repeating the newsworthy comments of a principal in a newsworthy event ought to be protected.

Beyond that, the allegedly libelous utterances – that Sandmann had a "smirk" and that he blocked the Phillips' egress out of the area – hardly seem like the stuff of a $250 million lawsuit. And the allegation that the boy was racist seems on thin legal grounds as many cases, though not all, have concluded that such an allegation is protected opinion, since how does one know as a fact the motives and internal mindsets of another. Again, I would much rather see the recognition of a neutral reportage principle where the media neutrally reports on the statements of people central to such a newsworthy incident than an artificially broad interpretation of the opinion privilege, but, especially in today's environment, that seems too much to ask. Given that this sort of coverage is what today's journalism demands, it would make sense to try to make good journalism and good law more consistent in this area.

The President called for "retribution" against NBC for satirizing him on Saturday Night Live.

ENEMY OF THE PEOPLE is a phrase that surfaced in the French Revolution and has been embraced by dictators and despots.

Next in the Times article's list of horribles is that the President called for "retribution" against NBC for satirizing him on Saturday Night Live. Specifically, his totally outrageous tweet says, "How do the Networks get away with these total Republican hit jobs without retribution?...Very unfair and should be looked into." The retribution he seeks was set forth by previous tweets in which he suggested that the FCC should "look at" NBC's broadcast license. Of course, the point is that in this country even lowly citizens like us are welcome to laugh at the President without retribution. In a nutshell, that's pretty much what our democracy and our First Amendment are all about. And it's pretty amazing – and downright scary – that a man who attacks just about every perceived opponent nastily and crudely is so wrapped up in his narcissism that he totally fails to get that. As Tony Schwartz, who now regrets having co-authored "The Art of the Deal" with Trump, tweeted in response, this is a step along the road to authoritarianism.

The President's blast at The New York Times, specifically calling it "a true ENEMY OF THE PEOPLE" came a day after the paper had run a well-documented investigative report

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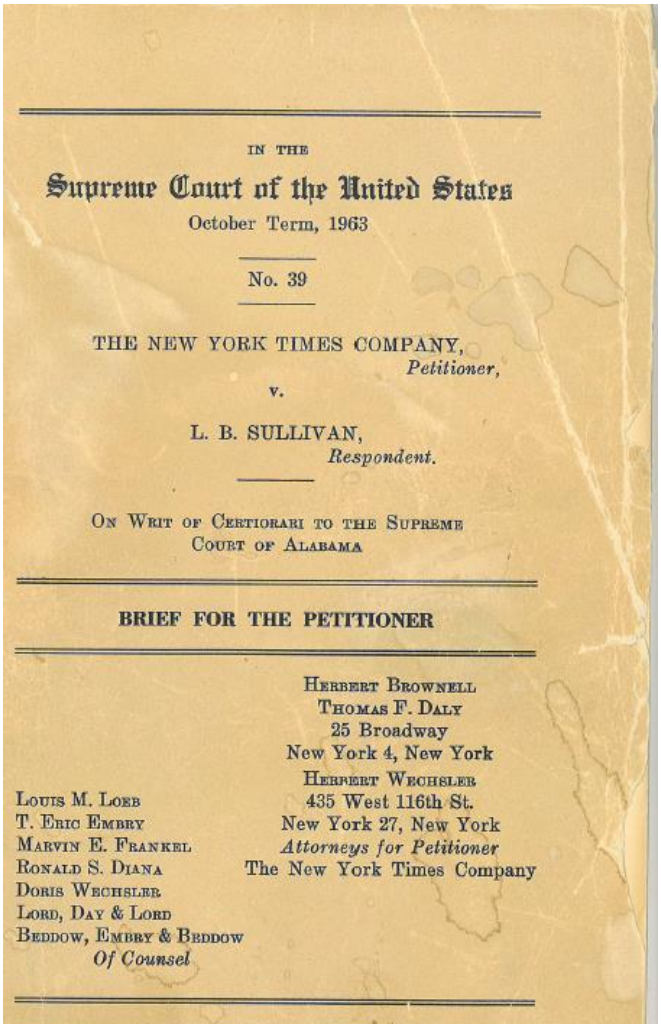
describing how he had worked to influence and undermine the federal investigation of him, his campaign and administration. Just last weekend Dean Baquet, the Times' Executive Editor, noted in a speech that the term was particularly pernicious, as it was a phrase with a deep history "that surfaced in the French Revolution when it was used to set up a tribunal that would punish the opposition." Further, he noted that it was a phrase and concept "embraced by dictators and despots" and was one which, till this Administration, no American President had ever uttered in public.

There are so many things wrong – tragic, really – with Trump's words that it's difficult to know where to start. When A.G. Sulzberger, the Times' publisher, met with the President last year, he emphasized that this sort of rhetoric was endangering the lives and safety of journalists both at home and abroad. Baquet noted in his speech that in the past, if a reporter got in trouble in a foreign land, we could always count on the White House to help and provide support. Now, he despaired, there is no one to call. Even where prior Administrations didn't love us, he said, they understood our role in our democracy.



IN THE

Supreme Court of the United States

October Term, 1963

No. 39

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONER

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BEDDOW, EMBRY & BEDDOW
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The author's well-worn copy of the Times' brief in *Sullivan*.

In addition, from a more parochial point-of-view, there appears to have a been a rise in the number of libel suits. The atmosphere which the President has fostered – and his meaningless "fake news" mantra – has enabled those with grievances against the media to go to court and get their views substantiated. Although jury experts at the MLRC Media Law Conference in Virginia last September were not able to document a rise of verdicts in plaintiffs' favor nor greater damages, it's hard to imagine that the everyday battering of the media by the President and his cadre isn't having that effect. Even more dangerous, it seems clear from poll results that it is decreasing the public's trust in the media, which has the concomitant result of minimizing a main hurdle to the White House's getting its way on contested issues. No President before has spent so much time and effort on trying to impugn and make ineffective one of the pillars of our democracy.

The following paragraph of the Times article begins with news of Justice Clarence Thomas' concurrence in the Supreme Court's denial of cert in a libel case brought by an alleged Bill Cosby rape victim who claimed that Cosby and his lawyer defamed her by deliberately distorting her personal background to damage her reputation for truthfulness. Her case had

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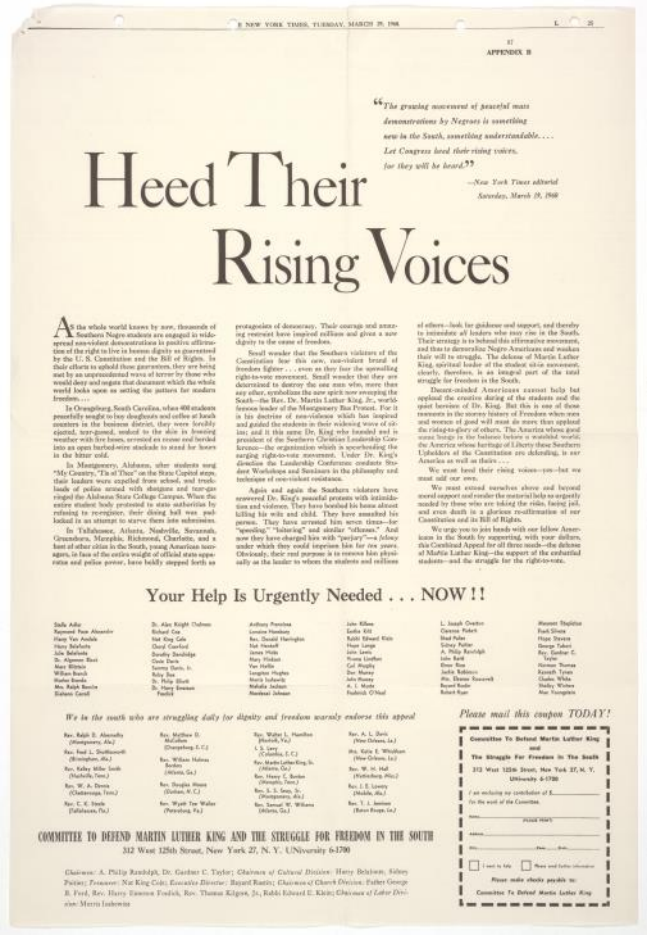
been thrown out, and while Thomas did not disagree with the Court's decision not to take the case, he used the opportunity to urge that *Times v. Sullivan* be reconsidered. Thomas' words and theory echoed Trump's campaign pledge "to open up the libel laws." Although after 55 years *Sullivan* seems like pretty established precedent, and the President's two appointments did not join the concurrence and have shown no indication of abandoning *Sullivan*, Thomas' opinion was troubling – though not wholly outrageous.

As the MLRC's 2011 Brennan Award winner (and my professor, client, co-teacher and friend) Anthony Lewis described in his seminal book about the history of the First Amendment and the Sullivan case "Make No Law," *Sullivan* really was born of the exigencies of the history of the Civil Rights movement of the 60's. L.B. Sullivan did not sue either to redeem his reputation or for money. He sued as a strategy perpetuated by the Southern segregationist establishment to kick the northern media out of Alabama and keep it from reporting to the nation about the abuses heaped on Blacks and civil rights workers in the South. This would enable the police in Montgomery and elsewhere to continue its harsh and illegal treatment of the civil rights workers without the pushback of adverse public opinion from the rest of the nation.



APPENDIX B

"The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable.... Let Congress heed their rising voices, for they will be heard."

—New York Times editorial Saturday, March 30, 1960

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom....

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state oppression and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the unyielding right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., worldfamous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it is this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs....

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and combat the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious reaffirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed . . . NOW!!

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Please mail this coupon TODAY!

COMMITTEE TO DEFEND MARTIN LUTHER KING AND THE STRUGGLE FOR FREEDOM IN THE SOUTH
312 West 125th Street, New York 27, N. Y. UNiversity 6-1700

Sullivan really was born of the exigencies of the history of the Civil Rights movement of the 60's. L.B. Sullivan did not sue either to redeem his reputation or for money. He sued as a strategy perpetuated by the Southern segregationist establishment to kick the northern media out of Alabama and keep it from reporting.

As the case got to the Supreme Court, the strategy was working: The Times was assessed $500,000 in damages in the *Sullivan* case, similar amounts in seven similar cases, and there were memos and letters within the Times directing its reporters to stay out of Alabama.

Similarly, the Times lawyers faced a quandary: because the "Heed Their Rising Voices" ad did contain some (small) falsehoods, under the strict liability regime prevalent at the time – leading to liability as long as there was falsity and reputational damage – they couldn't easily argue that the law had been misapplied. They had to argue that the law ought to be changed. That's where the First Amendment comes in. They argued that under the spirit of the First Amendment and in light of the repeal of the Sedition Act, excising the notion that one could be punished for criticizing the Government, our system demanded breathing space to make errors so as to incentivize, not disincentivize, reporting and speech on matters of public concern. And the liberal Warren Court, plainly worried about the national press being steamrolled out of Alabama, accepted the argument, and in so doing constitutionalized libel law.

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By declaring that "actual malice" was needed, it brought defamation within the ambit of the First Amendment. Given our national commitment to "uninhibited, robust, and wide-open" debate on public issues, which Justice Brennan – without even having watched Alec Baldwin or SNL – noted "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials," the Court established a rule that would protect the press even if it made mistakes, as long as it acted in good faith and didn't have serious doubts as to the truth at the time of publication. In reporting on matters of public concern, if the press were confident it was right even if it didn't have 100 percent of the evidence, the Court wanted it to go ahead and run a story without fear of burdensome liability or even of huge lawyers' bills.

So while he overstates it, Justice Thomas was not wholly wrong when he described *Sullivan* and its progeny as "policy-driven decisions masquerading as constitutional law." And from an originalist's point-of-view, libel does not directly deal with "abridging" speech – it assesses damages for defamatory speech – but, of course, such potential damages do have the consequence of chilling and abridging speech, just as Justice Brennan explained. Further, libel might seem to have little to do with Government's intrusion into the affairs of individuals, the motif of the Bill of Rights, but, of course, libel is determined and damages assessed through the court system, an essential part of government. So while Thomas' views might have some legitimacy if one looks directly, solely and strictly at the text of the First Amendment, the Court's decision in *Sullivan* more than stands up with the aid of history and the passage of time. Interestingly, Thomas doesn't make the above arguments in his concurrence; rather, as Lee Levine and Steve Wermiel set forth in their excellent analysis in this issue, Thomas' exclusive reliance on the Framers' original intent is wrong and misplaced. Despite Justice Thomas' shot over the bow and President Trump's recurring whining, I don't see the Court seriously taking them up on their invitation.

We were once the beacon of press freedom throughout the world, our First Amendment a model of free speech aspired to globally. Now we are copied because of our President's bullying threats against journalists.

Finally, the Times article warns that "a global crackdown against journalists continues apace," noting the detaining and deporting of a Times reporter by Egyptian authorities. It's troubling enough that the atmosphere foisted by our President has made journalists worldwide less secure and safe; it's even worse that our leader's shouting of "fake news" whenever a media outlets runs something he doesn't like and his lashing out at disfavored media companies and journalists with threats of delicensing, costly libel suits and restrictions of access to public events has emboldened leaders around the world – dictators or democrats – to do the same. We were once the beacon of press freedom throughout the world, our First Amendment a model of free speech aspired to globally. Now we are copied because of our President's bullying threats against journalists and his recurring and outlandish claims that the press is making stuff up whenever he sees something he doesn't like. 'Nuff said.

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I should emphasize that neither the MLRC nor I as its E.D. take political positions. We have members who I am sure support the positions and platforms of the President. But this column is not about that; it takes no view as to the Wall, immigration, health care, trade policies, foreign relations or the plethora of other issues that divide our country. It likewise ignores that, at bottom, our President operates like a 4th grader – everything is all about him; he will lie and make up stories to get what he wants; and he will make decisions based on his gut and not on facts or the expertise of others. No, this column is about the threat he poses to First Amendment values – and it is, above all, our devotion to those values and to a free and independent press that all of us have devoted our careers. And because he so unendingly and harshly seeks to minimize and damage journalists and journalistic institutions – and ultimately the trust and belief our citizens have in our free press – it is imperative that he not be re-elected in 2020.

This column is about the threat Trump poses to First Amendment values – and it is, above all, our devotion to those values and to a free and independent press that all of us have devoted our careers.

Which brings me to my conclusion. Obviously, the Democratic nomination is being fought for among many pretty qualified candidates. They span the range from far left quasi-socialists to quite moderate centrists. My own view – based on national electoral politics throughout my lifetime – is that going to the middle is the way to win national elections, and that the further extreme left the candidate, the more likely s/he might lose. That's why the biggest losers were the extreme conservative Barry Goldwater for the GOP in '64 and George McGovern for the Democrats (despite Watergate) in '72. And it is why, with the exception of Obama, the recent Democratic victors were Southern moderates – Clinton, Carter and Johnson.

But, in the end, my views about this don't matter. Defeating such an arch-enemy of the press matters. I will support the Democrat -whether it be Sanders or Warren on the left hand, or Biden or Kamala Harris on the other – who has the best chance of winning the election and removing this First Amendment threat from office. I will put aside my not insignificant differences with some of the potential candidates if the data shows that candidate has the highest probability of winning. For the sake of the First Amendment, I hope you do the same.

The opinions expressed in this column are those of the author and not the MLRC. We welcome responses at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Justice Thomas and *Sullivan*

By Lee Levine and Stephen Wermiel*

Let's not mince words—Justice Clarence Thomas's recent broadside against *New York Times v. Sullivan*[1] is a tragically misguided attack on the very foundations of the freedoms of speech and of the press in the United States.

On February 19, in a concurring opinion from the denial of a petition for a writ of certiorari, Thomas unleashed a fourteen-page assault on *Sullivan*[2] that would turn back the jurisprudential clock at least fifty-five years and, more accurately, the full 228 years since the First Amendment was ratified. Thomas joined the Court in 1991, one year after the retirement of *Sullivan*'s author, Justice William J. Brennan, Jr., whose tenure ran from 1956 to 1990.[3]

There are multiple responses to Thomas's assertion that *Sullivan* ought to be overruled. These include, in no particular order: the overwhelming academic consensus applauding the decision both at the time and thereafter; the impressive body of precedent it has spawned since it was decided;[4] the proper role of original intent in free speech analysis; the history of seditious libel in the United States and its dispositive significance in divining that intent in *Sullivan*; the case's place in defining "the central meaning of the First Amendment" that has guided the Court's First Amendment jurisprudence for more than half a century; and the limited scope of the past criticisms of *Sullivan* on which Thomas purports to rely, much of which he wrenches from the context in which they were actually made.

Let's not mince words—Justice Clarence Thomas's recent broadside against *New York Times v. Sullivan* is a tragically misguided attack on the very foundations of the freedoms of speech and of the press in the United States.

First, Thomas's opinion reads as if *Sullivan* were just decided last week and has therefore never been the subject of rigorous analytical scrutiny. His opinion is most notably silent about the contemporaneous academic reaction to *Sullivan*, authored by arguably the leading First Amendment scholars of that or any era. Shortly after it was decided, the legendary Harry Kalven, Jr. wrote the definitive analysis of *Sullivan* in the *Supreme Court Law Review*, an article that is still widely considered among the most authoritative academic expositions of the First Amendment ever published.[5] Kalven unequivocally pronounced Brennan's opinion for the Court in *Sullivan* to be "the best and most important it has ever produced in the realm of freedom of speech."[6]

Alexander Meiklejohn, perhaps the most influential free expression scholar in our history, characterized Brennan's opinion as nothing less than "an occasion for dancing in the streets."[7] And, much of Brennan's analysis was inspired by the highly respected Herbert Wechsler, the Columbia Law School professor who argued the case for *The Times* in the Supreme Court. All of this is chronicled in Pulitzer Prize winner Anthony Lewis's definitive work on the case, *Make No Law*, in which he explains the genesis and aftermath of the decision and concludes that *Sullivan* succeeded in "lay[ing] down the fundamental rules of our national

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life. It made clearer than ever that ours is an open society, whose citizens may say what they wish about those who govern them."[8]

Thomas's opinion largely ignores all of this, treating *Sullivan* as some sort of jurisprudential aberration, as he puts it, a "policy-driven decision[ ] masquerading as constitutional law."[9] Nothing could be further from the truth. In fact, *New York Times v. Sullivan* has become one of the foundational pillars of freedom of speech in the United States. Its articulation of the "central meaning of the First Amendment," encapsulated in Justice Brennan's frequently repeated description of our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[10] has influenced virtually all of the Supreme Court's subsequent First Amendment jurisprudence, including decisions that Thomas has enthusiastically joined such as *Citizens United v. FEC.*[11]

Beyond the decision's importance for freedom of expression more broadly, *Sullivan* adopted the actual malice standard for defamation lawsuits by public officials, later extended to public figures. This means that a public figure cannot recover damages for defamation without proving that the harmful statements at issue in the case were "calculated falsehood[s]," that is, that they were published despite the defendant's actual knowledge that they were false or probably false.[12] This, too, has become an important part of the fabric of First Amendment law, widely accepted in subsequent rulings.[13]

Thomas's opinion reads as if Sullivan were just decided last week and has therefore never been the subject of rigorous analytical scrutiny.

The actual malice standard was not, as Thomas describes it, a "policy-driven approach to the Constitution." It was, rather, a decidedly mainstream exercise in constitutional analysis, which honored both the Court's previous recognition that "libel" is not protected by the First Amendment and its concomitant obligation to determine the definitional contours of that category of unprotected speech.[14] Indeed, the Court had previously engaged in analogous exercises in so-called "definitional balancing" to identify the boundaries of other unprotected categories, including everything from "obscenity" to "fighting words."[15] Brennan's decision in *Sullivan* to define unprotected "libelous" speech about public officials as encompassing only calculated falsehoods injurious to their reputations, a decision endorsed by five other members of an otherwise unanimous Court, was actually a more speech-*restrictive* formulation than the approach favored by the three remaining Justices who, relying on a literal reading of the constitutional text (an approach that Thomas typically favors) would have declared *all* defamation actions brought by public officials to be precluded by the First Amendment.[16]

Thomas issued his opinion despite agreeing with the Court's decision to deny a petition for *certiorari* in a libel case against Bill Cosby, the now-incarcerated comedian. The petition was filed by Katherine McKee, who after accusing Cosby of sexual assault, filed a defamation action charging that Cosby's attorney had released a letter that damaged her reputation. The

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First Circuit affirmed a trial judge's decision that McKee was a limited purpose public figure and was unable to carry her burden of proving actual malice.[17]

Although the issue was not placed before the Court by McKee's petition, and although he wrote that he agreed with the Court's decision not to hear her case, Thomas used the Court's denial of *certiorari* as a vehicle to announce his view that the Supreme Court should reconsider *Sullivan*, overrule it, eliminate the actual malice standard, and return full control over libel law to the States. "The States," Thomas wrote, "are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm."[18]

Precisely the opposite was the case, however, when the Court decided *Sullivan* in 1964 and there is every reason to believe that, but for *Sullivan* and its progeny, an analogous effort by public officials and public figures to weaponize the law of defamation would be equally successful today. As Brennan's opinion in *Sullivan* described, and as Anthony Lewis chronicles in great detail in *Make No Law*,[19] the advertisement published by *The New York Times* that was the focus of the case never mentioned by name the plaintiff, L.B. Sullivan, the Montgomery, Alabama commissioner of public affairs. The Alabama courts imputed the advertisement's criticism of the conduct of the Montgomery police force to Sullivan, who had ultimate supervisory authority for its operations.[20] At the same time, as the Court also noted in *Sullivan*, the newspaper faced multiple other libel suits in the Alabama courts by other public officials concerning the same advertisement.[21]

There is every reason to believe that, but for *Sullivan* and its progeny, an analogous effort by public officials and public figures to weaponize the law of defamation would be equally successful today.

When *Sullivan* came before the Supreme Court, the common law of defamation—in Alabama and in most other States—heavily favored the plaintiff, imposing a relatively modest burden of proof on the person suing and a heavy burden on the defendant to, among other things, prove that the challenged statements were true. In *Sullivan* itself, the Alabama courts found the ad to be libel per se, concluded that it was about Sullivan because some of his witnesses testified at trial that they understood its criticisms to be a reflection on him, and therefore presumed damage to his reputation, all in accordance with the prevailing common law.[22] The only real option for *The Times* was to prove the truth of each of the relatively minor factual errors contained in the ad, which it could not do, both because there were some errors and because the newspaper was not responsible for its content in the first place.[23]

As Lewis documents, Sullivan's suit, the others filed against *The Times*, and still others filed against other national media outlets then attempting to cover the civil rights movement in Alabama were not motivated by a desire to recover damages for actual reputational harm so much as to dissuade the press from reporting to the nation about a subject of palpable public concern.[24] Simply put, the damage awards sought (and in many cases awarded) in multiple lawsuits aimed to make it too expensive for newspapers and television networks to continue reporting about civil rights. As Brennan wrote for the Court in *Sullivan*, "the pall of fear and

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timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[25]

It is against this backdrop that, after more than a quarter century on the Court, Thomas chose this moment in our history to call for *Sullivan* to be overruled. He writes at a time when the President of the United States has dubbed critics of his official conduct "enemies of the people" and has called for the libel laws to be "opened up" in the manner Thomas has now endorsed.[26] He writes at a time when an unprecedented number of public officials and powerful public figures, from Sarah Palin to Joe Arpaio to an assortment of Russian oligarchs, have brought defamation actions against *The Times* and other national media.[27] Make no mistake, but for *Sullivan* and its progeny, such lawsuits would—as Brennan wrote in *Sullivan*—deter "critics of official conduct . . . from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so."[28] What was true in 1964 remains true today: the libel law regime that Thomas apparently favors "dampens the vigor and limits the variety of public debate" and is demonstrably "inconsistent with the First and Fourteenth Amendments."[29]

He writes at a time when the President of the United States has dubbed critics of his official conduct "enemies of the people" and has called for the libel laws to be "opened up" in the manner Thomas has now endorsed.

Which brings us to Thomas's curious and decidedly selective discussion of original intent. Neither *Sullivan*, nor any of its progeny, Thomas asserts, "made a sustained effort to ground their holdings in the Constitution's original meaning."[30] These words simply cannot be squared with the Court's opinion in *Sullivan* itself, four full pages of which are devoted to the Framers' intent as gleaned from the most analogous historical experience—the controversy surrounding the Sedition Act of 1798.[31]

As Brennan explained in *Sullivan*, seditious libel can be traced to English common law, pursuant to which an individual could be punished for criticism that brought ridicule or disrepute on the King and his ministers, even if (and, in some cases, especially if) the criticism was true.[32] There is substantial evidence—some of which is recounted in *Sullivan*— indicating that the proponents of the First Amendment, Madison foremost among them, intended the free speech and press guarantees to prohibit punishment for seditious libel in the United States, i.e., to prohibit libel suits against public officials for criticism of their performance of their official duties. When Congress nevertheless passed the Sedition Act in 1798, which opened the door to numerous prosecutions for statements critical of President Adams and his administration, Madison and Thomas Jefferson led protests against the law in Virginia.[33] When Jefferson became president in 1801, he pardoned those who had been convicted of seditious libel under the statute.[34]

Brennan not only traced this history at length in *Sullivan*, he canvassed the most authoritative assessments of its constitutional significance, all of which, including most especially the published views of Justices Holmes, Brandeis and Jackson, reflected "a broad

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consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[35] This consensus—reflecting the considered judgment of "the court of history"—was and remains especially significant because, as Brennan also noted, "the Sedition Act was never tested" in the Supreme Court.[36]

Thomas rejects the significance of both this consensus and the historical record on which it is based, largely on the grounds that (1) both the criminal and common law of libel continued to exist without constitutional challenge following the controversy surrounding the Sedition Act and (2) several Justices noted, in the years before *Sullivan*, that "libel" was not protected by the First Amendment.[37] None of this is surprising, or particularly persuasive, however, especially since the First Amendment was not held to be applicable to the States until 1925, [38] *Sullivan* was the first case thereafter in which the Court undertook to assess the application of the common law in a manner analogous to the law of seditious libel, and none of the judicial statements that Thomas quotes therefore purported to speak to that issue. And, as noted, the Court *did* recognize the need to tread carefully and deliberately in *Sullivan*, displacing only so much of the common law that could not be reconciled with the First Amendment's documented antipathy to seditious libel.

Two other points are worth noting when assessing the significance of Thomas's professed allegiance to original intent. First, missing from his own discussion of the relevant history is any reference to the John Peter Zenger seditious libel trial in 1735. It is well accepted that the Zenger prosecution was a significant factor in solidifying the Colonies' antipathy toward the Crown that ultimately led to the Revolution as well as the new nation's insistence on a Bill of Rights that guaranteed its citizens the freedom of speech and of the press. One would have thought that the Zenger trial, which had "set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities," would be worth at least a mention in Thomas's assessment of the historical record, especially since the quoted language in this sentence was written by him in his concurring opinion in *McIntyre v. Ohio Elections Commission*.[39]

Almost nothing in our First Amendment jurisprudence, including decisions Thomas has written and joined, has turned on what freedom of speech meant either to Madison, who drafted it, or to the first Congress, which approved it.

Second, despite the fact that *Sullivan* demonstrably relied on the best evidence of the Framers' intent, it cannot be seriously questioned that Thomas's narrow focus on such an inquiry is of limited utility in interpreting the First Amendment. Although the First Amendment was ratified in 1791, the Supreme Court did not begin to decide cases requiring judicial consideration of its meaning for more than another 125 years.[40] Almost nothing in our First Amendment jurisprudence, including decisions Thomas has written and joined, has turned on what the freedom of speech meant either to Madison, who drafted it, or to the first Congress, which approved it. To cite just one recent example, it is difficult to imagine that the Framers believed the First Amendment restricted the ability of local governments to enact ordinances regulating outdoor signs displaying non-political messages, yet Thomas had no

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difficulty writing an opinion for the Court holding just that in *Reed v. Town of Gilbert.*[41] One will search that opinion in vain for a detailed discussion of "original intent" of the kind he criticizes *Sullivan* (albeit wrongly) for omitting.

Much of Thomas's historical critique of *Sullivan* relies on and quotes the work of the late Justice Byron White. White, who served on the Court from 1962 to 1993, joined Brennan's opinion for the Court in *Sullivan*, as well as several of its progeny, but later became a vocal critic of the Court's 1974 decision in *Gertz v. Robert Welch, Inc.,* which held that the First Amendment precludes private persons involved in matters of public concern from recovering in a defamation action without demonstrating the defendant's fault.[42] This aspect of the Court's decision in *Gertz* has nothing to do either with defamation actions brought by public figures or with the actual malice standard and, as a result, White's criticisms of that decision, many of which are taken from that context and then quoted by Thomas, provide no support for his own critique of either *Sullivan* itself or the actual malice standard it articulated. To be sure, White later indicated he believed *Sullivan* had been wrongly decided (despite the fact that he had joined in Brennan's opinion), but the fact remains that his historical critique in *Gertz* was directed at a very different target.[43]

The doubts that White *did* express about *Sullivan* were front and center when, three years after he articulated them, the Court decided *Hustler Magazine, Inc. v. Falwell.*[44] In that case, writing for a unanimous Court (although White concurred only in the judgment), Chief Justice Rehnquist unmistakably reaffirmed *Sullivan*, going so far as to hold that public figures cannot circumvent either *Sullivan* or its actual malice standard by framing their cause of action as some other tort. As Rehnquist reaffirmed unequivocally for the Court in *Falwell*, "one of the prerogatives of American citizenship," enshrined as the First Amendment's "central meaning," "is the right to criticize public men and measures."[45]

For all of these reasons, Justice Thomas's critique of *Sullivan* simply cannot withstand reasonable scrutiny. It is therefore not surprising (and encouraging) that not a single member of the Court joined in his opinion. Those Justices include both some who criticized aspects of *Sullivan* before becoming judges[46] and others, including the two most recent appointments, who have written decisions that reflect and appear to embrace *Sullivan*'s essential role in preserving a constitutional democracy.[47] As then-Judge Kavanaugh recently recognized, the "First Amendment guarantees freedom of speech and freedom of the press" and "costly and time-consuming defamation litigation can threaten those essential freedoms."[48]

That said, the constitutional law of defamation, an evolving body of precedent that is now itself more than a half-century old, is not, and should not be, immune from criticism as well as, where appropriate, course corrections. Brennan himself lamented the unnecessary confusion that resulted from his use of the phrase "actual malice" to describe the definitional line drawn in *Sullivan* to separate calculated falsehoods from protected speech.[49]

Perhaps most significantly, there are aspects of *Sullivan* and its progeny that, it can be reasonably argued, have not only failed to prevent unwarranted self-censorship in the manner that the Court in that case likely envisioned, but have, to at least some extent, facilitated it. Specifically, in subsequent cases, the "actual malice" concept has become something of a fact-

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bound inquiry that has all too often led to extremely costly and burdensome discovery before a meritless defamation action can be dismissed, itself (as Justice Kavanaugh has noted) a very real deterrent—in the form of outsized attorneys' fees if nothing else—to the kind of "uninhibited, robust, and wide open" debate promised in *Sullivan*.[50]

To be sure, both courts and legislatures have sought, with some success, to address this shortcoming by, among other things, (1) recognizing additional First Amendment protections—such as the so-called "opinion" doctrine—that can more easily be addressed via a preliminary motion,[51] (2) applying a "plausibility" requirement to a complaint's allegations of actual malice that can also be assessed through a motion to dismiss,[52] and (3) enacting both procedural (think anti-SLAPP statutes) and substantive (think Section 230 of the Communications Decency Act) laws that serve the same purpose. Nevertheless, the fact that such course corrections have proven necessary underscores the point that *Sullivan* was not, and is not, without its flaws when it comes to protecting political speech from retaliatory litigation.

By the same token, it is ironic that Thomas built his critique exclusively on *Sullivan*'s purported failure to reflect the Framers' "original intent" and said nothing about the very real challenges that the Court's defamation jurisprudence may face in this era of social media and digital communications. The Court itself has only begun to scratch the surface of complex questions about how social media, and digital communications more generally, may affect (and be affected by) our First Amendment jurisprudence. The issue of *The New York Times* containing the advertisement that was the focus of *Sullivan* sold 35 copies in Montgomery County and 394 throughout the entire state of Alabama.[53] Today, the message contained in that advertisement would reach millions of people in a matter of seconds and those messages would be subject to no real editorial controls or scrutiny.

It is ironic that Thomas built his critique exclusively on Sullivan's purported failure to reflect the Framers' "original intent" and said nothing about the very real challenges that the Court's defamation jurisprudence may face in this era of social media and digital communications.

Does the rapidity and volume of dissemination change the foundational principles underlying *Sullivan* and other core free speech doctrines? That is the type of challenging question Thomas might have productively addressed, but he did not. Indeed, when the Court wrestled with such questions two years ago in *Packingham v. North Carolina*,[54] Thomas joined a separate opinion by Justice Samuel Alito urging the Court to go slow in sorting out the First Amendment implications of new technology.[55] It is worth noting that that opinion made no effort to try to reconcile the reality of social media communications with the original intent of the Framers, perhaps because Justice Alito recognized the limited utility and relevance of such an exercise.

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Notes

*Lee Levine, Senior Counsel at Ballard Spahr LLP, and Stephen Wermiel, Professor of Practice of Law at American University's Washington College of Law, are the co-authors of *The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan*, published by the ABA Press to commemorate the 50th anniversary of that decision. Wermiel is also the co-author of *Justice Brennan: Liberal Champion,* the Justice's authorized biography. Levine and/or Ballard Spahr are counsel for the defendants in some of the cases referenced in this essay, which is an expanded version of a piece commissioned by and contained in *Communications Lawyer*, the quarterly publication of the ABA's Forum on Communications Law. That piece, and this one, benefited from the suggestions of Amanda Leith, co-editor of *Communications Lawyer.*

[1] 376 U.S. 254 (1964).

[2] McKee v. Cosby, No. 17-1542 (U.S. Feb. 19. 2019) (Thomas, J. concurring) [hereinafter *McKee*].

[3] See S. Stern & S. Wermiel, *Justice Brennan: Liberal Champion* (Houghton Mifflin Harcourt 2010).

[4] See generally, Lee Levine & Stephen Wermiel, *The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of New York Times v. Sullivan* (ABA Press 2014) [hereinafter The Progeny].

[5] See Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 S. Ct. L. Rev. 191 (1964).

[6] Id. at 194.

[7] Id. at 221 n. 125.

[8] Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 8 (Penguin Random House 1991).

[9] McKee, slip op. at 2.

[10] 376 U.S. at 270.

[11] 558 U.S. 310 (2010).

[12] Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

[13] See generally, *The Progeny, supra* note 4.

[14] See Chaplinsky v. New Hampshire, 315 U.S. 563, 571-72 (1942).

[15] See id. (fighting words); Roth v. United States, 354 U.S. 476 (1957) (obscenity).

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[16] See 376 U.S. at 295 (Black, J., joined by Douglas, J., concurring); id. at 304 (Goldberg, J., concurring).

[17] McKee v. Cosby, 874 F.3d 54 (1st Cir. 2017), *cert. denied*, No. 17-1542 (U.S. Feb. 19, 2019).

[18] McKee, slip op. at 14.

[19] See Lewis, *supra* note 8.

[20] 376 U.S. at 256.

[21] Id. at 278 n. 18.

[22] Id. at 260-64, 267.

[23] Id.

[24] See Lewis, *supra* note 8, at 34-45.

[25] 376 U.S. at 278.

[26] See, e.g., Michael Grynbaum & Eileen Sullivan, *Trump Attacks The Times, in a Week of Unease for the American Press,* N.Y. Times, Feb. 20, 2019; Hadas Gold, *Donald Trump: We're going to 'open up' libel laws*, Politico, Feb. 26, 2016.

[27] See, e.g., Palin v. New York Times Co., 264 F. Supp. 3d 527 (S.D.N.Y. 2017); Deripaska v. Associated Press, 282 F. Supp. 3d 133, 144 (D.D.C. 2017), *appeal dismissed*, 2017 WL 6553388 (D.C. Cir. 2017); Arpaio v. New York Times Co., No. 1:18-cv-02387 (D.D.C.) (complaint filed Oct. 18, 2018).

[28] 376 U.S. at 279.

[29] Id.

[30] McKee, slip op. at 14.

[31] 376 U.S. at 273-77.

[32] Id.

[33] Id.

[34] Id.

[35] Id. at 276.

[36] Id.

[37] McKee, slip op. at 6-10 (citing cases).

[38] See Gitlow v. New York, 268 U.S. 652 (1925).

[39] 514 U.S. 334, 361 (1995) (Thomas, J., concurring in judgment).

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[40] See, e.g., Schenck v. United States, 294 U.S. 47 (1919).

[41] 135 S. Ct. 2218 (2015).

[42] 418 U.S. 323 (1974).

[43] See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 771 (1985) (White, J., concurring in judgment).

[44] 485 U.S. 46 (1988).

[45] Id. at 51.

[46] See, e.g., Adam Liptak, *Clues on How Roberts Might Rule on Libel*, N.Y. Times, Sept. 27,2005; Elena Kagan, *A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan case and the First Amendment (1991))*, 18 Law & Social Inquiry 197 (1993).

[47] See Bustos v. A&E Television Networks, 646 F.3d 762 (10th Cir. 2011) (Gorsuch, J.); Van Kahl v. Bureau of Nat'l Affairs, Inc., 856 F.3d 106 (D.C. Cir. 2017) (Kavanaugh, J.).

[48] 856 F.3d at 108.

[49] The Progeny, supra note 4, at 342.

[50] See, e.g., Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U. L. Rev. 1 (1985).

[51] See, e.g., C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times v. Sullivan,* 78 Iowa L. Rev. 237 (1993).

[52] See, e.g., Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016); *Biro v. Conde Nast,* 807 F.3d 541, 544-45 (2d Cir. 2015); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013); Mayfield v. NASCAR, Inc., 674 F.3d 369, 377-78 (4th Cir. 2012); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012).

[53] 376 U.S. at 260 n.3.

[54] 137 S. Ct. 1730 (2017).

[55] Id. at 1738 (Alito, J., concurring in judgment).

ALI Announces "Defamation and Privacy Project"

By Tom Leatherbury

At its January 2019 meeting, the American Law Institute Council approved a new project to update the Restatement Second of Torts provisions concerning Defamation and Privacy. The ALI's announcement stated: "Torts: Defamation and Privacy will address torts dealing with personal and business reputation and dignity, including defamation, business disparagement, and rights of privacy. Among other issues, the updates will cover the substantial body of new issues relating to the Internet. The Reporters will be Lyrissa Lidsky, dean of the University of Missouri School of Law, and Robert C. Post of Yale Law School."

At the same meeting, the ALI Council approved another project updating the Restatement Second of Torts provisions on Remedies. The Reporter for this project is Douglas Laycock of The University of Texas at Austin School of Law and the University of Virginia School of Law.

If you are a member of ALI, you may join the Members Consultative Group of any ALI project by signing up on the ALI website (ALI.org). If you are interested in being nominated to join ALI, you may also obtain membership information on the website. If you have questions about either, please email me at tleatherbury@velaw.com or call me at 214.220.7792.

Oklahoma Gubernatorial Candidate Gets SLAPPed Down

By Robert Nelon

Gary Richardson, a Tulsa, Oklahoma lawyer who often represents plaintiffs in defamation and privacy cases against the media, was himself a plaintiff in a defamation and false light case he filed against Tribune Media Company, Tribune Broadcasting Oklahoma City, LLC (KFOR), and KFOR President and General Manager Wes Milbourn.

His suit, filed in late September 2018, didn't last long, the victim of an anti–SLAPP motion by the defendants brought under the Oklahoma Citizens Participation Act ("OCPA"), Okla. Stat. tit. 12, §§1430, et seq. (*Craig PC Sales & Service, LLC v. CDW Government, LLC*, No. CIV–17–003–F, USDC W.D. Okla)

Background

Richardson was a Republican candidate for Governor of Oklahoma in 2018. (Richardson came in a distant sixth out of ten candidates in the June 2018 Republican primary, garnering about 4% of the vote.) During the primary campaign in the spring, his advertising agency created an ad touting Richardson's Trump–like stand against illegal immigration. To illustrate his point that a hard line should be taken against anyone trying to enter the country illegally, Richardson cited the death of Bob Barry, Jr., the well–known former Sports Director at KFOR (the NBC affiliate in Oklahoma City) who died in June 2015 in an automobile accident caused by an undocumented immigrant. The ad used images of Barry (without the consent of his family) and implied that had Richardson's immigration policy been in effect, Barry would still be alive.

Gary Richardson, a Tulsa, Oklahoma lawyer who often represents plaintiffs in defamation and privacy cases against the media, was himself a plaintiff in a defamation and false light case.

When the ad was first submitted to KFOR, the station rejected it because it did not contain the sponsorship language required by FCC rules. Sales staff at KFOR warned the agency that the ad would not play well with an Oklahoma City audience; but the agency corrected the sponsorship language and insisted that the ad run as scheduled (once on April 28 and twice on April 29). KFOR aired the FCC–compliant ad (as did other broadcast media in Oklahoma).

The public reaction to the ad was as KFOR expected. The station received numerous phone calls and email messages expressing outrage over the ad, displeasure with Richardson, and disappointment with KFOR that it ran the ad. KFOR thought the public outcry was itself newsworthy and it broadcast a news report about it on April 30. Richardson was interviewed by reporter Sarah Stewart in his Tulsa law office. He stood by the ad and in the recorded interview said he thought it brought an important message to Oklahoma voters. He claimed not to understand why viewers would disapprove of his use of Barry's death as a reason for his anti

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The ad used images of Barry (without the consent of his family) and implied that had Richardson's immigration policy been in effect, Barry would still be alive.

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–immigration stance.

In response to Stewart's statement that the Barry family was not pleased with the ad, Richardson commented that people had been offended by other ads he had run, and that "it's politics, you know." In addition to the Richardson interview, the news report included an interview with KFOR General Manager Wes Milbourn, who explained that the station thought Richardson's ad unfairly exploited Barry's death, but that FCC rules required the station to run the ad. The Barry family's statement objecting to the non–consensual use of Barry's name and image was also reported.

Stewart's interview of Richardson was recorded on video. When Stewart finished with her prepared questions, the photojournalist, Emily Smith–Kemper, shot some "B–roll" video, including a "two–shot" of Richardson and the reporter talking with one another. Richardson was smiling and laughing as he and Stewart chatted. When Stewart scripted the news report, Smith–Kemper included about three seconds of video in which Richardson smiled and laughed in a segment fronted by Stewart's narration of the script. Although that short segment of video was followed immediately in the news report by a sound bite of Richardson saying that he was deeply sympathetic with the Barry family, Richardson claimed in his suit that this video segment in the news report ("the Segment") falsely made it appear that he was laughing at the death of Barry, thereby defaming him and placing him in a false light.

Richardson filed suit in the District Court of Oklahoma County on September 25, 2018, claiming he had been defamed and placed in a highly offensive false light. After they were served, the defendants considered removing the case to federal court but ultimately concluded

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that the state court judge, Trevor Pemberton, was a good draw and decided to remain there. On October 19 they filed a motion to dismiss under the OCPA, an anti–SLAPP statute closely paralleling the Texas version. (Although one judge in the Western District of Oklahoma has ruled that the OCPA applies in federal diversity cases, the uncertainty of the question and a desire not to add a potentially costly litigation issue were additional reasons not to remove to federal court.)

KFOR explained in their motion how the OCPA worked (all indications were that the judge, who was fairly new to the bench, had never handled an anti–SLAPP motion) and demonstrated that Richardson's suit was subject to dismissal under the OCPA if he could not show that he had a *prima facie* case. The motion, however, went beyond meeting the minimal burden of showing that Richardson's "legal action" involved speech on a matter of public concern and was subject to the OCPA procedure.

It suggested reasons why the suit must fail: KFOR argued that the news report did not contain any false statement of fact about Richardson; but if the Segment about which Richardson complained was subject to the implication he alleged—that it made him appear "egregious, ruthless, and willing to do anything to get ahead in the race"—the alleged implication was not capable of being proved true or false, and therefore could not be the basis of a defamation or false light claim. The motion also argued that, in any event, Richardson could not demonstrate that he had a *prima facie* case that the news report was broadcast with actual malice. (Tribune Media and Milbourn made the additional arguments that there was no allegation in the petition that they had anything to do with the content of the news report, were not "publishers" within the meaning of Oklahoma defamation and privacy law, and could not have acted with actual malice.)

Richardson claimed in his suit that this video segment in the news report ("the Segment") falsely made it appear that he was laughing at the death of Barry, thereby defaming him and placing him in a false light.

Richardson responded with a brief opposing the OCPA motion. His arguments were supported by his own affidavit in which he speculated that KFOR "spliced and edited" the Segment into another version of the story that aired at 4:30 pm that day, thus demonstrating that KFOR acted with actual malice. Most of Richardson's brief opposing the anti–SLAPP motion was devoted to the peculiar argument that the Segment did not involve a matter of public concern and Richardson was not a public figure, so the OCPA did not apply. He argued, however, that even if the OCPA applied, he could make out a *prima facie* case of defamation and false light because it was false to suggest he was laughing at the death of Bob Barry, Jr., and "splicing and editing" the Segment into the 6 pm new report "is clearly intentional and malicious conduct." Richardson argued further that KFOR acted with actual malice because it had not taken the news report off its website despite his demand that it do so.

The OCPA sets out a three–step procedure for obtaining or avoiding dismissal. The moving party (usually the defendant) must show by a preponderance of the evidence that the suit arises out of conduct, such as speech on a matter of public concern, that subjects the suit to the

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OCPA. The plaintiff must then show by "clear and specific evidence" that he can make out a *prima facie* case on each element of his claim. If the plaintiff does so, the case is still dismissed if the defendant shows by a preponderance of the evidence that it has affirmative defenses to the claim.

The OCPA instructs that the court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." There is only modest appellate authority in Oklahoma explaining the operation of the OCPA. *See Southwest Orthopaedic Specialists, PLLC v. Allison,* 2018 OK CIV APP 69; *Krimbill v. Talarico*, 2018 OK CIV APP 37, 417 P.2d 1240, *reh'g denied* (Dec. 20, 2017), *cert. denied* (Apr. 10, 2018). Relying on these two cases, KFOR argued for—and the court appeared to accept—the following interpretation of the OCPA process: Factual allegations in the pleadings are accepted as true unless controverted by an affidavit, documentary evidence, or matters on which the court may take judicial notice. If the plaintiff submits admissible evidence in the form of an affidavit, the court construes that evidence in a light most favorable to the plaintiff. To avoid Seventh Amendment problems regarding the right to a jury trial, the trial court cannot weigh the evidence; but the defendant may submit affidavits to controvert a pleading, and the court need not accept as true any allegation disproved by uncontroverted facts in the defendant's affidavits. The court may consider admissible evidence in the form of the defendant's affidavits that demonstrate the existence of facts not addressed or controverted by the plaintiff's affidavits.

KFOR argued that the Segment, just like the other images of Richardson in the news report, was an accurate depiction of him.

KFOR submitted rebuttal evidence consisting of affidavits from the KFOR reporter, photojournalist, and general manager, who explained why the station aired Richardson's ad, viewer reaction to it, and how the story about Richardson's campaign ad was reported and edited. Those affidavits—effectively disproving any actual malice—rebutted many of Richardson's factually–unsupported allegations and his speculation that the Segment was "spliced and edited" into the 6 pm news report.

However, KFOR's rebuttal argument—aside from refuting Richardson's specious argument that a candidate for Governor was not a public figure required to prove actual malice—focused primarily on the absence of any demonstrably false statement of fact in the news report. KFOR argued that the Segment, just like the other images of Richardson in the news report, was an accurate depiction of him; and whether in the Segment he allegedly appeared "egregious, ruthless, and willing to do anything to get ahead in the race" was a matter of opinion—merely one of many inferences a viewer might but need not draw from the news report.

After the defendants' OCPA motion was fully briefed, Judge Pemberton conducted a lengthy (by Oklahoma County standards) hearing. The first issue the court raised was a procedural one: The OCPA requires the court to conduct a hearing within 60 days after the motion is filed, but allows for an extension of time if the court's or counsels' schedules required, so long as the hearing is held within 90 days of the filing of the motion. If the hearing is not held within that time, or the court does not rule within 30 days of the hearing, the OCPA

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motion is deemed denied and the moving party can take an interlocutory appeal. In this case, the hearing was continued several times, including once at the request of the plaintiff.

As a result, the hearing was held 95 days after the motion was filed. The court let Richardson's counsel make a record that the plaintiff objected to having a hearing as untimely (the defendants did not object to the hearing); but the court concluded that it should proceed because some of the delay was attributable to the plaintiff's request, but for which the hearing would have been held within 90 days.

On the merits of the motion, the court challenged Richardson's counsel to explain what was demonstrably false about the Segment in the context of the news report as a whole. Struggling to do so, she repeatedly fell back on the argument that the Segment made it falsely appear that Richardson was laughing at the death of Barry and was therefore portrayed (as the petition alleged) as "egregious, ruthless, and willing to do anything to get ahead in the race."

Judge Pemberton got counsel to concede that if a viewer formed that impression, that simply was that viewer's opinion. Counsel could never explain how that impression was demonstrably true or demonstrably false. Accordingly**,** the court concluded that the plaintiff had failed to make the *prima facie* showing required by the OCPA of falsity, an essential element of either a defamation or false light claim. The court determined that having decided that issue, it need not address the issue of actual malice or the other grounds for dismissal raised by the defendants. Judge Pemberton then granted the defendants' motion and ordered the case dismissed. A formal order memorializing the ruling was entered on January 31, 2019.

The court concluded that the plaintiff had failed to make the prima facie showing required by the OCPA of falsity, an essential element of either a defamation or false light claim.

Richardson has appealed the order dismissing his case. [N.B.: As of this writing, no appeal has been taken yet. However, the plaintiff has taken preliminary steps to effect an appeal and the defendants expect him to appeal by the March 4 deadline. Will advise before publication.] The defendants have filed a motion for attorneys' fees under the mandatory fee-shifting provision of the OCPA.

Robert D. Nelon, Jon Epstein, and Lindsay A. Kistler of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, Oklahoma represented the defendants. The plaintiff was represented by Chuck Richardson, Lia Rottman, and Richardson himself of Richardson Richardson & Boudreaux, Tulsa, Oklahoma.

Indiana Appellate Court Affirms Dismissal for Failure to Serve Statutory Retraction Demand

By Alison Schary

On February 5, 2019, the Indiana Court of Appeals confirmed for the first time that Indiana's retraction statute requires a pre-suit retraction demand as a jurisdictional prerequisite to suit. *Hamersley v. ABC, Inc. et al.*, No. 18A-PL-955, 2019 WL 440972 (Table) (Ind. App. Feb. 5, 2019)

Background

The *pro se* plaintiff, Corey Hamersley, was incarcerated following convictions for attempted murder and other crimes stemming from an incident where he shot at a police officer while under the influence of drugs. He brought suit against ABC over portions of a jailhouse interview that were included in an episode of "20/20" called "Looking for Lauren," exploring the still-unsolved disappearance of Indiana University student Lauren Spierer.

The 20/20 episode followed a former FBI cold-case agent, Brad Garrett, as he tried to solve the case of Spierer's disappearance. It followed Garrett's process as he investigated various leads and theories – including a theory that Spierer may have accidentally overdosed at a local party, leading her fellow partygoers to panic and dispose of her body.

The Indiana Court of Appeals confirmed for the first time that Indiana's retraction statute requires a pre-suit retraction demand as a jurisdictional prerequisite to suit.

Toward the end of the episode, Garrett stated that the Spierer family received a tip from a former inmate who reported that Hamersley said he knew the men involved in Lauren's disappearance. The former inmate was interviewed in shadow to describe his alleged interaction with Hamersley. He said that while in prison with Hamersley, a news report about Lauren appeared on the television, and Hamersley said he "knew the guys that did that." He said Hamersley told him that Spierer overdosed at a drug and alcohol-fueled party, and that others at the party got scared and dumped her body in the Ohio River.

The episode then showed clips from a jailhouse interview that Garrett and another investigator conducted with Hamersley. In the interview footage, Garrett asks Hamersley if he helped move Lauren's body, which Hamersley denies, saying "absolutely not" and "I've never met this person in my life." Garrett also asks Hamersley if he would contact him should he remember anything or hear anything in prison related to the case. Hamersley responds: "Honestly, probably not. I do not want to be associated with this at all."

"20/20" correspondent Brian Ross asks Garrett for his reaction to Hamersley's interview. Garrett says that Hamersley "clearly was lying to me," noting that he was particularly

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suspicious that Hamersley refused any future assistance. Ross asks: "So what does this tell you as a veteran investigator?" Garrett responds: "It tells me he has a reason for lying. And I knew, at that point, that I have to dig, I have to figure out how Corey knows what he knows."

Defamation and Negligence Lawsuit

Hamersley brought claims against the Indiana Department of Corrections for negligence in permitting the interview and against ABC for defamation, alleging that the episode implied he was involved in a felony related to moving Spierer's body. ABC moved to dismiss the complaint on several grounds, citing Indiana's Rule 12 as well as its Frivolous Prisoner Claim Law, Ind. Code § 34-58-1-2, which requires courts to review complaints filed by prisoners and dismiss them if they fail to state a claim or are frivolous. First, it argued that Hamersley had failed to comply with the pre-suit notice requirement in Indiana's retraction statute for radio and television broadcasters, Ind. Code § 34-15-3-2, which states:

> At least three (3) days before filing a complaint in a suit described in section 1 of this chapter, the aggrieved party shall serve notice:
>
> 1. in writing;
> 2. on the manager of the radio or television station;
> 3. at the principal office of the radio or television station; and
> 4. that specifies the words or acts that the aggrieved party alleges to be false and defamatory.

Although Indiana trial courts had held on multiple occasions that the statutory retraction demand was a jurisdictional prerequisite to suit, this was the first time the state's appellate court construed the statute.

Hamersley's complaint did not attach or mention any such notice. Second, ABC argued that Hamersley failed to state a claim because he made no allegations of actual malice, which was the requisite standard of fault in Indiana for a case involving a matter of public concern. Third, ABC argued that Garrett's statement that Hamersley was "lying" was opinion based upon disclosed facts. Finally, ABC argued that Hamersley's claim was barred by the incremental harm doctrine.

In his opposition to ABC's motion, Hamersley claimed he had complied with the pre-suit retraction demand and attached a document titled "Notice of Tort Claim." The document was unsigned, undated, and contained no indication that it had been addressed to the "manager of the radio or television station" at its "principal office." Nor did it specify the particular words in the episode that were allegedly false and defamatory.

Court Rulings

The trial court dismissed Hamersley's complaint, finding that it lacked jurisdiction over his

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defamation claim because he had failed to comply with the retraction statute. The court stated that service of the pre-suit demand was a "condition precedent" to suit and held that the "Notice of Tort Claim" attached to Hamersley's papers did not satisfy the statutory requirements.

The Indiana Court of Appeals affirmed dismissal. Although Indiana trial courts had held on multiple occasions that the statutory retraction demand was a jurisdictional prerequisite to suit, this was the first time the state's appellate court construed the statute. The appellate court agreed with the trial court that Hamersley had failed to demonstrate compliance with the statutory requirement of a pre-suit retraction demand, warranting dismissal. The appellate court held that Hamersley's suit was also subject to dismissal on the independent ground that Hamersley had failed to plead actual malice, and therefore failed to state a claim for defamation in a case involving a matter of concern.

Alison Schary is an associate at Davis Wright Tremaine in Washington D.C.

Free Association and Free Speech Rights Shield Anonymous Instagram Account Publishing #MeToo Allegations

By Theresa House and Oscar Ramallo

The #MeToo movement has dramatically changed how people respond to allegations of sexual misconduct. It has not yet changed our libel laws, but a new decision out of Los Angeles Superior Court indicates that people who band together to speak out against inappropriate behavior in the workplace can find protection under traditional First Amendment rules.

In October 2017, as the #MeToo movement was first gaining steam among the mainstream public, a group of unnamed individuals came together to create an Instagram account called Diet Madison Avenue ("DMA"). The purpose of the account was to inform people specifically within the advertising industry about the risks of sexual harassment in that field and to raise awareness of resources available for victims, including offline mentoring and counseling. The private account, which was only visible to approved followers, was administered and published anonymously.

In May 2018, an advertising industry executive who was identified in two of DMA's Instagram stories filed a defamation lawsuit in Los Angeles Superior Court, naming as defendants the DMA Instagram account and Does 1 through 100. Although the plaintiff alleged in his complaint that he had a good idea of who was responsible for DMA's postings about him, he nevertheless obtained court permission on an ex parte basis to serve subpoenas on Instagram and other tech companies for the purpose of identifying a range of potential defendants.

The plaintiff's attorney admitted that anyone revealed to be associated with DMA would be "toast" and have their lives "ruined."

The subpoenas were broad—seeking to uncover the identities of anyone who had ever connected to DMA's account, for over a year's worth of content from the date of its inception to the present—even though the alleged defamatory content was limited to Instagram "stories" posted on only two days, which were temporary in nature and expired within 24 hours of being published. If the tech companies fully complied with the subpoenas, the identities of several dozen individuals—who were not personally involved in publishing the allegedly defamatory stories— potentially would have been revealed. The plaintiff's attorney admitted that anyone revealed to be associated with DMA would be "toast" and have their lives "ruined."

A team of lawyers from Arnold & Porter as well as Gordon Rees in Los Angeles successfully obtained a protective order limiting the subpoenas to information about the identities of those who authored the two allegedly defamatory stories. Previous decisions in California considering "unmasking" subpoenas like the ones at issue here had addressed only free speech issues associated with anonymous postings on the internet (most often involving

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unfavorable online reviews); this case presented the new and separate question of what protections, based on the First Amendment right of free association, are afforded to groups of individuals who choose to participate in confidential associations. The court agreed with counsels' arguments that, under the U.S. and California constitutions, "disclosure of confidential associational affiliations and activities must be justified by a compelling state interest and must be precisely tailored to avoid undue infringement of constitutional rights," a test which these subpoenas failed.

The trial court declined to consider the defendants' separate argument in support of a motion seeking to quash the subpoenas in full, on grounds that application of California's strong common interest privilege would bar the claims. The common interest privilege has been found to apply to statements made among loose professional associations, even in the absence of a direct employment relationship. Further, where the potential application of the common interest privilege is apparent based on the allegations in the complaint, California law provides that it is the plaintiff's burden to overcome the privilege in order to survive a demurrer. No case, however, had considered whether the privilege should be applied when a plaintiff was seeking pre-answer discovery to reveal the anonymous identity of a potential defendant. Defendants are considering whether to seek appellate review to decide whether a trial court should consider if the privilege applies, when evaluating if a plaintiff has met his or her burden to show a legally and factually sufficient prima facie case in support of a request for an unmasking subpoena.

This case presented the new and separate question of what protections, based on the First Amendment right of free association, are afforded to groups of individuals who choose to participate in confidential associations.

For now, members of confidential associations who are changing the world through grassroots organizing can take heart that information about their membership and associational activities will enjoy strong protection under the First Amendment's right to free association.

The Arnold & Porter team was led by Theresa House with the help of Jennifer Sklenar, Oscar Ramallo, Vanessa Adriance, Carolyn Shanahan, Cathy Liu, and Jesse Feitel. They were joined by co-counsel A. Louis Dorney and Elizabeth Vanalek of Gordon Rees Scully Mansukhani. They represented, respectfully, an anonymous individual associated with the DMA Account, and the DMA Account.

Outrage and Fraud Claims Over True Crime Series Survive Motion to Dismiss

By Josef Ghosn

An Alabama federal district court recently ruled that Beth Holloway, the mother of Natalee Holloway who disappeared in Aruba in 2005, stated claims for outrage and fraud against the producers of a true crime series that claimed their show would reveal "the specifics of what happened to [Natalee] and the remains of her body." Holloway v. Oxygen Media, (N.D. Ala. Jan. 7, 2019) (Bowdre, J.).

Acknowledging that "even the most deeply wounding conduct rarely gives rise to civil liability for the tort of outrage," the court concluded that "This case plausibly presents such outrageous conduct."

Background

Natalee Holloway disappeared on May 30, 2005 while on a high school senior class trip to Aruba. Her disappearance garnered intense police and media coverage, but Natalee has not been found and has been declared dead. Her mother Beth Holloway has appeared frequently on television following her daughter's disappearance seeking answers in the case.

Defendants produced a six-part television series entitled "The Disappearance of Natalee Holloway" (The Series") and marketed it as an unscripted documentary following a lead that could reveal specifics of what happened to Natalee's remains and the circumstances of her death.

The Series depicted Natalee's father, Dave Holloway and his private investigator, T.J. Ward as they investigated John Ludwick, who claimed to have exhumed and desecrated Natalee's remains and also stated that he knew where the remains were buried. Several attempts were made to find Natalee's remains but Mr. Ludwick failed to find the grave site. The Defendants severed ties with Mr. Ludwick after he was unable to find the grave site. However, the Series depicted a third trip to Aruba, filmed on a cellphone, purportedly without Defendants' knowledge, where Mr. Ludwick claimed he found the grave site. Within seconds of arriving at the house, Mr. Ludwick dug up a Ziploc bag from just below ground surface containing bone fragments. According to Ms. Holloway's complaint, the bag that was supposedly buried for seven years appeared fairly new and in good condition.

Mr. Holloway and Mr. Ward again traveled to Aruba to obtain the fragments and when they arrived, Aruban authorities informed them that the bones were in fact animal remains. Defendants then delivered the remains to their forensic expert, Dr. Jason Kolowski. Defendants failed to inform Dr. Kolowski of the true origin of the bone samples and Dr. Kolowski later told Ms. Holloway that he could have been burned professionally by testing bone samples that had been previously contaminated. Through his testing, Dr. Kolowski could not determine if the bones were human. He then tested the bones again for mitochondrial DNA, which all living beings possess. Because mitochondrial DNA cannot uniquely identify one person, this test

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would have allowed Dr. Kolowski to exclude the bone fragments as belonging to Natalee or determine that the bones belonged to an individual with a mitochondrial DNA sequence similar to Natalee's. This test revealed the presence of human mitochondrial DNA belonging to a Caucasian individual but it did not reveal that the bones themselves were human. However, since the bones were handled and likely contaminated by Mr. Ludwick, a Caucasian male, it was it surprising that they contained Caucasian mitochondrial DNA residue. Defendants did not perform any testing to determine definitively whether the bones were human.

Mr. Holloway called his ex-wife Ms. Holloway on August 10, 2017 and told her that human female remains at least ten years old and from a Caucasian individual had been found at a grave site in Aruba. He then asked her for a DNA sample. That same day, Dr. Kolowski informed Ms. Holloway that the DNA test would either match the bone fragments to Natalee or fully exclude that the bones belonged to Natalee and Ms. Holloway provided a sample of her DNA two days later. However, neither Mr. Holloway or Dr. Kolowski informed Ms. Holloway of the true nature of the bones, that her DNA would be used in the Series, that the Series even existed, or that Mr. Ludwick, who was Caucasian and a paid participant in the Series, recovered the bone fragments from a Ziploc bag only after defendants stopped filming him and after twice failing to locate the fragments.

After obtaining Ms. Holloway's DNA, defendants and the Series depicted a meeting between Mr. Holloway and Dr. Kolowski and conveyed this scene as the first time Mr. Holloway learned of the results of the initial DNA testing. Additionally, the bone fragments were conveyed as human that belonged to a Caucasian of European descent and that Ms. Holloway's DNA could determine whether the fragments belonged to Natalee. On September 22, 2017, Defendants received a laboratory report definitively stating that the results of the DNA tests were not reportable. The Series finale aired on September 23, 2017 and showed that Defendants were expecting a match, inconclusive results, or a full exclusion of the DNA test but the episode ended without stating the results of any of the DNA tests. Mr. Ludwick later confessed that the bone fragments came from the skull of a wild boar.

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Procedural History

Beth Holloway alleged one count of fraud and one count of outrage against Oxygen Media and Brian Graden Media. Specifically, she alleged they committed fraud when Mr. Holloway and Dr. Kolowski, acting as agents of the Defendants, obtained her DNA under false pretenses and that Defendants committed outrage by obtaining her DNA under false pretenses for use in the Series. Defendants filed a motion to dismiss arguing that Ms. Holloway failed to plead fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure and that she failed to alleged the proper facts showing intentional, reckless, extreme, or outrageous conduct as required to state a claim for outrage under Alabama law, and that their publication of the Series is protected under the First Amendment.

Motion to Dismiss Ruling

The court first looked at Ms. Holloway's claim of fraud. Under Alabama law, a plaintiff must show (1) a false representation, (2) of a material existing fact, (3) reasonably relied on by the claimant (4) who suffered damage as a proximate consequence of the misrepresentation. In addition, when alleging fraud, Rule 9(b) requires that the complaint must state (1) precisely what statements were made; (2) the time and place of each statement and the person responsible for making the statement;(3) the content of each statement and how those statements misled the plaintiff; and (4) what the defendants obtained as a consequence of the fraud.

The court then determined that Ms. Holloway satisfied all of the requirements of both Alabama law and FRCP 9(b) and properly alleged fraud. The court also struck down Defendants' argument that Ms. Holloway failed to plead sufficient facts to inform each defendant of the nature of its alleged participation in the fraud as required to state a fraud claim against multiple defendants, stating that each of the Defendants produced and published the Series with the other defendant. Additionally, Defendants attempted to argue that Ms. Holloway failed to allege facts showing that Mr. Holloway and Dr. Kolowski were agents of Defendants, and therefore Defendants could not be held liable for their false representations.

The court again disagreed and stated that Ms. Holloway alleged enough facts to show that both Mr. Holloway and Dr. Kolowski were agents of the media defendants, specifically noting that both men were paid participants and main characters in the Series and that both men were acting in accordance with Defendants' instructions in order to continue to receive money from Defendants related to the production of the Series.

To state a claim of outrage under Alabama law, a plaintiff must show that the defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it.

The court held that Ms. Holloway sufficiently alleged facts showing that Defendants acted recklessly by procuring her DNA under false pretenses and by broadcasting the Series.

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Interestingly, the court pointed to an Alabama Supreme Court decision finding a viable claim for outrage in three general circumstances: wrongful conduct in the family-burial context, barbaric methods employed to coerce an insurance settlement, and egregious sexual harassment.

The court noted that while this case does not concern the interference with known human remains, it does involve misconduct and misrepresentations regarding the discovery of human remains and given Alabama law's heightened concern with human remains and family member's connections with the deceased, and the Defendants' egregious conduct, the court could not state at the motion to dismiss stage that Defendants' conduct was not extreme and outrageous such that it caused Ms. Holloway emotional distress so severe that no reasonable person could be expected to endure it.

The court also dismissed Defendants' First Amendment argument that they were protected from liability because they were publishing information about a public figure. The court found that Ms. Holloway pled sufficient facts to show that Defendants' either knew of the falsity of their claims or purposefully disregarded the obvious falsity of the claims.

Josef Ghosn is MLRC's 2018-19 Legal Fellow. Plaintiff is represented by L. Lin Wood. Oxygen Media and Brian Graden Media are represented by Cameron Stracher, NY; and Lightfoot Franklin & White LLC in Birmingham, AL.

Georgia Long-Arm Statute Does Not Reach Chicago Newspaper's Online Report

By Damon E. Dunn and Cecilia M. Suh

A federal district court in Georgia dismissed claims by a Georgia resident against two Chicago newspapers over a news report concerning a police misconduct lawsuit against the plaintiff and the City of Chicago. *Marsalis v. STM Reader, LLC, et al.*, No. 1:18-cv-01555-ELR (N.D.Ga. Jan. 10, 2019) (Ross, J.).

The court held that, under the Georgia long-arm statute, it lacked personal jurisdiction over the publishers of the *Chicago Reader* and *Chicago Sun-Times* newspapers, notwithstanding allegations that the report, published nearly 17 years ago, was still accessible on the *Chicago Reader*'s website and causing injury in Georgia.

Background

In 2000, the *Chicago Reader* moved to unseal a federal civil rights lawsuit to report, *inter alia*, the City settled claims that the Georgia resident, then a Chicago police officer, detained a 19-year-old woman on a purported curfew violation and raped her. The presiding judge cited "important issues concerning the public interest," noting that police misconduct required "appropriate media scrutiny," in granting the motion to unseal and since then, the report, headlined "Armed and Dangerous," has remained available on the *Chicago Reader*'s website.

The lacked personal jurisdiction over the publishers of the *Chicago Reader* and *Chicago Sun-Times* newspapers, notwithstanding allegations that the report, published nearly 17 years ago, was still accessible on the *Chicago Reader's* website.

Nearly 17 years later, plaintiff Marsalis sued both newspapers for defamation of character, libel, slander, and assault under Georgia law, alleging "publication of false statements via newspaper article and electronic media." Marsalis alleged that "Armed and Dangerous" contained false information because he "was never arrested, charged, or indicted for any criminal matter" and that they had "carelessly published classified material which should have been sealed." Marsalis further alleged that multiple employers had terminated his employment and that he was denied employment opportunities and admission to professional schools because the report remained accessible on the internet by searching his name. Marsalis claimed violations of his "right to privacy, due process of law, equal protection, and to continue with his life," and sought approximately $1,000,000 in damages.

The defendants filed a motion to dismiss, arguing that the court lacked personal jurisdiction under Georgia's long-arm statute or the Due Process Clause because they lacked sufficient minimum contacts with Georgia. Defendants submitted an affidavit averring that they were not incorporated in Georgia, had no officers, employees, offices, equipment, telephone numbers, or

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property located within Georgia, and did not target Georgia residents. Defendants alternatively argued that plaintiff's claims were time-barred under the single publication rule because the report originally was published in 2001.

The defendants also filed a motion to stay discovery, requesting that the court temporarily stay all preliminary discovery deadlines until the court had resolved their motion to dismiss. The defendants argued that there was a substantial likelihood that the motion to dismiss would end the case in its entirety, so there was no reason to exhaust significant time and resources preparing and negotiating for discovery that was unlikely to begin, and that the court had broad discretion and authority to stay discovery.

In response, Marsalis filed an amended complaint, which purported to add jurisdictional allegations and elaborate on his previous allegations. The defendants responded with a motion to dismiss the amended complaint that essentially incorporated their first motion by reference.

Marsalis also filed a "Motion for Emergency Injunctive Relief for the Plaintiff" seeking removal of the report from the internet and defendants' "data base, servers, websites, google, dogpile, and any and all such internet websites that shows the defamatory/slanderous article."

The court subsequently granted defendants' motion to stay discovery until the court resolved all motions to dismiss and denied plaintiff's motion for emergency injunctive relief, finding that the motion was "lacking any facts that show a substantial likelihood of success on his claims," instead focusing on the alleged damage Marsalis had suffered, and that Marsalis had failed to tender or offer any security to satisfy a temporary restraining order.

The court observed that the Georgia long-arm statute was more exacting than the Due Process Clause.

Dismissal of Complaint

On January 10, 2019, the court granted defendants' motion to dismiss, finding that it lacked personal jurisdiction over the non-resident defendants under the Georgia long-arm statute. The court explained that the exercise of personal jurisdiction was a two-step inquiry, requiring personal jurisdiction to: (1) be appropriate under the Georgia long-arm statute, and (2) not violate the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

The court observed that the Georgia long-arm statute was more exacting than the Due Process Clause and that three statutory bases for jurisdiction were pertinent, *i.e.*, whether the defendants: (1) transacted any business in Georgia; (2) committed a tortious act or omission within Georgia; or (3) committed a tortious injury in Georgia caused by an act or omission outside Georgia if defendants regularly did or solicited business, engaged in any other persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered, in Georgia.

The court first rejected Marsalis's argument that accessing and reviewing an online news report in Georgia constituted business in Georgia. It ruled that publication did not constitute transacting of business, specifically noting that Marsalis had not alleged that defendants obtained any clients or other business in Georgia by publishing the report.

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The court also ruled that personal jurisdiction did not exist under the second basis because torts committed while using a computer occur where the computer is located, *i.e.*, Illinois. The court found that Marsalis had not alleged that defendants used a computer in Georgia to publish the report whereas defendants averred the report was published in Illinois.

With respect to the third long-arm basis, the court similarly found it insufficient that the report was accessible to Georgia residents via the internet. Even if Marsalis was located in Georgia and suffered "a tremendous loss of earnings" there, he had not alleged conduct by defendants inside Georgia.

Because there was no statutory personal jurisdiction over the defendants, the court declined to address whether the exercise of jurisdiction would comport with the Due Process Clause or whether the complaint was time-barred.

Damon E. Dunn and Cecilia M. Suh of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago and Edward B. Krugman of Bondurant Mixson & Elmore LLP in Atlanta represented STM Reader, LLC and Sun-Times Media, LLC. Earnest Marsalis represented himself.

Hot Topic Roundtable

Drones in Newsgathering

MLRC is pleased to introduce the "Hot Topic Roundtable," a series in which a group of attorneys is asked to address the same set of questions on a timely subject. This month we look at drone journalism.

*Our respondents are **Thomas Curley**, Associate General Counsel at Gannett**; Mickey Osterreicher**, General Counsel for the National Press Photographers Association; and answering together, CNN's **David Vigilante**, Senior Vice President and Deputy General Counsel, and **Dana Nolan**, Counsel.*

How is your organization currently using drones for newsgathering? Some examples of your organization's work or other drone journalism you admire?

Curley: Gannett has trained about 60 journalists who have received their FAA remote pilot certification in some 23 news markets and we are sharing their content across the USA Today Network of publications. In addition to passing the FAA Part 107 licensing exam, our pilots attend a week-long training session at Virginia Tech. We expect to continue expansion of our drone journalism program in 2019. The UAS program is led by Andy Scott of USA Today, who is also director of photo and video news gathering.

We've got a lot of great examples of drone journalism. A couple of examples of how we have used drone footage for in-depth reporting include this story about a deadly flash flood in Arizona, and this story about the e-coli outbreak impacting romaine lettuce. Some breaking news examples include the California wildfires, and the aftermath of a massive fire in New Jersey.

Osterreicher: The National Press Photographers Association (NPPA) does not itself use drones but many of our members do. As the *Voice of Visual Journalists*, NPPA is a vocal advocate for the use of drones as the next natural progression of technology in newsgathering.

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We have held several Drone Journalism Workshops throughout the country over the past three years, helping to train over 400 journalists in the safe, legal and ethical use of drones. NPPA has also held two annual Drone Journalism Leadership Summits, bringing together newsroom leaders with the FAA, law enforcement, insurance representatives, drone technology experts, and media attorneys discussing the most pressing issues in drone journalism and how newsrooms and news management should orient themselves around concerns of safety, operations, ethics, insurance and cooperation with law enforcement.

Vigilante/Nolan: CNN has an entire unit that is solely dedicated to drones – CNN Air. We use drones and drone technology daily, whether it be for newsgathering, enhanced storytelling or production value. From coverage of the back-to-back hurricanes in 2017 to covering the Super Bowl in 2019, we continue to find new uses for drones every day.

What are some of the legal issues you've dealt with so far?

Curley: Thankfully, we've had few legal issues with respect to our actual operations. Instead, our legal focus has been on making sure that we are in compliance with FAA regulations and that we are effectively communicating those regulations to our journalists, particularly as they evolve and are applied. The News Media Coalition on drones spearheaded by Chuck Tobin at Ballard Spahr has been a great resource on the law as well as an effective advocate on behalf of news organizations' First Amendment rights in this area.

The issues we have seen tend to involve over-zealous police in emergency or special event settings. We have attempted to be proactive in organizing meetings with local officials before we encounter a problem, as it can be challenging to address these issues with law enforcement in breaking news situations. Additionally, we have enlisted local FAA enforcement officers on occasion to help with the education process to successfully ensure local public safety officers understand the law and the FAA's role in enforcing flight standards.

Osterreicher: As a member of the News Media Coalition, NPPA has been involved in meeting with the FAA as well as House and Senate Staff for the Transportation Committee to help establish the least burdensome and commonsense Part 107 Rule. We have also been stakeholders during the National Telecommunications and Information Agency (NTIA) meetings on Best Practices Addressing Privacy Issues Regarding Use of UAS NPPA is also an official observer to the Uniform Law Commission Tort Law Relating to Drones Committee.

Over the years we have successfully sent letters seeking onerous and constitutionally suspect anti-drone bills be either withdrawn, modified, vetoed or struck down.

Vigilante/Nolan: CNN has been involved in helping navigate the legal landscape from the beginning as a designated "Pathfinder" by the FAA. We've dealt with seemingly everything from helping to create a waiver process, obtaining said waivers, and then working to enforce them. Right now, one of the biggest issues for us is that local municipalities do not know or understand the current legal landscape with respect to UAS. Many believe they have the authority to regulate drone use above their cities/towns, but in reality, that authority mostly lies

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exclusively with the FAA. As a result, we often face obstacles with local law enforcement and state legislators and end up spending significant time educating them as to why we are authorized to fly and the measures we take to do so safely.

How do you balance state and local versus federal regulations?

Curley: Although I realize this issue is not without some complexity, it is our view that the FAA has the exclusive legal authority to regulate use of airspace by aircraft, including drones. We know that has not prevented some jurisdictions from enacting local ordinances attempting to regulate the use of drones, including access to the ground where operations can be launched. Some of these regulations have been, or I expect will be, challenged in court.

Osterreicher: NPPA believes that the FAA should better exercise the federal preemption it professes over the national airspace but understand that it may not have the wherewithal to enforce its authority over state governments and local municipalities enacting new anti-drone laws and promulgating overly restrictive regulations. We hope that the FAA will work with all stakeholders to better harmonize what is becoming a patchwork of disparate directives to help create more certainty for drone operators.

Vigilante/Nolan: The FAA has been clear about what is in their authority versus what is in state/local authority. With a few exceptions, state and local authority is limited to land use, zoning, privacy and law enforcement, while the FAA has exclusive authority over the national airspace. Of course, we are sensitive to the fact that state and local lawmakers have a unique interest in UAS around their towns, but we find that a few phone calls along with some education and communication can go a long way.

One issue which has emerged is what to do about drone footage we've not shot ourselves -- i.e., how can we be sure it lives up to our ethical standards if we don't have transparency into its creation?

Do you worry more about criminal liability, your relationship with the police, safety concerns or ethical issues?

Curley: I would say we worry about all of these issues, of course, but criminal liability seems a lesser concern given the lawful manner in which we engage in drone journalism. As noted above, developing a relationship with local police is key to avoiding practical problems, regardless of whether the FAA has exclusive regulatory authority. We also spend a lot of time on safety up front at our week-long training session and on a continuing basis with our pilots.

The potential ethical issues are worthy of scrutiny too, and this is an essential element of our training curriculum. We've got an over-arching set of ethical guidelines for our journalists, of which drone activity is just one part. One issue which has emerged is what to do about drone footage we've not shot ourselves -- i.e., how can we be sure it lives up to our ethical standards if we don't have transparency into its creation? While most third-party drone footage doesn't raise a concern of this sort, we have decided to take a pass if the footage was captured in a manner which we would not be comfortable employing ourselves, regardless of news value or the absence of our own legal exposure.

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Osterreicher: All these issues are intertwined, and one is not necessarily more worrisome than the other although integrating the safe use of drones into the national airspace should be of paramount importance. The criminal and civil labilities created by overly broad and vague laws and regulations have the tell-tale chilling effect on what we consider to be First Amendment protected activities in the use of drones for newsgathering. We also advocate that journalists and news organizations take a proactive and cooperative approach to working with law enforcement to avoid and mitigate confrontational situations regarding drone use. This is especially important on the national level to help ensure constitutionally sound policies and regulations but is just as crucial on the local level where most of the interaction occurs.

Vigilante/Nolan: All of the above are important to us. However, safety has always been our top priority. If we are operating safely and deliberately, other concerns diminish greatly. We continue to work hard to ensure safety remains at our core culture. Notably, CNN often works with law enforcement and other emergency personnel to explore the best and safest way to integrate drones into coverage of events where they are present.

How cooperative are your journalists? Are there things they'd like to be doing that are not permissible at this point?

Curley: Being journalists, they are always looking for new and creative ways to tell stories and pushing back against regulations that sometimes don't make much sense to them. The number one area where we are looking for greater flexibility from the FAA is with respect to flights over and around people. Obviously, there are safety concerns which need to be kept firmly in mind, but the FAA's rules are overly restrictive at the moment. The good news is that the agency recently issued a proposed rule which will provide for greater flexibility in this area.

Most drone operators would like the regulations to be updated to permit flights over people, night flights and flights beyond line of sight without a waiver.

Osterreicher: I believe most drone pilots are extremely cooperative when it comes to newsgathering events and often are willing to set up pooling arrangements if only one drone is permitted to fly by authorities at the scene. Most drone operators would like the regulations to be updated to permit flights over people, night flights and flights beyond line of sight without a waiver.

Vigilante/Nolan: Our journalists are the best in the business. They are wholeheartedly cooperative and work closely with us on each mission to ensure it is done safely and within our limits. Fortunately, CNN holds multiple waivers and authorizations, and therefore it is rare that our journalists are limited in that respect.

How is it different using drones to film people versus natural phenomena – e.g. a storm versus a demonstration?

Curley: Well, being a defense lawyer by trade, I am always in favor of stories and photography relating to inanimate objects. They rarely bring legal claims! But seriously, as

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noted above, flights over or around people obviously present a higher degree of regulatory and operational risk.

Osterreicher: I think both represent different opportunities and challenges. The privacy issue arises anytime people are being photographed. Just as capturing images from the ground – the question is whether those being photographed or recorded have a reasonable expectation of privacy?

Vigilante/Nolan: Although CNN holds a waiver for operations over people (and in fact was the first commercial operator to do so), safety is still our top priority. With this in mind, we do not typically fly over people if it can be avoided and is not needed for the story. In that respect, flying over nature is "easier." Plus, local law enforcement is significantly less concerned about flights over nature versus people.

How do drones affect insurance policies?

Curley: While we certainly wouldn't use drones without making sure we had the right coverage, it does not change the calculus for us very much given the breadth of people, places and moving parts we already insure. In other words, at least thus far, drones have not measurably affected our existing risk profile in the eyes of our insurers, but we do carry a separate aviation liability policy that specifically addresses our use of drones in newsgathering.

Osterreicher: That question is probably more dependent on whether news organizations operate drones using their own employees or contract out to third-parties. In either case it is important to have the right coverage for the kind of work being done.

Vigilante/Nolan: Quite a bit! We have worked hard to ensure our drones are safe and reliable and even more importantly, that our pilots are well-trained and knowledgeable. Of note, CNN Air's Safety Management System and Pilot Training Program go well beyond what is required for a Part 107 commercial drone operator. Not only do our insurers appreciate this, but it also demonstrates our commitment to safety and how seriously we take these endeavors.

The real challenge here is to continue to develop and implement the most commonsense and least burdensome rules as quickly as possible so as not to stifle the use of drones or create a vacuum that may be filled by well-intentioned but misguided and constitutionally suspect legislation.

How do you see the journalistic and legal landscape concerning drones changing in the near- and long-term?

Curley: Journalistically, I think we are all well incentivized as news media organizations not to take unnecessary risks in our UAS programs. It is not us I worry about in terms of a catalyst for negatively impacting the legal landscape. It's the folks who don't follow the rules and commonsense practice that we should worry about. I fear the proliferation of drone use more generally – and the well-publicized incidents recently where airports have been shut down due

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to drone activity – will lead to even greater attempts at regulation, particularly at the state and local level.

Osterreicher: I believe the changes will evolve slowly as journalists try to be good stakeholders in this emerging field. Of course, the law is always playing catch-up with any technological advancements, especially when privacy concerns are involved. The real challenge here is to continue to develop and implement the most commonsense and least burdensome rules as quickly as possible so as not to stifle the use of drones or create a vacuum that may be filled by well-intentioned but misguided and constitutionally suspect legislation driven my unfounded fears created in part by the national news media's breathless (and often) inaccurate reporting about drone incidents.

Vigilante/Nolan: The landscape is changing every day. Right now, we are navigating largely uncharted waters and helping to create the map, which is pretty cool. As time goes on and drones become a larger part of our everyday life, we hope to see remote identification as well as more education on the local level. In any event, the drone space will undoubtedly continue to grow. Drones add context, show the forest through the trees (literally), and open up a whole new host of possibilities. It's fun to have a front row seat!

Federal Aviation Administration Publishes Proposed Rules for Flights Over People, Nighttime Operations

By John W. Scott and Charles D. Tobin

Nearly three years after first opening up the skies to drone journalism, the Federal Aviation Admiration has published its long-anticipated notice of proposed rulemaking that would enable, under tight regulation, drone operations over people and at night. *See* 84 FR 3856, 3907 (published February 13, 2019). The FAA will be accepting comments on the new proposed rules through April 15, along with comments regarding two other notices that would affect news drone operations.

Earlier in the year, the FAA Unmanned Aircraft Systems Aviation Rulemaking Committee issued a final report and recommendations. These recommendations, if adopted, would amend the FAA's initial 2016 rulemaking. *See* 14 CFR, Part 107. The initial Part 107 rules – to the frustration of many journalists – prohibited unmanned drone flights over people not involved in the operation of the drone, as well as flights at night. The new proposed rule would fill these holes.

Drone Flights After Dark

Currently, the FAA rules governing drone flights prohibit operations after dark without a special FAA waiver. *See* Part 107.29(a) ("No person may operate a small unmanned aircraft system during night.").

Under the proposed rule, an operator would be allowed to fly a news drone at night, provided that the drone maintains anti-collision lighting visible for at least three miles and the operator completes updated training focusing on nighttime drone operations. The FAA's study of night operations determined that such flights do not pose an increased safety risk as it concluded drone pilots and manned aircraft pilots were able to maintain visual line of sight with drones more easily at night, as opposed to during the day, because of drone anti-collision lighting.

Drone Flights Over People

The drone regulations enacted in 2016 also prohibited drone flights over any individuals who are not directly participating in the operation of the drone or are not located within a covered structure or stationary vehicle. The FAA rulemaking committee recommended that this restriction should be loosened in order to allow for drone flights over people that present only a low probability of causing serious injury. The committee used two concepts to evaluate the risk of injury: first, the "injury threshold" and second, the "impact kinetic energy threshold." The injury threshold is the maximum injury level a person would be expected to suffer as a result of being hit by a small drone operating under normal operating conditions.

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The impact kinetic energy threshold is the maximum kinetic energy that the small drone could transfer to a person upon impact without exceeding the injury threshold.

Based upon these considerations, the FAA has proposed three categories performance based requirements, which drones would have to meet in order to operate over people.

Under the first category, drones weighing less than 0.55 lbs. could operate over groups of people without a waiver. The weight requirement is aggregate of any cargo attached to the UAS at any time in flight. All other requirements of Part 107 would remain in effect.

Under the second category, drones weighing between 0.56 and 55 lbs. could to operate over people, provided the manufacturer was able to certify that the drones met certain performance standards: (1) The drone must be designed so that, upon impact with a person, it would not result in injury as severe as the injury that would result from the transfer of 11 ft.-lbs. of kinetic energy to a rigid object; (2) The drone cannot have exposed rotating parts that could lacerate human skin; (3) The drone cannot possess a material, component, feature or defect which presents more than a low probability of causing a casualty when operating over people. Those features could include exposed wires, hot surfaces, sharp edges, faulty construction or corrupted software.

Under the third category, pilots would operate under more restrictive standards while the drone itself would have relaxed performance standards. The drone must be designed so that, upon impact with a person, it would not result in injury as severe as the injury that would result from the transfer of 25 ft.-lbs. of kinetic energy to a rigid object. The drone cannot have exposed rotating parts that could lacerate human skin. And the drone cannot possess a material, component or feature which presents more than a low probability of causing a fatality when operating over people. In addition to these performance based requirements, the category provides operational limitations as well. A Category 3 drone is not permitted to fly over open air assemblies of people and can only operate within or over a closed or restricted access site, where notice is given that drones will be flying over. Also, a Category 3 drone may not "hover" over people; it may only transit over a site.

The proposed rules put much of the burden for initial compliance on manufacturers. While not purporting to tell manufactures how they are to demonstrate compliance with the requirements. Under the rules, manufacturers are allowed to propose any means of compliance to show that a drone meets the requirements of Category 2 or 3.

Drone pilots would be required to ensure that their drone meets the requirements of the rule by ensuring that the drone is visibly marked as compliant with either Category 2 or 3. This requirement would be in addition to current obligations for pilots to conduct pre-flight checks. Pilots are also responsible for following a manufacturer's operation instructions specific to the drone in question.

Advanced Notice of Proposed Rulemaking – Safety and Security Issues

At the same time it published the notice of proposed rulemaking regarding night operation and operations over people, the FAA published an advanced notice of proposed rulemaking – a

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precursor to an actual draft rule – regarding a number of other issues related to drone operation. *See* 84 FR 3732, 3739 (published February 19, 2019). In the executive summary, the FAA explained that the advanced notice largely responds to public safety and national security agencies' concerns about "a need to distinguish between small UAS [drones] that may pose a threat and those that do not," especially when flying near groups of people.

In the advanced notice, the FAA refers to proposals for future rules that may include:

- Stand-off distances, measured horizontally and/or vertically, from "sensitive locations, "critical infrastructure, "certain mobile assets," and firefighting, search and rescue missions and "certain law enforcement proceedings."
- Limitations on altitude, airspeed and other performance metrics.
- Greater development of an Unmanned Traffic Management System (UTM) for all drones, which could include filing flight plans and/or operational boundaries.
- Payload restrictions, to respond to incidents where drones have been used to "conduct illegal surveillance and industrial espionage," "to deliver contraband to prison inmates," to deliver explosives, and "to conduct malicious cyber activity".

Unlike the Notice of Proposed Rulemaking for flights over people and nighttime flights, which sets out the language of an actual proposed rule and seeks public comment, this advance notice poses a series of questions. The questions are designed to draw information from stakeholders and the public for how to best address the safety and security concerns.

Any regulation requiring journalists to disclose news missions in advance to government obviously has serious First Amendment implications, even considering the legitimate potential this discussion has raised about malicious drone operators. The progress of this advanced notice of proposed rulemaking will warrant very close attention.

Comments to this advanced notice of proposed rulemaking are due April 15, 2019.

External Marking

Finally, on February 13, the FAA adopted an interim final rule that requires drone owners to display the unique identifier number, assigned by the FAA upon completion of the registration process (registration number), to the external surface of their drone. *See* 84 FR 3669-73. Drone operators are no longer permitted to enclose the number in a compartment of the drone.

This final rule is scheduled to go into effect February 25, 2019.

John W. Scott in Philadelphia and Charles D. Tobin in Washington, D.C. are with Ballard Spahr LLP. The firm represents the News Media Coalition, a collaboration of more than a dozen media companies and nonprofits, in legal issues related to the use of drones in journalism.

High School Students First Amendment Suit Can Proceed

Student Journalists Have Individual Right of Action Under Kansas Law

By Eric Weslander

In a case with implications for student speech and student journalism, a federal district court in Kansas recently held that three public-school students stated a potential claim that the district violated their First Amendment rights by censoring the contents of on-campus student protests in connection with the April 20, 2018 National School Walkout against gun violence. M.C. et al. v. Shawnee Mission Unified School Dist. No. 512.

The decision also held, as a matter of first impression, that student journalists have an individual right of action under Kansas' anti-*Hazelwood* statute, the Kansas Student Publications Act, which was implicated in this case by an assistant principal confiscating the camera of a student journalist and ordering student journalists to leave the area of a protest. At the same time, the Court dismissed a claim against the school district's superintendent on qualified-immunity grounds.

In an order dated January 28, 2019, Judge Julie A. Robinson, Chief Judge of the U.S. District Court for the District of Kansas, denied in part and granted in part the Fed. R. Civ. P. 12(b)(6) Motion to Dismiss brought by the Defendants in the case, the Shawnee Mission School District (SMSD) and its then-interim superintendent, Kenneth Southwick.

In a case with implications for student speech and student journalism, a Kansas court recently held that three public-school students stated a potential claim that the district violated their First Amendment rights by censoring the contents of on-campus student protests.

Background

The Plaintiffs in the case were two Shawnee Mission North high school students and a Hocker Grove Middle School student, who alleged that SMSD unlawfully censored them by imposing subject-matter restrictions on the protests so that they could only generically address "school safety" and support for victims, instead of the political topics the students wanted to address, including gun-law reform.

Prior to the protests, students at multiple SMSD sites informed administrators of their plans for a protest, and worked with school administrators to coordinate a time for the protests to occur during the school day so that it would not interrupt instructional time. Although the extent of SMSD's central coordination of the speech restrictions was not known at the time of the Motion to Dismiss briefing, documents produced in discovery showed that SMSD's central administration encouraged school principals to "redirect" students as to the topics of the planned protests, while publicly emphasizing that the protests reflected the

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students' own viewpoints and were not sponsored or approved by the school district. For example, one school principal at another site reported to an SMSD administrator, "The student wanted to make it about guns but we persuaded her to make it School Safety." The administrator responded, "Good work, sounds like you guys are on it!"

At Shawnee Mission North, students initially took part in a protest on the school's football field where speakers adhered to SMSD's content restrictions. When the 17 minutes allotted for the protest had ended, however, students refused to go back inside and began an impromptu, second protest outside the school. At that point, an assistant principal confiscated a school-issued camera that Plaintiff S.W., a member of the school's yearbook and newspaper staff, was using to attempt to document the protests. The assistant principal took one other student's camera and singled out journalism students, ordering them to go back inside the school.

At Hocker Grove Middle School, the protest was cut short after students refused to follow the subject-matter restrictions. In video captured of the event and exchanged by the parties in discovery, Plaintiff M.C., then an 8th grader, is shown standing up on a bench and stating, "The school administration wants us to make this about school violence and not about the real issue here. The real issue is gun violence, and I'm not going to be quiet." At that point, an administrator can be seen interrupting her, stating "No, no, that's not what this is about." While acknowledging that the protest was cut short prematurely with the knowledge and approval of an SMSD central administrator who was on site, SMSD contended it stopped the Hocker Grove protest out of a need to maintain order and safety, not because students refused to be censored.

Judge Robinson first noted that the First Amendment extends protection not only to alleged expressive activity, but to recipients of communication and to "creation of speech, including the recording of matters of public interest for purposes of newsgathering."

In its Motion to Dismiss, SMSD argued that the suit should be dismissed in its entirety because the protests could be considered school-sponsored speech and that therefore, under the *Hazelwood* standard, the District could censor the contents of protests based on nothing more than a desire to avoid controversy. SMSD also argued that students did not have an individual right of action under the Kansas Student Publications Act because the statute did not contain an express provision for a cause of action, and because the purpose of the law was not to protect students' First Amendment rights but to "shift" liability from administrators and teachers, and on to students, for defamatory statements printed in student publications.

First Amendment Analysis

In her order denying in part and granting in part Defendants' Motion to Dismiss, Judge Robinson first noted that the First Amendment extends protection not only to alleged expressive activity, but to recipients of communication and to "creation of speech, including

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the recording of matters of public interest for purposes of newsgathering." The Court then discussed the differences between the *Tinker* and *Hazelwood* standards and rejected Defendants' argument that the *Hazelwood* standard necessarily applied, noting that the event was organized by students at the national level, that students chose the date of the protest, to coincide with the Columbine High School tragedy, and that they hoped to demand reforms to reduce gun deaths and school shootings.

Further, that SMSD allegedly made clear to parents and students that the walkouts were student-led and optional, and that the District was not sponsoring the event, indicated under the relevant standard that "the speech at issue was merely being tolerated, as opposed to sponsored by the school." The court concluded that because "the walkout occurred during school hours and on school grounds does not dictate a finding that the speech was school sponsored," noting that *Tinker* also involved speech occurring during school hours and on school grounds. Even though there was faculty supervision over the events, the decision noted, "it is the degree of involvement that determines whether speech is school sponsored" (emphasis in original).

The Court also rejected Defendants' argument that because the complaint referred to "permitted" or "sanctioned" aspects of the event, the speech occurring during the protests was school-sponsored, finding that the two terms were easily synthesized: "The District permitted the student walkouts insofar as it advised students and parents that students would not be disciplined for participating in the national walkouts for which they sought prior approval. However, the District disclaimed any endorsement or sponsorship of the event. The District then placed certain restrictions on the student speech that would be permitted during the walkouts." A subset of SM North students remained outside at the end of the event "to speak freely about gun violence and gun reform, topics that were off limits during the permitted walkout. Only student journalists were prohibited from remaining outside during this portion of the event."

The Court could not "find on this record that students' private expressive activities ... reasonably conveyed to the students, parents, and public that this nationally organized, student-led walkout bore the imprimatur of the school."

Given the allegations that the District disclaimed all sponsorship of the event, and made clear the walkout was optional, the Court could not "find on this record that students' private expressive activities during this bifurcated walkout at one District high school reasonably conveyed to the students, parents, and public that this nationally organized, student-led walkout bore the imprimatur of the school." Instead, the Court concluded that the facts alleged showed the speech was merely "tolerated," requiring the application of the *Tinker* standard. The Court held that under this standard Plaintiffs had stated a plausible claim for relief as to a First Amendment violation, noting that the alleged purpose of the restrictions (as stated by an SMSD spokeswoman to a local newspaper) was to avoid the appearance the District was taking a position on Second Amendment issues, and that "the only justification for the speech restrictions alleged in the Complaint is the need to avoid association with a controversial topic." By contrast, the Court

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could not find at the Motion-to-Dismiss stage that "SMSD reasonably forecast that the students' speech during the walkout would cause substantial disruption with discipline or student safety."

As to the confiscation of Plaintiff S.W.'s camera, the Court denied the Motion applying the *Tinker* standard, given that the facts alleged "suggest that the only basis for confiscating the camera was to avoid… S.W. potentially documenting a controversial student event." At the same time, the Court noted in a footnote that it was skeptical that the censorship of journalists would survive even a *Hazelwood* analysis, given that the allegations were that "school officials imposed a prior restraint on student journalists' ability to conduct any newsgathering on the event, without regard for whether the journalism would associate the school with a position of neutrality on the subject."

The Court dismissed the individual-liability claim against Southwick on qualified-immunity grounds, holding that there were inadequate allegations that Southwick himself personally authored or promulgated the policy to restrict speech and did not himself confiscate a camera. Further, the Court stated that Plaintiffs had not set forth in their Complaint a stand-alone theory of liability for actions taken after the protest, such as Southwick's public pronouncements making statements including that the SMSD investigation of the protests would look first and foremost at "what it was that we did right." The Court also held that Plaintiffs failed to allege sufficient facts to plausibly show that Southwick was liable under a supervisory-liability theory given that there were no allegations in the Complaint plausibly showing that Southwick was responsible for the policies restricting speech and press at the schools. In addition, the Court held that Plaintiffs could not demonstrate that their rights, as they related to Southwick's personal actions, were clearly established such that qualified-immunity would not apply, given the lack of controlling case law directly on point. "At most, Southwick's post-walkout statements suggest he was given conflicting legal advice after-the-fact about whether *Tinker* or *Hazelwood* governed the District's policies."

The Court easily rejected Defendants' argument that the Kansas Student Publications Act did not imply a private right of action.

The Court easily rejected Defendants' argument that the Kansas Student Publications Act did not imply a private right of action, based on application of the two-part test under Kansas law that analyzes whether (a) the act was designed to protect a specific group of people as opposed to the general public, and (b) whether, from legislative history, a private right of action was intended. As to the first prong, it was undisputed that the statute was intended to support a specific group of people-- that is, student journalists. As to the second prong, the Court examined detailed legislative history on the Act and held that it "demonstrates support for the Act's protection of student journalists, and their right to expression on controversial subjects without censorship," as opposed to demonstrating an intention to "shift" liability from district officials to students as argued by Defendants.

Finally, the Court held that Plaintiffs had alleged sufficient facts to show a plausible

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violation of the Act, given that the Act prohibits censoring student-journalists' work allegations solely out of a desire to avoid controversy, and that the allegations of the Complaint were that "the entire point of confiscating the camera was to prevent S.W. from photographing the event for the student newspaper" and that the camera was confiscated because it would have documented political or controversial subject matter.

In summary, the Court allowed Plaintiffs' § 1983 claims to go forward against SMSD but not Southwick, and held the Complaint stated a claim under the Kansas Student Publications Act based on the alleged confiscation of S.W.'s camera and the district targeting student journalists to be removed from the protests.

The parties held a court-ordered mediation in early February, and remain in settlement negotiations at the time of this writing. Plaintiffs are seeking relief including implementation of policies and training to prevent similar violations in the future, as well as nominal damages, a written apology, and attorney's fees.

Eric Weslander of Stevens & Brand represents Plaintiffs in this matter along with Lauren Bonds and Zal Shroff of the ACLU of Kansas. Defendants are represented by Drew Marriott, Ryan VanFleet and Duane Martin of EdCounsel, LLC.

Fourth Circuit Holds that Blocking on Public Official's Social Media Page Violates First Amendment

Facebook Page Used for Official Purposes a Public Forum

By Katie Fallow and Ella Solovtsova Epstein

On January 7, 2019, the Court of Appeals for the Fourth Circuit became the first appellate court to address how the First Amendment applies to social media accounts operated by public officials – an issue that has become increasingly important as more and more government officials turn to social media as the primary way to speak to, and hear from, their constituents. In Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019), the court found in favor of free speech rights online, holding that a local county official's Facebook page, which she used for official purposes, was a public forum and that her decision to temporarily block plaintiff Brian Davison from posting on the page was unconstitutional viewpoint discrimination.

The Fourth Circuit became the first appellate court to address how the First Amendment applies to social media accounts operated by public officials.

Background

Defendant Phyllis Randall was elected Chair of the Loudoun County Board of Supervisors at the end of 2015. The night before she was sworn in as chair in January 2016, Randall created the "Chair Phyllis J. Randall" Facebook page for the stated purpose of allowing all of her constituents to start a "back and forth conversation" on any topic. *Davison* at 673. She also used the page to update her constituents about key issues facing their community, including upcoming Board meetings and public safety threats. Constituents could – and did – post comments on the page, responding to Randall and discussing various issues with each other.

Brian Davison is an outspoken resident of Loudoun County who is particularly concerned about public school financing. During a February 2016 Loudoun County Board meeting, chaired by Randall, Davison asked a question implying that some school board members had acted unethically. Shortly thereafter, Randall posted about the meeting on her page, and Davison commented on Randall's post, reiterating his accusations about school board members' potential conflicts of interest. Believing Davison's comments to be inappropriate, Randall deleted her original post and all public comments under it, including Davison's. She then blocked Davison from posting to her official Facebook page. About twelve hours later, Randall unblocked Davison.

Proceeding *pro se*, Davison sued Randall and the Loudoun Board in the District Court for the Eastern District of Virginia, alleging violations of his First Amendment right to free speech

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and his Fourteenth Amendment right to due process. Randall moved to dismiss Davison's lawsuit, arguing among other things that because she personally created and operated the Chair Phyllis J. Randall Facebook page, it was not a government-operated account and therefore was not subject to the First Amendment. After a one-day bench trial, the district court ruled in the summer of 2017 that Randall acted under color of state law in banning Davison, and that the temporary block violated Davison's right to speak in a public forum free from viewpoint discrimination. The district court granted Davison declaratory relief. The parties then filed cross-appeals with the Fourth Circuit.

Fourth Circuit Decision

Fourth Circuit Court Judge Wynn wrote the majority opinion, joined by Judge Harris, and Judge Keenan concurred.

The majority opinion first rejected Randall's argument that Davison lacked standing to pursue his First Amendment claim because Randall had only blocked Davison for 12 hours and therefore, according to Randall, Davison was not injured in fact. Noting that standing requirements are somewhat relaxed in First Amendment cases, the court held that Davison had standing to sue because he intended to continue to engage in speech on Randall's Facebook page and because Randall continued to take the position that her page was not subject to the First Amendment and therefore she could block him again. In those circumstances, the court concluded, there remained a credible threat of Davison being blocked again, and thus the injury in fact requirement was met.

Randall created and administered the page to "further her duties as a municipal official," making it a "tool of governance."

Having concluded that it had jurisdiction over Davison's claim, the court held that Randall's blocking of Davison violated the First Amendment because it constituted viewpoint-based discrimination in a public forum.

To begin, the court held that Randall acted under color of state law in administering the page and banning Davison from it. To determine this, the court tested whether Randall's "purportedly private actions [bore] a 'sufficiently close nexus' with the State to satisfy Section 1983's color-of-law requirement when the defendant's challenged 'actions are linked to events which arose out of his official status.'" *Davison* at 680.

The court concluded that Randall created and administered the page to "further her duties as a municipal official," making it a "tool of governance," and that she used the page in a way in which a private citizen could not, linking her actions with her role as a public official. *Id.* at 680. In addition, "the specific actions giving rise to Davison's claim—Randall's banning of Davison's...Page—are linked to events which arose out of her official status." *Id.* at 681.

The court then held that Randall's page was a public forum under the Supreme Court's public forum doctrine. The court found that Randall's Facebook page was by its very nature compatible with expressive activity, and that she intentionally opened up the comment section of her page to speech by members of the public without restriction. As the court observed, "[a]

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n 'exchange of views' is precisely what Randall sought—and what in fact transpired—when she expressly invited 'ANY Loudoun citizen' to visit the page and comment 'on ANY issues,' and received numerous such posts and comments." *Id.* at 682.

In light of these facts, the court decided that the interactive section of the page—in other words, the comment portion of the page—constituted a First Amendment-protected public forum. The court did not reach the question of the type of public forum (traditional, limited, or designated) involved, because the viewpoint discrimination in which Randall engaged is banned in all fora. *Id.* at 687-88.

The court rejected Randall's argument that the public forum analysis should not apply because Facebook in its entirety is a privately-owned platform. The court noted that the Supreme Court has never limited forum analysis solely to government-owned property, but has instead held that forum analysis could be applied to private property dedicated to public use or controlled by the government. *Id.* at 683.

The court also rejected Randall's argument that the page amounts to government speech, which is not subject to the First Amendment requirement of viewpoint neutrality. The court held that even if Randall's own posts were government speech, the interactive component of the page, where the public could post comments, was not government speech. *Id.* at 686.

The court also rejected Randall's argument that the page amounts to government speech, which is not subject to the First Amendment requirement of viewpoint neutrality.

Concurring Opinion

Judge Keenan joined the majority opinion in full, but filed a separate concurrence "to call attention to two issues regarding governmental use of social media that do not fit neatly into our precedent." *Id.* at 692. First, she questioned "whether any and all public officials, regardless of their roles, should be treated equally in their ability to open a public forum on social media." *Id.* at 692.

Second, she noted the legal complexities introduced by the interplay of private and public actors in online spaces in which third-party speech occurs. Since private companies host the social media sites which government actors manage, it can be difficult to determine which party is responsible for "burdens placed on a participant's speech." *Id.* at 693. Judge Keenan called on the Supreme Court to consider further the reach of the First Amendment in social media.

Katie Fallow is a senior staff attorney and Ella Solovtsova Epstein is an intern at the Knight First Amendment Institute at Columbia University. The Knight Institute represented the plaintiff in the Davison case before the Fourth Circuit.

Eleventh Circuit Affirms Exception to Grand Jury Secrecy for Records of Historical Significance

By Sean Howell

Relying on a seldom-invoked exception to the secrecy of grand jury proceedings for matters of historical significance, the Eleventh Circuit has upheld a district court's disclosure of grand jury transcripts from an investigation into what some consider to be the last mass lynching in American history. Pitch v. United States, No. 17-15016, 2019 WL 512157 (11th Cir. Feb. 11, 2019).

The decision confirms the continuing viability of the exception, over the reservations of some who have questioned whether courts have the authority to release grand jury records for reasons other than those enumerated in the Federal Rules of Criminal Procedure.

Background

In the course of doing research for a book, author and historian Anthony Pitch located in the National Archives (but was unable to view) the transcripts of a grand jury investigation into the murders of four African-Americans in Walton County, Georgia, in 1946. The victims, two married couples, were dragged from a car, tied to a tree, and shot multiple times. The murders came on the heels of a racially charged Democratic gubernatorial primary election, the first in the state in which African-American citizens had been allowed to vote. Amid national outrage, President Harry S. Truman ordered an FBI investigation, but despite 16 days of testimony before the grand jury, no one was ever charged. Many consider the event, known as Moore's Ford Lynching, to be the last mass lynching in American history.

The Eleventh Circuit has upheld a district court's disclosure of grand jury transcripts from an investigation into what some consider to be the last mass lynching in American history.

The Federal Rules of Criminal Procedure enumerate several exceptions to the general rule that federal grand jury records are to be kept secret. Fed. R. Crim. P. 6(e). There is no enumerated exception for historically significant material, however. Where a specific enumerated exception does not apply, some courts have held that district courts may nevertheless unseal grand jury transcripts pursuant to their "general supervisory authority over grand jury proceedings." *See In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261, 1267–68 (11th Cir. 1984). Under this precedent, disclosure is appropriate where the need for disclosure outweighs the public interest in continued secrecy. *Id.* at 1272, 1275.

However, the Supreme Court has not yet opined on the scope of a district court's authority to unseal grand jury transcripts, and the Department of Justice, under both the Obama and

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Trump administrations, has taken the position that district courts have no such authority. The DOJ argues that the exceptions enumerated in the Federal Rules are exclusive.

Interestingly, despite this view, the DOJ in 2011 urged the Advisory Committee on the Criminal Rules to revise Rule 6(e) (which covers the secrecy of grand jury proceedings) to explicitly incorporate an exception for matters of historical significance. See Letter from Attorney General Eric Holder to Judge Reena Raggi, Chair of the Judicial Conference's Advisory Committee on Criminal Rules, Oct. 18, 2011.

Among other things, the DOJ's proposed rule would have required a showing that the records were of "exceptional" historical significance, that at least 30 years had passed since the records were closed, and that no living person would be materially prejudiced by the records' disclosure. After considering the issue at a meeting in 2012, the Advisory Committee reported that it believed the change was unnecessary, given the weight of authority supporting district courts' inherent authority to unseal the records in appropriate cases. See Minutes of Meeting of June 11-12, 2012, Judicial Conference Committee on Rules of Practice and Procedure, at 44.

In *Pitch*, the Eleventh Circuit held that it was bound by in-circuit precedent holding that district courts have inherent authority to unseal grand jury transcripts outside of the specifically enumerated exceptions. The court went on to adopt a nine-factor test enumerated by the Second Circuit for determining whether the disclosure of historically significant grand jury records is appropriate.

In *Pitch*, the Eleventh Circuit held that it was bound by in-circuit precedent holding that district courts have inherent authority to unseal grand jury transcripts outside of the specifically enumerated exceptions.

Applying that test, it found that the following factors weighed in favor of disclosure: Pitch's status as an author and historian; the fact that he sought disclosure for a "legitimate, scholarly purpose"; the fact that Moore's Ford Lynching was "clearly an event of exceptional historical significance"; and the fact that over 70 years had passed since the murders. The court described the passage of time as the "touchstone" of the inquiry: it "generally must be long enough that the principal parties to the investigation— the suspects and witnesses— and their immediate family members have likely died, and that there is no reasonable probability that the government would make arrests based on the disclosed information."

The court held that these factors trumped the interest in keeping the records sealed. It further held that disclosure of the entire grand jury transcripts, rather than selections, was appropriate because scant details about the incident have come to light in the past 70 years.

Concurring, Judge Jordan expressed some reservation about the open-ended balancing test under which a district court's decision to release grand jury transcripts is evaluated in the Eleventh Circuit. However, he found it significant that the Advisory Committee had agreed with the circuit's interpretation in its 2012 meeting, and accordingly joined the court's opinion.

Judge Graham dissented, arguing that district courts lack inherent authority to disclose

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grand jury transcripts outside of the enumerated exceptions, and further contending that, even if they did, disclosure was not warranted in this case. Though the government had conceded that there was no interest in preserving the records' secrecy, Judge Graham reasoned that the descendants of those named in the grand jury transcripts had a legally cognizable interest in keeping the records sealed: "I am unable to dismiss the reputational harm that could occur to a living person if the grand jury transcripts reveal that their parent or grandparent was a suspect, a witness who equivocated or was uncooperative, a member of the grand jury which refused to indict, or a person whose name was identified as a Klan member."

Pitch's book on the event is *The Last Lynching: How a Gruesome Mass Murder Rocked a Small Georgia Town*.

Sean Howell is an associate at Covington & Burling, San Francisco.

Court Grants Access to Warrant Materials in Michael Cohen Case

By David McCraw

A federal judge in New York has granted in part an application by news organizations seeking to unseal materials related to the April 2018 FBI search of the office, home, hotel room, and electronic communications of former Trump lawyer Michael Cohen. U.S. v. Cohen, 18cr602 (S.D.N.Y. Feb. 7, 2019).

The New York Times filed a motion in November 2018 asking the court to grant public access to the warrant applications, the supporting FBI affidavits, court orders, and other documents from the searches. The Times's application was subsequently joined by a group of other news organizations.

Judge William H. Pauley III issued a 30-page decision in early February finding that the common-law right of access applied to a portion of those materials. He directed that the warrant materials dealing with Cohen's tax evasion case be released with certain redactions. He came to the opposite conclusion in respect to an ongoing investigation into campaign finance violations.

The court applied the well-established common-law balancing test that looks at the importance of the documents to the adjudicatory process and then weighs any countervailing interests. Relying on several decisions from courts in the Second Circuit, Judge Pauley found that the presumption of access to warrant materials – both traditional search warrants and those addressed to electronic communications under the Stored Communications Act ("SCA"), 18 U.S.C. § 2703 – was strong. He noted that warrant materials went to the heart of a significant adjudication made by the court.

Judge William H. Pauley III issued a 30-page decision in early February finding that the common-law right of access applied to a portion of those materials.

In ordering the release of the tax-related documents, the court found that the government could no longer argue that sealing was needed to protect an ongoing investigation following Cohen's guilty plea to the tax charges in August 2018. At the same, the court recognized that some individuals and businesses mentioned in the documents had cognizable privacy interests. The court's order directs the redaction of references to Cohen's business partners who were peripheral to the case as well as references that might inaccurately imply criminal complicity on the part of others. But, Judge Pauley said, there was no reason to keep secret the identities of financial institutions that Cohen dealt with, Cohen's consulting arrangements, and his business transactions related to buying and selling taxi medallions.

However, warrant materials arising from the investigation into campaign finance violations will remain secret for now. The court was persuaded that the investigation was ongoing and a release of materials could jeopardize the FBI's work.

All of the objections to unsealing came from government; Cohen did not file papers in response to the application by the news organizations.

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Judge Pauley went out of his way to dismiss the idea that the public interest in the Cohen case should be a factor in the access analysis. He said that the subject matter of the documents was irrelevant and warned that assessing "the degree of public interest in the underlying substance of the document would require a court to engage in an inherently subjective determination as to the newsworthiness of particular information." Instead, the access right was premised on the general need "for public monitoring of the federal courts and their exercise of judicial power," he said.

The court rejected the news organizations' argument that the First Amendment right of access applied alongside the common-law right. Judge Pauley acknowledged that the Second Circuit, in prior access cases, had counseled that the courts should not entertain the constitutional question if the common law provided for access. But he termed "such guidance . . . out of vogue with more recent circuit precedent."

The Second Circuit has never addressed whether the First Amendment applies in the warrant context. (Among the circuits, only the Eighth has found that warrant materials are subject to the First Amendment right.) Judge Pauley jumped in to the void and concluded that warrant materials did not meet either of the threshold requirements for invocation of the First Amendment right: that there be a history of access to such materials (the experience prong) and that access would enhance the functioning of the particular judicial process associated with the materials (the logic prong).

However, warrant materials arising from the investigation into campaign finance violations will remain secret for now. The court was persuaded that the investigation was ongoing.

In the court's view, there was no consistent history of access to warrant materials. Instead, Judge Pauley said, access had been granted inconsistently, depending on the fact-specific circumstances of a given case. Moving to the experience prong, he acknowledged that public scrutiny was often beneficial to court proceedings, but held that, in the context of warrants, access would introduce the potential for witness corruption, destruction of evidence, and the flight of persons under investigation.

The court separately analyzed whether Section 2703 warrants were subject to the First Amendment right of access, a question of first impression in the Second Circuit. Once again, the court found that neither the experience test nor the logic test was met.

Under the court's ruling, the government was given three weeks to submit the proposed redactions to the court for review. The government is also required to update the court in three months about the status of any ongoing investigation and explain the need for any continuing withholding.

The New York Times Company was represented by David McCraw, the company's deputy general counsel. Rachel Strom of Davis Wright Tremaine represented ABC, The Associated Press, CNN, the Daily News, Dow Jones, Newsday, the New York Post, and CBS.
The government was represented by AUSA Thomas McKay.

New York's Appeals Court Rules NYPD Body Cam Recordings Are Not "Personnel Records"

By Tom Sullivan

On February 19, New York's intermediate appellate court found that footage from police officers' body-worn cameras was not barred from disclosure without the officers' permission or a court order. Accordingly, the appeals court affirmed the trial court's dismissal of a petition brought by the labor union representing New York City police officers that sought to enjoin the city's plan to publicly release such footage following officer-involved shooting incidents. In re Patrolmen's Benevolent Ass'n v. De Blasio, 2019 WL 660696 (N.Y. App. Div. 2019).

Background

Section 50-a of the New York Civil Rights Law states that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" under the control of a police department, department of corrections, fire department, or probation department are considered confidential and are "not subject to inspection or review without the express written consent" of the police officer, firefighter, correction officer, or probation officer involved or a court order. N.Y. Civ. Rights Law § 50-a(1). Following a class action lawsuit against the New York City Police Department in 2013 involving the city's "stop and frisk" program, a federal judge required the NYPD to implement a one-year pilot program where officers would wear body cameras to provide an objective record of stops and frisks. After that and subsequent other pilot programs, the NYPD announced in January 2018 that it planned to have every patrol officer wear cameras by the end of the year.

New York's intermediate appellate court found that footage from police officers' body-worn cameras was not barred from disclosure without the officers' permission or a court order.

While the pilot was ongoing, in September and November of 2017, there were three shooting incidents captured by officers' cameras. The city determined that it would release those videos without waiting for a request under New York's Freedom of Information Law. Commissioner James O'Neill explained the department was releasing the videos "because the NYPD is committed to being as transparent as possible with respect to the release of body-worn camera video in these critical incidents."

The Patrolmen's Benevolent Association (the "PBA"), the union for NYPD officers, subsequently filed a hybrid complaint and petition under Article 78 of New York's Civil Practice Law and Rules (the state law provision used to challenge administrative action) on January 9, 2018. The union claimed that the release of the footage, and the city's plan to

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release other footage in the future, violated Section 50-a and was arbitrary and capricious. It sought a declaration that body-worn camera footage was a personnel record and an injunction barring future release of such footage without the consent of the officers involved or a court order. The PBA subsequently applied for a temporary restraining order preventing the city and police department from releasing footage to the public during the pendency of the proceeding. The trial court denied that motion, finding that the standards for such relief were not met.

A coalition of media companies, including Hearst Corporation, The Associated Press, Inc. BuzzFeed, Inc., Cable News Network, Inc., The Center for Investigative Reporting, Daily News, LP, Dow Jones & Company, Inc., Gannett Company, Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York Times Company, NYP Holdings, Inc., and Spectrum News NY1, and the Reporter's Committee for Freedom of the Press, sought to intervene in the action to oppose the petition, concerned about the impact of an adverse ruling. At a May 3, 2018 conference, the trial court dismissed the action, finding that there was no private right of action under Section 50-a or in the context of an Article 78 petition by which the PBA could seek an injunction barring the city from releasing the footage. Thus, the court ruled, the PBA lacked any entitlement to maintain any action under the statute. The media coalition's motion to intervene was held in abeyance by the court until it decided the city's dismissal motion and then denied as moot after the motion to dismiss was granted.

The union claimed that the release of the footage, and the city's plan to release other footage in the future, violated Section 50-a and was arbitrary and capricious.

The PBA appealed and on May 14 moved for an order from the Appellate Division enjoining the release of body-worn camera footage during the pendency of the appeal. The same coalition of media companies filed an amicus brief, arguing among other things that the motion should be denied because the footage was not a personnel record under the statute. On July 3, a panel of the appellate court granted the PBA's motion, preventing the city from releasing the footage until the appeal was decided. The media coalition subsequently filed another amicus brief, addressing the merits of the appeal with a similar argument.

The Court's Opinion

The Appellate Division's decision affirmed the lower court's ruling in favor of the city, but on different grounds – the one advocated by the media coalition's amicus brief.

As an initial matter, the appellate court found that the trial court erred in concluding that the PBA could not seek an injunction. It ruled that because Section 50-a creates a protective right for police officers and does not explicitly prohibit a private right of action, the PBA was not precluded from challenging the city's decision to release the footage. 2019 WL 660696, at *1.

However, the court found that the petition was still properly dismissed because the body-

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worn camera footage was not a personnel record within the scope of Section 50-a. The court noted that the "threshold criterion" in determining whether a document is a personnel record is whether it is "of significance to a superior in considering continued employment or promotion." *Id.* (citations omitted). The panel found that in considering this question a court needed to evaluate a record's general nature and use, and not whether it merely could possibly be used evaluate officers' performance, as urged the PBA. *Id.* at 2.

The court stated that to rule otherwise "could sweep into the purview of § 50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by § 50-a." *Id.* The court held that though the body-worn camera program was partially designed for performance evaluations, the true purpose of the program was "transparency, accountability, and public trust-building," and barring the footage's release would defeat those purposes. *Id.*

The PBA has stated it is assessing its option for appeal. If the union seeks review by the New York Court of Appeals, the media coalition anticipates filing another amicus brief.

The PBA is not the only police union challenging the release of personnel records. In California, several police unions have filed suit to prevent retroactive enforcement of Senate Bill 1421, which requires the release of records related to, among other things, officer-involved shootings and sexual assault by an officer. The unions have argued that the law should only apply to records created after January 1, 2019. Those cases are ongoing.

Media Amici Reporters Committee for Freedom of the Press, Hearst Corporation, The Associated Press, Inc. BuzzFeed, Inc., Cable News Network, Inc., The Center for Investigative Reporting, Daily News, LP, Dow Jones & Company, Inc., Gannett Company, Inc., Gizmodo Media Group, LLC, New York Public Radio, The New York Times Company, NYP Holdings, Inc., and Spectrum News NY1 were represented by Katie Townsend and Adam Marshall of the Reporters Committee for Freedom of the Press and by Tom Sullivan and Steve Zansberg of Ballard Spahr LLP. Appellant Patrolmen's Benevolent Association of the City of New York, Inc. was represented by Michael Bowe and Alexander Simkin of Kasowitz Benson Torres LLP and Michael Murray of the union's general counsel's office. Respondents Bill De Blasio, City of New York, James P. O'Neill and New York City Police Department were represented by Aaron Bloom, Richard Dearing, and Jeremy Shweder of the New York City Law Department.

Court Unseals Facebook Records Revealing "Friendly Fraud" System Used On Minors

By D. Victoria Baranetsky

A judge in the Northern District of California granted in large part a motion by the Center for Investigative Reporting (CIR) to intervene and unseal certain documents filed in a class action lawsuit against Facebook. Bohannon, et. al v. Facebook, Inc., 12-cv-01894 (Jan. 14, 2019) (Freeman, J.). The ruling applied a recent Ninth Circuit decision that requires the "compelling reasons" standard be met to permit sealing in class action lawsuits.

Background

In October 2011, an unnamed minor, asked his mother Glynnis Bohannon if he could spend $20 on Facebook to purchase a game called Ninja Saga. Ms. Bohannon agreed and gave her Wells Fargo MasterCard to her child who made the purchase through Facebook Credits system, a virtual currency payment system. The child was unaware that Facebook Credits stored the card information, and continued to make in-game purchases that ultimately charged several hundred dollars to Ms. Bohannon. Ms. Bohannon sought a refund from Facebook, but the company never did, forcing the family to file a class action lawsuit.

The complaint in the 2012 class action lawsuit, alleged the social media company inappropriately profited from business transactions that were voidable and that Facebook had misrepresented the charges under a scheme that does not comply with state or federal law. The lawsuit revealed many unseemly facts about the social media giant, yet, throughout the lawsuit, Facebook moved to seal various documents, which Plaintiffs opposed.

For instance, one of the documents (later unsealed), revealed that two Facebook employees denied a refund request from a child whom they call a "whale" – a term coined by the casino industry to describe profligate spenders. The child had entered a credit card number and in about two weeks charged thousands of dollars, according to a conversation between two Facebook employees.

> *Gillian: Would you refund this whale ticket? User is disputing ALL charges…*
>
> *Michael: What's the users total lifetime spend?*
>
> *Gillian: It's $6,545 – but card was just added on Sept. 2. They are disputing all of it I believe. That user looks underage as well. Well, maybe not under 13.*
>
> *Michael: Is the user writing in a parent, or is this user a 13ish year old*
>
> *Gillian: It's a 13ish yr old. says its 15. looks a bit younger. she* not its. Lol.*

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Michael: … I wouldn't refund

Gillian: Oh that's fine. cool. agreed. just double checking

The records also show Facebook employees thought the policies and practices were incorrect, that often employees failed to send receipts for these purchases, and links on the company's website to dispute charges frequently failed to work.

Still, the Court ultimately agreed with Facebook that sealing was appropriate at that time, according to a "good cause" standard — meaning that Facebook needed to merely demonstrate good cause (instead of a compelling reason) to seal the documents. The case settled in 2016 and the documents remained under seal for several years.

However, circumstances substantially changed, when the Ninth Circuit clarified in a 2016 case (subsequent to the court's sealing decisions) that the higher "compelling reasons" standard applies to records filed in cases involving a motion for class certification. While the Ninth Circuit traditionally drew a distinction between "dispositive" motions, where courts applied the compelling reasons standard, in contrast to "non-dispositive" motions where a good cause standard was required, the court disapproved of such a binary approach in *Center for Auto Safety v Chrysler Group, LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). Courts in the Northern District of California subsequently extended the ruling and held that motions for class certification should comport with the compelling reasons standard.

Around that time, reporter for *Reveal at The Center for Investigative Reporting*, Nathan Halverson began to investigate the case – to pursue a story, but was unable to gain access to the records.

The Lawsuit and Court's Order

On September 17, 2018, given the immense public interest in Facebook's activities, and the meaningful changes in the law since the sealing of the documents, *The Center for Investigative Reporting*, the nation's oldest nonprofit investigative newsroom, filed a motion to intervene and unseal the court records under the First Amendment and common-law rights of access to inspect and copy judicial records and documents.

CIR raised three main arguments. First, the information sealed under the good cause standard cannot meet the compelling reasons standard because any purported harms from disclosure are likely speculative. CIR noted that this was especially true given that Facebook's business and technology has advanced with such "celerity as to make the sealed information largely obsolete." For instance, Facebook no longer uses the Facebook Credits system at issue in the case. Second, CIR argued that some of this information may already be in the public record, given the recent investigations of Facebook. Regardless, CIR finally noted that the public interest in unsealing these documents was particularly high because of the public

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scrutiny over Facebook's recent data management scandals, such as Cambridge Analytica. CIR also noted that this case pertains to minors, who continue to be at risk today.

After CIR filed its motion, Facebook responded on October 8, 2018 and agreed to unseal some portions of the previously sealed records but still asserted that CIR's motion to unseal should be denied because the documents are confidential and trade secret as the policies contained within are still in use. More specifically, Facebook argued its refund and fraud-detection practices, though no longer in use for its Credits System, are still used for other purchases. Moreover, Facebook argued that despite the recent ruling of *Center for Auto Safety v Chrysler Group* had only recently required the compelling reasons standard be applied, the court had already undergone a "detailed analysis" and considered "compelling reasons."

District Court Decision

The court disagreed. On January 14, 2019, the court issued an order granting in part and denying in part CIR's motion. The court stated it had only applied the "good cause" standard to its analysis— and now having once again reviewed the documents under this standard it chose to unseal even more than what Facebook had agreed to unseal. In particular, the court chose to unseal portions of a deposition of Bill Richardson, including information "that Facebook uses and evaluates in connection with purchases made by Facebook users."

The court's order in *Bohannon* underscores that courts should not permit trade secret exemptions to more broadly permit corporate secrecy.

While Facebook argued that this information is sealable because it is highly sensitive and confidential information from which Facebook "derives economic benefit" the court held that the public interest will be served by unsealing some portions of the document.

Similarly, Facebook argued an Exhibit containing its interrogatory responses should be kept under seal because they contained highly sensitive, confidential dollar values related to transactions, refunds, and chargebacks involving minors between 2008 and 2014. Facebook said that these dollar values are highly sensitive information, the disclosure of which "would put Facebook at an unfair competitive disadvantage in dealing with its partners and competitors."

The Court disagreed stating, "Facebook provided no specific support for the argument that revenue figures from nearly five years ago would impact current partnerships or provide undue advantage to its competitors" and "[b]y contrast, this information would be of great public interest."

The court's ruling was also particularly of note as other courts have recently ruled to keep Facebook records under seal under the rubric of protecting trade secrecy. More specifically, late last year, several news outlets including, *CNN*, *The Guardian*, and the *New York Times* filed a motion in a California state court asking for documents to be unsealed in a case

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involving Facebook. While the news intervenors in that case made similar arguments - that Facebook's claims of trade secrecy and confidentiality did not justify sealing - that motion was unsuccessful. (Ultimately, the records in that case were released after the United Kingdom's Parliament used its legal powers to seize the internal Facebook documents.)

In contrast, the court's order in *Bohannon* underscores that courts should not permit trade secret exemptions to more broadly permit corporate secrecy. In its decision, the court disagreed with Facebook and stated that unsealing details regarding Facebook "would be of great public interest."

Indeed, after the ruling, CIR published two stories about the records. The stories sparked a flood of other reports to follow. Subsequent stories followed in *The New York Times*, *USA Today*, *Chicago Tribune* and other domestic outlets. The story also caught interest in outlets abroad including in countries like the United Kingdom, France, Russia, New Zealand, Dubai and China.

D. Victoria Baranetsky is general counsel at The Center for Investigative Reporting in Emeryville, CA. Ms. Baranetsky represented CIR in this action. Facebook was represented by Cooley LLP.

Letter to a Newer Media Lawyer

Don't Just Wait By The Phone

Dear Newer Media Lawyer:

Always – always – answer your phone. But never sit around waiting for it to ring.

Three distinct times in my so-called adult life, answering the phone has changed the trajectory of my career. And in between calls, I've looked for any way I could to keep moving forward on my own.

Charles Tobin

Exactly 30 years ago, on a Saturday during my last year of law school, the phone rang in my Gainesville, Florida apartment. It was an obnoxiously early hour. My voice was all rasp. I'd spent the night before at a watering hole with classmates, working out our frustrations over many pitchers of beer.

The upbeat Southern accent on the other end sounded as if he'd been up for hours. "Chuck, this is George Gabel in Jacksonville. I was just going through today's mail at the office (did I mention, this was a Saturday?). I saw your nice letter and resume. Would you like to come over and visit with me tomorrow (on a Sunday)?"

That fateful call led to a lifelong mentorship and dozens of my first appearances for journalists in court. George, now retired after an epic career as rainmaker and kingmaker, was one of those lawyers who made success look absolutely effortless. Clients flocked to him, judges waited on his every word, jurors nodded like bobbleheads when he argued. He chaired every group that mattered – and many that didn't. Except to the participants. And that mattered to George. He was the perfect, first role model for any young lawyer.

In my fourth year at George's firm, the phone rang again. "Chuck, this is Barbara Wall." I put down the accident-reconstruction report I had been studying – in addition to media work, we did personal injury defense (*wonderful* training in the basics of civil practice.) Barbara, now Gannett's Chief Legal Officer, at the time was the company's newsroom counsel at its Northern Virginia headquarters. I had been her summer associate during law school, and Barbara and I had remained in close touch.

Gannett had just created a position for an in-house litigator. The job called for hands-on defense of defamation and privacy cases in the dozens of states where Gannett operated. Before Barbara finished laying it out for me, I knew I had to take the position.

Eight years and 23 states' worth of *pro hac vice* admissions later, I returned home after an 8-hour flight. Before I put my bags down, the phone rang, and I ran to answer. It was Gregg

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Thomas, at the time head of Holland & Knight's media practice in Tampa. He was in D.C. for the night. Would I like to have dinner? I was totally spent, but Gregg and I had known each other a long time. And being gracious to the outside counsel who served our company was one of the countless lessons that Barbara – the second terrific role model I've had the incredible fortune to work for – had taught me.

So just an hour later, I found myself at The Palm enjoying cocktails with Gregg. He leaned in and said, "Well, are you ready to give up corporate life and come to work with our firm?" And so I did, and set off on 16 wonderful years at the firm's D.C. office, where I helped found its national media practice.

Each of these calls came after days, weeks, years of my concerted efforts to engage with our practice in any way I could. Student-meets-world. Lawyer-meets-world. Lawyer flings himself at the world with reckless abandon. Conferences, panels, speeches, committees, guest lectures, articles, lunches, dinners. You name it. I'd do it. I still do.

I don't care how busy a day I've already had, or how crummy I feel that day. If a client needs my ear, I will make time to listen. If a colleague shows up at my door with a problem, I will make time to work through it. If an ABA or MLRC leader asks me to participate in a program, I will make time to participate. If George Freeman asks me to write a column for this newsletter, I will make time to write it.

A client and good friend, CNN's lead in-house lawyer David Vigilante, recently put words to it in a way I've never been able to: the label "work-life balance" sets up an artificial contest between two concepts that do not belong separated. Especially for media lawyers. We need to accept that our whole life is happening all the time.

The label "work-life balance" sets up an artificial contest between two concepts that do not belong separated. Especially for media lawyers. We need to accept that our whole life is happening all the time.

Compartmentalization? Forget it – that's just not me.

Indeed, I have never missed one of my kids' soccer matches, school plays, debate tournaments, or honor society inductions. But my Blackberry or iPhone has always rested in my lap. And at almost each event, I've responded to a client or partner who needed something quickly. I have even stepped out into the hallway at two different Bruce Springsteen concerts to conduct last-minute pre-broadcast reviews for TV stations. I know, crazy, right?

I look at it this way: people honor me when they ask me to do stuff. They trust me with their worries. I should honor them back by responding when it's important to them, not just when it's convenient for me.

And I continue to get so much more than a career out of this line of work: I have made some of the most fabulous friends anyone could ever have. Real friends. Lifelong friends. Not simply "work" friends.

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As I labored in Jacksonville to overprepare for my earliest court appearances, Tim Conner, now with Holland & Knight and still one of my closest pals, sat right next to me. When I wanted to go crazy for my 50th birthday, I reached out to my longtime buddy Dave Giles at E.W. Scripps, and we traipsed across Europe to see Springsteen in Prague. Carolyn Forrest at Fox Television and I have mentored each other through our terms as ABA Forum Chair, and I will never attend a media bar gathering, or spend time in Atlanta, without trying to see her and her lovely husband Tim. At pivotal moments when I need fresh perspective and superb judgment, Kelli Sager at Davis Wright Tremaine will always be my trusted big sister in our bar. For years, Laura Prather at Haynes & Boone, my kid sister in this bar, and I have looked for work and social opportunities to share, and we regularly text with relish about each of our kids' milestones.

Answering my phone also has helped me spot the best emerging talent. I make time for law students whenever I can – you should too, we all remember what that insecure time was like. Responding to their calls, getting to know them, and ultimately introducing them to my partners, led to the brilliant hirings of associates Drew Shenkman (now in-house with CNN and doing fantastic work there) and Adrianna Rodriguez (enduring her 7th year working with me and flourishing nonetheless). Both are steadily branding themselves as energetic and superbly creative leaders of the next generation of media lawyers.

Just look at where answering my phone has gotten me now. Phoenix-based superstar media lawyer David Bodney, whom I've known for decades, called 5 years ago to invite me to an evening of jazz in NYC before the MLRC dinner. That began an annual ritual, and an even closer bond that led me to call David in 2017 and ask about combining practices. We are now in our second year as co-leaders of Ballard Spahr's media and entertainment group – working with the superlatively talented and kind lawyers from Levine, Sullivan, Koch & Schulz who merged into the firm shortly after me. Now, none of our phones ever stop ringing.

If you love this business, don't be afraid to let your work and life intertwine. Just be sure that when I call, you answer the phone!

Best wishes,

Chuck

Chuck Tobin is the co-Chair of the Media & Entertainment Law Group of Ballard Spahr LLP and is based in Washington D.C. In between answering his phone, he has served as: President of the MLRC Defense Counsel Section; Chair of the ABA Forum on Communications Law; Chair of the D.C. Bar Media Law Committee; Chair of the Florida Bar Media & Communications Law Committee; and Editor-in-Chief of the ABA journal LITIGATION.

10 Questions to a Media Lawyer: Rachel Matteo-Boehm

Rachel Matteo-Boehm is a partner at Bryan Cave Leighton Paisner's San Francisco office and co-leader of the firm's Media Litigation team.

1. How'd you get into media law? What was your first job?

My first job out of college was as a reporter for *The Dallas Morning News*. It was during a recession and I was a young reporter stuck covering the suburbs. I would see the newspaper's lawyer, Paul Watler of Jackson Walker, going back into the "glass offices" to talk about what I imagined was interesting stuff with the editors. That looked like a job I wanted, and I was already broke, so I figured – Why not go to law school? I can come back and be a reporter or I can be a media lawyer. When I graduated from law school, I went to work as an associate for Paul and his then-firm, Jenkens & Gilchrist in Dallas. I worked there for a year before I moved back to my home state, California, to be with my now-husband. During that year in Dallas, I got to work on several media matters for the *Morning News* and WFAA-TV. I loved it, and I got to work with my former newsroom colleagues in a new way. That was a hard job to leave. I am still a member of the Texas bar.

2. What do you like most about your job? What do you like least?

I believe so strongly in the importance of protecting free speech and First Amendment principles. I feel incredibly fortunate to have a legal practice that allows me do something I truly believe in every single day, with interesting clients, and most of the time litigating over important legal and policy issues. I also think our bar is the best – filled with talented, interesting lawyers who are also genuinely good people, many of whom I have known for many years. I really value the relationships I have made with media lawyers all over the country.

However, the all-consuming nature of this job can extract a heavy price. I have worked far, far too many weekends and holidays over the years. I also have a 13 year old daughter, so much of my so-called free time is spent on the many tasks that come with parenthood. I make time for exercise, but there's not much time left over for friendships or pursuing other personal hobbies/ interests, and that's not good.

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3. What's the biggest blunder you've committed on the job?

Believing I had unlimited stores of energy to work endlessly without a break. Without getting into details, let's just say I have learned, the hard way, that I can't just power through indefinitely without taking some time off here and there. This profession is a marathon, not a sprint, and stopping to recharge periodically is not optional if you want to practice for many years and continue to have the mental energy to practice at a high level.

Matteo-Boehm interviewing a worker in a pipe (it was raining) while a reporter for The Dallas Morning News.

4. Highest court you've argued in or most high profile case?

I argued three related appeals all on the same day, all before the same panel, in the Ninth Circuit last year (cross-appeals in *Courthouse News Service v. Planet* and a related appeal in *Courthouse News Service v. Yamasaki*, both cases on issues involving the First Amendment right of access to civil court records). The *Planet* case is now in its eighth year (and third appeal) and had a voluminous record, and the record in the *Yamasaki* case wasn't small either. Arguing three cases with such big records on the same day again was challenging to say the least.

5. What's a surprising object in your office?

An Underwood typewriter – No. 6 from 1935. It was a birthday gift from my husband, who discovered it in the basement of a building that was part of a real estate deal he handled. He bought it from the building owner, had it refurbished and it's now a working typewriter again. It reminds me of my newspaper reporter roots and my love of words and language, and ultimately, all things free speech.

I also have a betta fish in a tank on top of a bookshelf, who is excited to see me every morning when I arrive at the office (to be fed) and is generally a calming presence as I go about my often stressful days.

6. What's the first website you check in the morning?

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I don't normally check websites in the morning. I'm based in California and have a national practice, and am not a natural morning person. This means the first thing I do when I get to the office every morning, usually later than I should, is play catch-up, responding to emails or getting on the phone with people from the East Coast, who have already been at work for a few hours by the time I arrive. After I work my way backwards through the time zones, I catch up on my web reading – usually around lunchtime -- but I'm usually looking at content that is pushed to me (like MLRC's MediaLawDaily), or links to content that are emailed to me.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

I think a career in law is still a good idea for those who are good writers and critical thinkers, those who enjoy debate, and those who love going deep into a thought problem, and the intersection of policy and law. The advice I always give law students who come to me for career advice is to have a plan for what kind of law you want to practice, and to think not only about what subject area in which you want to practice but how your choice of a practice, and where you do it (e.g., large, medium, small firm, government, in-house work) will impact your day-to-day life in ways that are not always obvious in law school. Then go after what you want – don't let someone else decide what kind of law practice you will have for the lack of a purposeful choice on your part.

8. One piece of advice for someone looking to get into media law?

Be future-thinking. How will media law look in 10 years? Build the skills and expertise to thrive in that environment. But don't forget about fundamental principles, which you will also need to construct thoughtful and well-developed arguments to deal with the media law issues of the future.

9. What issue keeps you up at night?

I do a lot of work involving access to government records and proceedings, and believe deeply in government transparency. Due to budgetary constraints, there's less overall litigation in that area these day than there used to be – there is 2016 report by the Knight Foundation called "In Defense of the First Amendment" that discusses the problem – and I worry about what will happen to the law in this area with fewer lawsuits to keep those who would close proceedings or seal or withhold records accountable.

10. What would you have done if you hadn't been a lawyer?

There are a lot of things I'd like to do if I had multiple lives to lead. I am fascinated with space exploration, so maybe I would do something in that area. I am an adventurous eater, so another option would be something having to do with food. When I was young I wanted to be an advertising copyrighter. Something else in a creative field, or that would get me outdoors on a regular basis, is also appealing.