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MEDIALAWLETTER

Reporting Developments Through August 25, 2017

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MEDIA LAW RESOURCE CENTER

ANNUAL DINNER
WEDNESDAY, NOVEMBER 8, 2017

Trump and the Press:
A Conversation with Former Presidential Press Secretaries

Ari Fleischer
White House Press Secretary for President George W. Bush

Joe Lockhart
White House Press Secretary for President Bill Clinton

Dana Perino
White House Press Secretary for President George W. Bush

and

Mark McKinnon
Co-Executive Producer,
"**THE CIRCUS: INSIDE THE GREATEST POLITICAL SHOW ON EARTH**"
A Showtime television documentary about the 2016 presidential campaign

Moderated by:
Katy Tur
Anchor, MSNBC Live

Cocktail Reception at 6:00 P.M.
Sponsored by AXIS PRO

Dinner at 7:30 P.M.

Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Friday, October 20, 2017
Business Attire

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RSVP for Dinner by Friday, October 20, 2017

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Firm/Organization: _____

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Phone: _____ Fax: _____

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____ Table(s) for 12 at $5,940 each

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MLRC
DEFENSE COUNSEL SECTION

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Please list names of individuals attending below (print clearly)

Name: _____ E-mail: _____

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Name: _____ E-mail: _____

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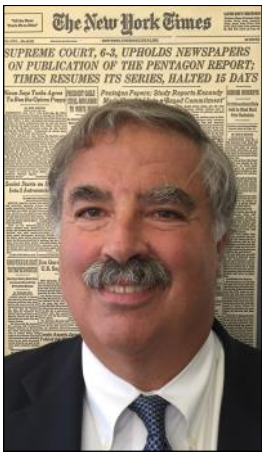
From the Executive Director's Desk

No Rest for Media Bar in the Trump Era

Busy Summer Moves Into Busy Fall; Terrific London Conference Ahead

Although summer is supposed to be a relaxing and not busy time, many lawyers will say that's a myth. Indeed, this summer has proved to be as busy, if not busier, that the seasons which preceded it. Herewith a brief summary of some of the projects the MLRC has been working on.


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

George Freeman

Where else to start but on the Trump front. As many of you know, relations between the White House and the press have been at an all-time low, and the President has made threats and criticisms against not only the media as a whole, but also individual journalists, on an almost daily basis. Therefore, we thought it important to be prepared in case the Executive Branch tries to bar the press from events typically open to the media or seeks to keep certain "unfavorable" reporters or publications from press conferences or other events generally open to the press. In response, our Newsgathering Committee has drafted a model brief which can be used in any of such instances. Framed as a brief in support of injunctive relief, it sets forth the major arguments and case law that might apply when the press is denied access to the executive branch, including First Amendment claims for denial of access and retaliation.

But if, as almost seems inevitable, the Administration does strike out against the media as a group or individual reporters it doesn't like, we hope this model brief will allow us to hit back swiftly and efficiently.

So far, our fears haven't quite come to fruition. But if, as almost seems inevitable, the Administration does strike out against the media as a group or individual reporters it doesn't like, we hope this model brief will allow us to hit back swiftly and efficiently. That said, we hope that no one starts such a litigation without some consultation with the broader media bar community, as I believe one of the biggest mistakes we can make is to pick fights unwisely – what worse than a litigation which does not have public support and may be a loser. And my thanks go to all – both MLRC staff, including our fellow Allison Venuti, and members of the Newsgathering Committee – who worked on this important and worthwhile project.

* * *

A second somewhat Trumpian project we have worked on is essentially the creation of a

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running log of instances around the nation where journalists have been denied access to public information. We are undertaking this effort, which launched in August, in conjunction with the National Press Club Journalism Institute. We are looking for instances of denials of access on a federal, state or local level. While I would expect that denials or eternal delays in getting public documents under FOIA or state sunshine laws will lead the way, we are also seeking examples of court sealings, closed doors to courts or public meetings, and refusals by public officials to respond to inquiries and the like.

Please use the form if you are aware of any of these instances. Also, feel free to advise non-members who might be subject to governmental information rejections of this new vehicle. It will be used not only as a historic log, but as evidence that might be helpful when such issues are negotiated or litigated. I also would point out that this project is not duplicative or in conflict with one initiated by the Committee to Protect Journalists; their project deals more with physical threats or attacks on journalists – so, in fact, the two studies are complimentary. Additionally, the information on each will be publicly available and certainly can be used by all other media groups and organizations. Kudos to Deputy Director Jeff Hermes for developing this project together with the NPC.

A second somewhat Trumpian project we have worked on is essentially the creation of a running log of instances around the nation where journalists have been denied access to public information.

* * *

A project I am particularly excited about is a polling and research study aimed at better understanding public opinion of press freedom and the First Amendment. Financed largely by the Democracy Fund, led by the RCFP and executed by professional research firms, I am acting as an advisor to the project. If we are going to effectively rebut the President's quotidian bashing of the press, and his propagandist efforts to minimize and delegitimize the press, understanding why so many in the public have bought into his fake arguments is crucial. Indeed, the findings might well give rise to the message we should affirmatively be putting out.

As it is now planned, the project will start with a few focus group meetings – in Kansas City and Orlando – which will help develop questions for a national polling effort. I have worked on the outline for the proposed focus group discussions, and they will likely cover a wide range of issues, from how people get their news and if and how readers evaluate news sources and platforms to what the role and responsibility of the media should be. In a intentionally open-ended way, the focus groups also will be questioned about their thoughts on Trump's criticisms of the press, such as his fake news mantra, anonymous sources and leaks. While there have

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been many studies in past years measuring trust in journalism and views of different news entities, this project will aim to better understand how we can rebut the attacks on the media and ultimately rebuild confidence in the value of a free and independent press.

* * *

Looking forward, our London Conference is less than a month away. Deputy Director David Heller has put together a terrific program, and already we have over 200 registrants. The first and last sessions are particularly noteworthy. The first panel is entitled "Brexit, Trump & the Rise of Populism", and will explore why these movements were not well predicted – or perhaps even covered – by the media, and what these developments mean for the press – and democracy – on both sides of the pond. A particularly distinguished panel will discuss these issues, including John Micklethwait, Editor in Chief of Bloomberg News, James Fallows of the Atlantic, and Judge Judith Gibson from New South Wales, Australia.

The last session should be rollicking – not an oxymoron when it comes to MLRC programs. It will feature an Oxford-style debate on invasion of privacy, an area where there is a vast difference between American and European law. It will pit Max Mosley and Fraser Campbell supporting the interests of individual privacy rights against Chip Babcock and Liz McNamara arguing for broad freedom of expression. Mosley, of course, was the plaintiff in a privacy suit against the News of the World about an article headlined "F 1 Boss has Sick Nazi Orgy with Five Hookers," accompanied by a sub-head of "Son of Hitler-loving fascist in sex shame." The newspaper had exposed his involvement in what it called a Nazi-themed sadomasochistic sex act involving several female prostitutes, and published a video of the festivities. Ruling that there was no evidence of a Nazi element to the sexual acts, and that this sort of sexual behavior was generally not a matter of public interest, Judge Eady ruled in favor of Mosley and awarded nearly $100,000 in damages.

Max Mosley, plaintiff in a privacy suit against the News of the World, will take on American lawyers in an Oxford-style debate on privacy rights.

Other highlights will be a brief talk by a charismatic Judge of the European Court of Human Rights, Ganna Yudkivska, leading off an open group session on Privacy and the Press in the

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Digital Age, and a program on National Security vs. the Press, a very timely topic, which will discuss the possibility of prosecutions of journalists under the U.S. Espionage Act, 100 years old this year, and the British Official Secrets Act. Add to those and other interesting panels our social events and the energy of London, and you have a recipe for a wonderful few days. On Sunday, Mark Stephens is hosting a Sunday brunch at his firm, right over the Tower Bridge and overlooking the Thames. Sunday evening will be a fun reception at Bloomberg's colorful offices. And Monday, after a full day of programs, Hiscox is sponsoring a not-to-be-missed reception at the National Gallery, right above Trafalgar Square, which will include not only food and drink, but tours of the artwork.

Some London Conference goers will head out to Olympic Stadium to see the Tottenham Hotspurs. Above, star forward Harry Kane.

Finally, as two years ago, we are planning on having a small but hardy group travel to the London Olympic Stadium on Saturday early afternoon to see an English Premier League match between Tottenham Hotspur and West Ham United. Tottenham finished second in the league last year – and, indeed, has been one of England's hottest teams since the game two years ago which we attended, when they routed heavily favored Manchester City. On the other hand, West Ham has a storied history, but at this writing is languishing at the bottom of the standings. Tickets are very hard to come by- we probably will only have 5-6 available – but if you're interested in going please email me and I will distribute them at cost on a first come, first serve basis.

* * *

Looking further ahead to Nov. 8, we have a great program lined up both for the Annual Dinner and the Forum, which precedes it. At the Dinner, which is back at the Grand Hyatt this year, the program will be on Trump and the Press and will feature three or four former press secretaries commenting, based on their personal experiences, on today's fraying relationship between the President and the "enemy of the American people." Current FOX political

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commentators Dana Perino and Ari Fleischer, both of whom were press secretaries for George Bush 43 (boy, does he look better every day) and Jay Lockhart, press secretary for Bill Clinton, will be on the panel. Joining them will be Mark McKinnon, producer of "The Circus," a documentary about the Trump campaign, who also has been a political consultant for political leaders of both parties. We hope to show some clips of Trump and the press from his documentary to kick-off the program. Our moderator will be Katy Tur of NBC and a host of her own show on MSNBC, who was the target of much Trumpian abuse during the campaign.

The subject of our Forum, at 4pm the afternoon of the Dinner will be Is Libel Back? That seems to be a pretty pertinent question in light of the seeming increase in libel filings in the past year. We will get some quantitative data on that question and, mainly, discuss why this trend is happening. Have Trump's attacks on the media emboldened plaintiffs and put the media in a weaker and more vulnerable position? As a result, do plaintiffs think juries are more likely to rule against the media, and was Trump's fake news campaign a factor in ABC's settling the Pink Slime case for record shattering damages? Is the 24/7 news cycle, the internet's need for speed or leaner news staffs responsible for more mistakes being made? Is financing of such suits by billionaires maybe seeking revenge on a publication contributing to this trend? And what are we going to do about all this?

These and other questions will be discussed by a great panel of Bob Lystad, who will report on these trends from an insurance co. point of view; David McCraw of The New York Times, who will discuss the recently filed and dismissed libel case against The Times by Sarah Palin; Lynn Oberlander, who will look at these questions from the digital front; Liz McNamara, who litigated the UVA trial and has a national perspective on these issues; and Eriq Gardner of The Hollywood Reporter, who covered the Pink Slime case and many other libel matters in the past year. As usual at our Forum, there will be plenty of opportunity for audience participation.

So it's been a busy summer, and looks to be a very interesting Fall.

We welcome responses to this column at gfreeman@medialaw.org; they may be printed in next month's MediaLawLetter.

Save the Date: September 13 at 1-2 p.m. EST

The Inaugural Conference Call of MLRC's New Insurance Committee

The call will include a presentation from Chad Milton of Media Risk Consultants on "Insuring the Media in the 21st Century."

MLRC new Insurance Committee, chaired by Jim Borelli, Eric Brass and Betsy Koch, will help members navigate the media insurance market, understand the nuts and bolts of coverage, and knowledgeably advise clients on insurance challenges in the 21st century.

To join the call or committee, email: medialaw@medialaw.org. All MLRC members are welcome to participate.

New MLRC Committee Formed to Cover Media Insurance Issues

Topics Include Claims Trends, Emerging Exposures, Risk Management and Coverage Needs

For many people, including media attorneys, insurance is one of the mysteries of the universe. Earlier this year work was begun to shed brighter light on this relatively dark corner with the formation of the MLRC Insurance Committee.

The committee is co-chaired by Betsy Koch, Eric Brass and Jim Borelli. The goal is to bring together through regular committee meetings media defense counsel, in-house attorneys and insurance professionals to consider issues and developments of importance to the industry in hopes that such dialogue will lead to greater understanding and knowledge for all participants.

The goal is to bring together defense counsel, in-house attorneys and insurance professionals to consider issues and developments of importance to the industry in hopes that such dialogue will lead to greater understanding and knowledge for all.

It is envisioned that as the work of Committee proceeds, it will contribute to MLRC programming and publications and generate new members for the MLRC, particularly within the media insurance community. Topics likely to be discussed include claims trends, emerging exposures, risk management and coverage needs and coordination.

The initial meeting of the MLRC Insurance Committee will be by conference call on Wednesday, Sept. 13, at 1-2 pm Eastern, Noon to 1 pm Central, 11 am to Noon Mountain, and 10 -11 am Pacific. All MLRC members are welcome to attend. Call-in to (888) 291-0312; code: 8788 869 #

The call will feature Chad Milton speaking on "Insuring the Media in the 21st Century." Chad's presentation will be followed by a discussion of topics for future calls, other possible committee activities and projects, and recruiting additional members. So bring your ideas, suggestions and questions.

Court Resurrects Libel Suit Against NY Times Over Slavery Comment

By David McCraw

A libertarian professor who was accurately quoted as saying slavery was "not so bad" should be allowed to proceed with discovery in his libel suit against The New York Times, the Fifth Circuit ruled in August. *Block v. Tanenhaus*, No. 16-30966 (5th Cir. Aug. 15, 2017).

The circuit's decision reversed a district court's order dismissing the case under the Louisiana anti-SLAPP law. The court found that the plaintiff, Loyola University Professor Walter Block, had created a genuine issue of material fact as to whether The Times defamed him in the way it presented the quotation. At the same time, the court sidestepped ruling on the long-running issue of whether the anti-SLAPP statute should apply in federal courts.

The crux of Block's complaint is that he was portrayed as a racist and supporter of slavery in a January 2014 story about the libertarian thinkers who were backing Rand Paul for president. While Block concedes saying slavery was "not so bad" – in fact, he has repeated it several times on his blog – he faults The Times for failing to make clear that he opposes slavery because it is involuntary.

The story contained two references to Block. An early paragraph said, "One economist, while faulting slavery because it was involuntary, suggested in an interview that the daily life of the enslaved was 'not so bad – you pick cotton and sing songs.'" Later, the article continued: "Walter Block, an economics professor at Loyola University in New Orleans who described slavery as 'not so bad,' is also highly critical of the Civil Rights Act. 'Woolworth's had lunchroom counters, and no blacks were allowed,' he said in a telephone interview. 'Did they have a right to do that? Yes, they did. No one is compelled to associate with people against their will.'"

The Times argued that Block's reference to picking cotton and singing songs showed that Block was not talking about some sort of hypothetical voluntary slavery but instead slavery as it was practiced in the American South. The Fifth Circuit rejected that argument, saying "[S]tating that cotton-picking and song-singing are 'not so bad' in themselves, if done without coercion, is not at all the same as that chattel slavery was 'not so bad'." As the court saw it: "If the context of his statement is what he alleges, Block's statement made clear that he would only describe slavery as 'not so bad' to the extent that, unlike chattel slavery, it was voluntary."

The panel also rejected The Times's argument that its earlier paragraph, in which it said that Block objected to slavery, put the quotation into context. The panel found that there was an issue of a fact as to whether a reasonable reader would connect the first paragraph, in which Block was not named, to the second paragraph about Block, which appeared much later in the piece.

The Times was similarly unsuccessful in arguing that the inclusion of the two paragraphs, which fully captured Block's views, showed that there was no actual malice under *Times v.*

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Sullivan. The court noted that Block was a public figure and had to meet the *Sullivan* test but said without further explanation that the actual malice argument failed because there was a "genuine issue of material fact as to whether the NYT altered the meaning of the quotation."

The court did not directly address The Times's argument that under Louisiana law public figures cannot make claims for libel by implication. The Times pointed out that Block's complaint explicitly asserted that the story implied that he was a racist. Instead of addressing that strand of state law, the Fifth Circuit found that "describing someone as believing that chattel slavery is 'not so bad' has a natural tendency to harm the person's reputation."

It seems clear from the decision that the Fifth Circuit is looking to address hether an anti-SLAPP statute applies in federal court. Ultimately the panel concluded that Block had forfeited the argument by not raising it earlier in the litigation. The court nonetheless included a lengthy footnote cataloging how courts in the circuit have grappled with the issue.

It was the second time the case has been before the Fifth Circuit. The district court initially dismissed the case on an anti-SLAPP motion in 2015. Block appealed, and a different panel at the Fifth Circuit remanded the case so the district court could clarify whether it had improperly made factual determinations in ruling for The Times. On remand, the district court again dismissed, saying that no factual disputes had to be resolved to find that Block had failed to present a viable defamation claim.

The Fifth Circuit is looking to address whether an anti-SLAPP statute applies in federal court … but concluded that Block had forfeited the argument by not raising it earlier in the litigation.

Block, who describes himself as an "Austrian school economist and anarcho-libertarian philosopher," is a prolific commentator on libertarian politics and economic theory. He holds a Ph.D. in economics from Columbia University, has taught at Loyola University since 2001 and is currently a senior fellow of the Ludwig von Mises Institute in Alabama, which vigorously opposes government intervention in the economy. No stranger to controversial statements, Block adheres to a notably absolutist form of libertarianism, and has written books and articles defending, for example, the economic roles of pimps and corrupt policemen and "voluntary slave contracts" and describing the harm posed by government institutions like the Federal Reserve. He previously found himself at the center of negative attention at Loyola following a lecture in which he stated, in response to a question, that one possible explanation for wage disparities between whites and African-Americans might be lower IQs among the latter group.

After Rand Paul dropped out of the presidential race, Block became the leader of a pro-Trump libertarian group.

The Times and two reporters named as defendants are represented by Lori Mince and Alysson Mills of Fishman Haygood in New Orleans and The Times's in-house counsel, David McCraw and Ian MacDougall. The plaintiff is represented by Mahtook & LaFleur of Lafayette, La.

Media Coalition Argues That Georgia's Anti-SLAPP Law Applies in Federal Court Diversity Actions

Carbone v. Cable News Network on Appeal to 11th Circuit

A media amicus coalition, including MLRC and 24 other media organizations, filed a brief asking the U.S. Court of Appeals for the Eleventh Circuit to rule that the Georgia anti-SLAPP statute applies in diversity actions in federal court.

The issue is currently the subject of a circuit split and could ultimately be headed to the Supreme Court: The First, Fifth and Ninth Circuits have all ruled that state anti-SLAPP laws do not conflict with federal procedural rules and thus apply in federal court.

The D.C. Circuit, in contrast, has held that anti-SLAPP laws fatally conflict with the Federal Rules of Civil Procedure that govern motions to dismiss and for summary judgment. See Abbas v. Foreign Policy Group, LLC, 783 F.3d 1328 (D.C. Cir. 2015) ("Federal Rules 12 and 56 answer the same question as the D.C. Anti-SLAPP Act .... A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision.").

Judge Kozinski on the Ninth Circuit has also criticized his court's ruling on the issue and urged, thus far unsuccessfully, that it be reconsidered. See Makaeff v. Trump Univ., LLC, 715 F.3d 254, 272 (9th Cir. 2013) (Kozinski, J., concurring).

As reported in February, the district court in Carbone v. CNN, a media defamation case, followed the minority position and ruled that the Georgia anti-SLAPP law conflicts with Federal Rule 12(b)(6) and thus could not be applied in a diversity action in federal court. See Carbone v. Cable News Network, 1:16-CV-1720 (N.D. Ga. Feb. 14, 2017) (contrasting the federal "plausibility" standard with the Georgia statute's "probability of prevailing" standard.)

CNN has now appealed to the Eleventh Circuit, and the applicability of the anti-SLAPP statute is among the issues presented. Focusing on that issue, the media amicus brief argues that applying the Georgia anti-SLAPP in federal court would protect valuable speech on matters of public concern and that, under settled legal principles, the Georgia anti-SLAPP law does not conflict with the Rules of Federal Procedure and, in fact, advances the aims of the Erie doctrine.

As the brief explains, federal courts can and should give full effect to both the Federal Rules and state anti-SLAPP provisions in diversity cases, because the two establish complementary rather than contradictory grounds for resolving claims. While Federal Rules 12 and 56 set out minimum requirements that claimants must satisfy at the pleading and pretrial stages, neither

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guarantees claimants an affirmative right to move forward with their claims if they satisfy the Rules' requirements. Thus, just as various other federal provisions identify additional grounds for disposing of a case pretrial -- for example, Rule 9(b)'s particularity requirement for fraud claims, and the Private Securities Litigation Reform Act's special burden placed on certain securities-law plaintiffs -- anti-SLAPP provisions like Georgia's similarly reinforce the Federal Rules by establishing additional requirements that plaintiffs must satisfy to proceed with litigation that endangers press freedom. In short, the state anti-SLAPP provisions supplement the Federal Rules; they do not contradict them.

Moreover, applying the anti-SLAPP rules in federal court serves the goals of the Erie doctrine. Doing so ensures the evenhanded treatment of speakers regardless of whether they target in-state or out-of-state entities for criticism, and dissuades the targets of such criticism from engaging in forum-shopping by choosing to sue in federal court, outside the anti-SLAPP law's protective sphere.

Recent developments underscore the importance of this recurring issue. Just days after the media coalition filed its amicus brief, the Fifth Circuit addressed -- but ultimately declined to resolve -- the applicability in federal court of Louisiana's anti-SLAPP statute, in a defamation suit against the New York Times. See Block v. Tanenhaus, (5th Cir. Aug. 15, 2017).

The Fifth Circuit held that the defamation plaintiff had forfeited the argument that the anti-SLAPP statute did not apply, and therefore assumed for purposes of the appeal that it did -- not the first time that the Fifth Circuit ducked the issue, see id. at n.2 (citing cases). And then, just a few days after that, a Bankruptcy Court Judge in the Southern District of New York, presiding over the Gawker Media bankruptcy, held that certain aspect of California's anti-SLAPP statute could not be applied to two defamation claims against the debtor company. As this quick succession of decisions illustrates, litigants are now well-aware of the open question surrounding the application of anti-SLAPP laws, and will continue to press the issue until it is definitively resolved.

The media brief was written by Peter C. Canfield, Jones Day, Atlanta; and Yaakov M. Roth, Anthony J. Dick, and Vivek Suri, Jones Day, Washington, D.C., on behalf of ABC, Inc.; Advance Publications, Inc.; American Society of News Editors; Association of Alternative Newsmedia; Association of American Publishers, Inc.; Atlantic Media; Bloomberg, LP; Cox Media Group; Dow Jones & Company, Inc.; The Economist Newspaper Limited; Gannett Company, Inc.; The Georgia Press Association; The Media Law Resource Center, Inc.; Meredith Corporation; Motion Picture Association of America, Inc.; The National Press Photographers Association; National Public Radio, Inc.; NBCUniversal; New World Communications of Atlanta, Inc.; The New York Times Company; The News Media Alliance; Online News Association; The Reporters Committee for Freedom of the Press; Univision Communications Inc.; and The Washington Post.

Bankruptcy Court Rules California Anti-SLAPP Statute Is Not Applicable in Federal Court

Statute Is Substantive, But Conflicts with Federal Rules of Civil Procedure

The New York court in charge of Gawker's Chapter 11 bankruptcy ruled that California's anti-SLAPP law conflicts with the Federal Rules of Civil Procedure and cannot be raised in federal court. In re Gawker Media LLC, No. 16-11700 (S.D.N.Y. Bankr. Aug. 21, 2017) (Bernstein, J.). The ruling came in the context of a creditor's objection to the treatment of his defamation claims against Gawker in the liquidation plan.

Background

In June 2016, Gawker filed for bankruptcy in face of the $140 million verdict in the Hulk Hogan trial. Journalist Charles C. Johnson and his website GotNews, had a pending defamation action against Gawker in California state court. At issue in that case were several critical articles about Johnson. One article entitled "Which of These Disgusting Chuck Johnson Rumors are True?" included an unsubstantiated tip that "Chuck had a 2002 bestiality charge expunged from his record due to his being a minor, 14 at the time." Another article entitled "What Is Chuck Johnson, and Why? The Web's Worst Journalist, Explained" accused Johnson of publishing false stories.

The liquidation plan contains a reserve of $1.5 million for Johnson's claims. Johnson filed an objection, estimating the value of his claims at $20 million each. Debtors sought to disallow the claims entirely, arguing that Johnson had no probability of success under the California anti-SLAPP statute as the Gawker articles were opinion, published without actual malice, or protected by Section 230.

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The bankruptcy court rejected Johnson's argument that his claims were "personal injury torts" outside the scope of the Bankruptcy Code. The court held they could be resolved in the liquidation as "core matters," noting that "a bankruptcy court may adjudicate claims bearing the 'earmarks of a financial, business or property tort claim, or a contract claim' even where those claims might appear to be 'personal injury torts' under the broad view."

Applicability of the California Anti-SLAPP Statute

Looking at the text and purpose of the California anti-SLAPP statute, the court concluded it was substantive in nature under the Erie doctrine. But it could not apply in federal court because the anti-SLAPP law conflicts with the federal rules governing summary judgment and motions to dismiss. Following the reasoning of the D.C. Circuit in *Abbas v. Foreign Policy Group,* 783 F.3d 1328, 1335 (D.C. Cir. 2015), the court concluded that "At bottom, the literal application of the California statute would require a federal court to dismiss a lawsuit that would not be subject to dismissal under Federal Rules 12 and 56." Moreover, applying the anti-SLAPP law would force the court to "decide disputed factual issues without the benefit of a trial and its attendant protections not the least of which is the ability to cross-examine witnesses" raising questions about the constitutionality of ant-SLAPP relief. *Citing, e.g., Davis v. Cox,* 351 P.3d 862, 874 (Wash. 2015) (declaring the Washington State anti-SLAPP law unconstitutional).

Libel Suit Over New York Times Editorial Survives Motion to Dismiss

A libel suit filed by the Murray Energy Corporation and five of its coal mines against the New York Times survived a motion to dismiss. The Marshall County Coal Co. et al. v. The New York Times Company, No. 5:17-CV-79 (N.D. W. Va. Aug. 10, 2017) (Bailey, J.).

At issue is an April 24, 2017 New York Times editorial entitled "Money Talked Loudest at Donald Trump's Inaugural" which criticized coal company executive Bob Murray and his contributions to President Trump's inauguration. The lawsuit alleges two sentences in the editorial are defamatory. 1) That Murray, owner and operator of the plaintiff corporations, "earned infamy when he falsely insisted that the 2007 collapse of his Crandall Canyon mine, which killed six miners, was due to an earthquake, not dodgy mining practices." 2) That Murray Energy "is a serial violator of federal health and safety rules."


Money Talked Loudest at Donald Trump's Inaugural

By THE EDITORIAL BOARD APRIL 24, 2017

April 24, 2017 New York Times editorial "Money Talked Loudest at Donald Trump's Inaugural" which criticized coal company executive Bob Murray and his contributions to President Trump's inauguration.

Applying the Iqbal/Twombly "plausibility" pleading standard, the district court held that plaintiff adequately pled falsity. The court observed that a motion to dismiss is not the proper stage to judge the veracity of a claim – the allegations simply must be plausible. Thus even where plaintiff conceded its companies have violated federal health and safety rules, the editorial could reasonably be read as implying that Murray was worse than other mining companies who have also run afoul of safety rules.

As to actual malice, the allegation that the New York Times did not fact check the editorial created a plausible basis for actual malice, especially where the editorial at issue was not subject to deadline pressure. The court's cursory review of the actual malice pleading stands in stark contrast to Judge Rakoff's detailed examination of the issue in Palin *v. New York Times*

Fair Report Privilege Protects News Article About Public Matrimonial Hearing

A defamation suit by a former law firm associate against the *New York Daily News* over an article describing his behavior at a matrimonial hearing was dismissed pursuant to New York's statutory fair report privilege. *Zappin v. Daily News, L.P., D/B/A The Daily News*, No. 16 Civ. 8762 (S.D.N.Y. Aug. 9, 2017) (Failla, J.). The decision clarifies that New York's fair report privilege applies to fair and accurate reports about public matrimonial hearings.

The plaintiff had argued that a 1970 New York Court of Appeals decision – coincidentally also against the Daily News - categorically carved out matrimonial proceedings from the privilege. See *Shiles* v. *News Syndicate Co.*, 27 N.Y.2d 9 (1970). In sweeping language, the Court of Appeals in *Shiles* stated that the fair report privilege was inapplicable to "the publication of a report of matrimonial proceedings." *Shiles,* however, concerned a news report about information in sealed matrimonial records. Conducting a "more nuanced inspection" of the 1970 decision, the federal district court held there was no bar to applying the fair report privilege to public matrimonial proceedings, noting that Section 235 of New York's Domestic Relations Law distinguishes between matrimonial records, which are presumptively sealed, and matrimonial proceedings, which remain open to the public unless closed by the court.

While the article did contain one minor factual error, the court concluded that the statement in question, and the article as a whole, remained substantially fair and accurate.

At issue in the instant defamation suit was a short article entitled "Lawyer fined $10,000 for misusing legal license 'feigned an assault' in courtroom, judge says." The plaintiff, who was representing himself in a bitter divorce from another big law firm associate, had already been fined for misconduct. The *Daily News* article recounted an evidentiary hearing over plaintiff's claim that opposing counsel knocked him to the floor with an elbow during a court appearance. After witnesses refuted plaintiff's claim, the judge in the matrimonial proceeding concluded that the concluded that the plaintiff had "feign[ed] an assault" and dismissed plaintiff's histrionics as another "bizarre" event in the case.

Looking at the news article, the hearing transcript, and sanctions decision, it was clear that the Daily News report was substantially accurate as a matter of law. While the article did contain one minor factual error – misstating whether the plaintiff had admitted using a particular phrase during the alleged elbowing incident – the court concluded that the statement in question, and the article as a whole, remained substantially fair and accurate.

The newspaper was represented by Matthew Leish, Vice President & Deputy General Counsel, Daily News, L.P. Plaintiff represented himself.

News Media Coalition Pushes Back Against Government Monitoring of Journalists' Drone Flights

By Charles D. Tobin

Nearly two dozen news organizations have asked the Federal Aviation Administration to resist recommendations from law enforcement and national security agencies that would enable the government to monitor and identify the operators of all commercial drones flights in the U.S. – including the emerging fleet of news drones.

The News Media Coalition – consisting of 21 news companies including the Washington Post, the New York Times, the Associated Press, ABC, NBC, Scripps Media, Gannett, Tegna, and Sinclair – and nonprofit organizations including the MLRC, are participating in a multistakeholder group convened by the FAA. The FAA assembled the group earlier this year as an advisory rulemaking committee (ARC). It is tasked with providing FAA Administrator Michael Huerta, at the end of September, high-level recommendations for a proposed regulation on the remote identification and tracking of unmanned aircraft systems, or "drones."

The idea for a regulation permitting the government to track all drone traffic – which obviously would threaten drone journalists' independence from government oversight – emerged at the end of last year. The FAA was preparing to release for public comment another proposed rule to permit flight operations over people, a capability that newsrooms are eager to have and that currently requires a cumbersome FAA waiver process. On the eve of that release, the FBI, Department of Defense, Department of Justice, and state and local police agencies expressed alarm to the FAA and the White House that terrorists could begin to use drones as weapons over crowds of people around the U.S. Because of those concerns, the FAA delayed releasing the overhead-flights rule and announced the formation of the ARC.

Every few weeks for the past two months, the FAA has had the ARC – which, in addition to law enforcement, federal agencies and the Armed Forces, includes commercial-aviation associations, drone manufacturers, software developers, remote-aircraft hobbyists, and toy manufacturers – meet to discuss proposals for the technology and implementation of a new tracking system, and to debate policy considerations. The high-level questions raised in these meetings include: Should manufacturers or drone users bear the cost of any new tracking technologies? Should drones be continuously monitored, or should monitoring be triggered by a specific event? What information, if any, should the FAA make available to the public about drones that are being tracked? Should drone users be required to keep data for a prescribed period of time?

In these meetings, the News Media Coalition, while acknowledging that public safety is an important consideration and is not a partisan issue, has raised red-flag concerns with the First

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Amendment implications of government surveillance of news drones. With the drafting of the ARC's report to the Administrator now underway, and the final report due on September 30, the News Media Coalition late last month sent the ARC a written statement of its concerns. They argue that the FAA should include the following points in the Administrator's report:

- Journalists should not be required to routinely file flight plans with the FAA for drones coverage, especially when covering breaking news. Some proposals in the ARC would require all commercial drone operators to pre-file some sort of flight plan.

- Public safety officials should have "probable cause" or "reasonable suspicion" before accessing any FAA database containing information about a drone. Simply operating a drone with a camera should not open up the drone or the operator to government tracking.

- Any new rule should not require journalists to alter their own retention practices for news materials.

- The FAA should maintain a log where federal, state or local officials would record instances, and their reasons, whenever they access the FAA database for more information about a drone.

- The FAA log should be subject to FOIA.

The News Media Coalition, assembled in 2014, successfully persuaded the FAA to include a number of journalist-friendly provisions in the final FAA rule released in 2016 that currently governs drone operations. Also in 2016, the coalition persuaded another multistakeholder group, convened by the Obama Administration, to develop voluntary privacy guidelines for drone operators, to include a complete carveout for newsgathering in the best practices document the group produced.

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The Road to Destruction of Section 230 May Be Paved with Well-Intended Anti-Trafficking Bill

By Allison Venuti

Senate Bill 1693, also known as the Stop Enabling Sex Trafficking Act of 2017 (SESTA), was recently presented to the Senate with noble intent, but may come with severe consequences for free speech and emerging internet platforms.

Background

SESTA was proposed by Senator Rob Portman (R-OH) with bipartisan support from 26 senators including McCain (R-AZ), Rubio (R-FL), Cruz (R-TX), McCaskill (D-MO), and Blumenthal (D-CT). The legislation would amend § 230 of the Communications Decency Act and well as the Trafficking Victims Protection Reauthorization Act of 2008 (18 U.S.C. §§ 1591, 1595) (TVPRA) in an effort to ensure websites facilitating sex trafficking are able to be held liable criminally (§ 1591) and civilly (§ 1595). Representative Ann Wagner (R-MO) has also proposed a more broad (and arguably more problematic) H.R. 1865 to the House to amend the CDA and anti-trafficking laws, but this article will focus on the Senate's efforts, which could create more collateral damage while failing to battle the inarguable horrors of sex trafficking.

The legislation would amend § 230 of the Communications Decency Act to ensure websites facilitating sex trafficking are able to be held liable criminally and civilly.

SESTA is not the first attempt to combat sex trafficking online. Lawmakers and prosecutors, both federal and state, have attempted to curtail and punish websites with adult classified pages for their alleged connections to, and possible assistance of, sex trafficking advertised online. Backpage.com is the most notorious target of these efforts, though its US adult section was closed in January 2017. Washington, Tennessee, and New Jersey each drafted a law against advertising sex trafficking, but the site avoided liability each time through § 230's intermediary liability protections and First Amendment defenses. See *Backpage.com, LLC v. McKenna*, 881 F. Supp. 2d 1262 (W.D. Wash. July 27, 2012); *Backpage.com, LLC v. Cooper*, 939 F. Supp. 2d 805, 813 (M.D. Tenn. Jan. 3, 2013); *Backpage.com, LLC v. Hoffman*, No. 13-cv-03952 (D.N.J. Aug. 20, 2013).

In 2015 Congress stepped in with the Stop Advertising Victims of Exploitation (SAVE) Act, rolled into the Justice For Victims of Trafficking Act of 2015. The statute amended the TVPRA's criminal provision (§ 1591) to include "advertising" for sex trafficking as culpable conduct. Generally, punishable acts under the TVPRA, such as recruitment or patronization,

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require knowledge that the action is related to sex trafficking, or benefitting from the action with knowledge *or reckless disregard* of its relationship to sex trafficking. Advertising, however, requires acting with knowledge; reckless disregard is insufficient. Not allowing reckless disregard to apply to advertising helped assuage those concerned that the imposition of a lower standard would be too burdensome to place on online intermediaries. The law obviously targeted Backpage's ads, and the site attempted to contest the law as it had with the state efforts. But the SAVE Act's constitutionality remains in question because Backpage's case was dismissed for lack of an injury-in-fact. See *Backpage.com, LLC v Lynch*, No. 1:15-cv-02155 (D.D.C. 2016).

Last year, three victims of sex trafficking brought claims against Backpage in Massachusetts in *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. Mass. Mar. 14, 2016). But once again the online classified website prevailed. The plaintiff/appellants, three Jane Does, raised state law and federal claims under the TVPRA civil provision.

Judge Selya's opinion for the First Circuit held that the district court properly dismissed their claims while noting the difficulty of the decision as proper application of the law left the victims without relief. The Court noted the tension between CDA § 230 and the TVPRA and found that the intermediary liability protections under § 230 precluded civil claims under the TVPRA. While Backpage used some methods which may have made it easier for sex trafficking to occur on their site—such as allowing unverified emails and stripping metadata from photographs—these actions fell under the "traditional editorial functions."

The plaintiffs argued Backpage was not only an intermediary but an active "participant in a venture" under the law. However, while "participation in a venture" was yet to be interpreted in a published opinion, the plaintiffs' claims clearly treated Backpage as a publisher. Moreover, the plain language of the CDA only exempted criminal law and was silent as to those civil claims. With a coda to its decision, the Court added that "[i]f the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation."

SESTA Bill

SESTA is the proposed remedy. The bill seeks to amend both the CDA and TVPRA provisions in concert. First, the bill explicitly adds the federal criminal (§ 1591) and civil (§ 1595) statutes to those to which § 230 does not apply. Next, it opens § 230 to "[s]tate criminal prosecution or civil enforcement action targeting conduct that violates a Federal criminal law prohibiting" sex trafficking. And, SESTA defines "participation in a venture" as "knowing conduct by an individual or entity, by any means, that assists, supports, or facilitates" sex trafficking."

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(See CDA § 230 and TVPRA §§ 1591, 1595 with proposed SESTA language below).

The proposed bill, though boasting bilateral support, creates a potential for undue increased liability, expensive lawsuits, and harm to free expression and internet progress. Resistance has been firm and swift as statements and letters in opposition to the bill have come from tech giants, human rights and civil liberties organizations, and think tanks and civil-society organizations, as well as one of the drafters of § 230 – Senator Ron Wyden.

First, the new definition of "participation in a venture" is concerning as it could include those intermediary activities which previously were held to be editorial functions. Allowing anonymous posters to use unverified email addresses is an editorial choice, but it may also "assist" or "facilitate" sex trafficking by enhancing the anonymity of a trafficker.

The lowered bar for scienter under § 1591(a)(2) could see websites held culpable for editorial choices which assist/support/facilitate an act which they may not know (but "recklessly disregard") is for sex trafficking purposes. Additionally, opening § 230 to state criminal and civil laws imposes uncertain liability from a patchwork of untested laws (including those that would doubtless be written in response to SESTA). While these state laws may only target conduct by intermediaries that violates the Federal anti-trafficking laws, multiple (and costly) lawsuits may be brought before that limitation is properly understood, while such suits would likely have quickly (and less expensively) been dismissed under § 230.

With increased chances of litigation, intermediaries are arguably left with three means of avoidance: over-policing and censoring content that might in any way relate to sex trafficking, harming free expression and costing great sums; reducing or stopping any monitoring of such content to avoid "knowledge" of any activity; or simply eliminating all such content from third parties. Going after intermediaries will disproportionately disfavor emerging platforms as tech giants such as Google and Twitter can afford litigation and monitoring costs, while the next social media platform may be priced out of the market.

Another concern is that the law is not just unnecessary, but possibly harmful to the concerns of sex trafficking victims. Those opposing the bill argue that the issue is not a lack of legal remedies, but under enforcement of existing remedies by the Justice Department thus far. Members of the House and Senate, including Portman and Wagner, have called on the Justice Department to investigate Backpage more vigorously under the existing laws.

Additionally, SESTA may not stop sex trafficking, but just force it into darker corners of the internet. While making relief available to victims under civil laws is another valiant purpose, it is debatable whether the scope of culpable actions leading to such relief should be expanded. Especially because of increased incentives for websites to either avoid monitoring or delete third party content, otherwise reputable websites may not catch or report harmful activity. So, in balance, it appears that the possible harms to free expression and economic growth on the

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internet may outweigh the small and uncertain gains SESTA may bring to anti-trafficking efforts.

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CDA § 230 and TVPRA §§1591, 1595
with proposed SESTA amendments in bold face:

47 USC § 230

§ 230. Protection for private blocking and screening of offensive material
(a) Findings. The Congress finds the following:
(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
b) Policy. It is the policy of the United States--
(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material;

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(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer**; and**

(6) to ensure vigorous enforcement of Federal criminal and civil law relating to sex trafficking.

(c) Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].

(d) Obligations of interactive computer service. A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws.

(1) No effect on criminal law. Nothing in this section shall be construed to **impair—**

(A) the enforcement of section 223 or 231 of this Act [47 USC § 223 or 231], chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code [18 USC §§ 1460 et seq. or §§ 2251 et seq.], **section 1591 (relating to sex trafficking) of that title, or any other Federal criminal statute; or**

(B) any State criminal prosecution or civil enforcement action targeting conduct that violates a Federal criminal law prohibiting—

(i) sex trafficking of children; or

(ii) sex trafficking by force, threats of force, fraud, or coercion.

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(2) No effect on intellectual property law. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on civil law relating to sex trafficking. —Nothing in this section shall be construed to impair the enforcement or limit the application of section 1595 of title 18, United States Code.

(f) Definitions. As used in this section:

(1) Internet. The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service. The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider. The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

18 USC § 1591

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(a) Whoever knowingly--

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports,

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provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1), knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is--

(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 20 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means--

(A) threats of serious harm to or physical restraint against any person;

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(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term 'participation in a venture' means knowing conduct by an individual or entity, by any means, that assists, supports, or facilitates the violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 USC § 1595

§ 1595. Civil remedy

(a) An individual who is a victim of a violation of this chapter [18 USC §§ 1581 et seq.] may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter [18 USC §§ 1581 et seq.]) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b)

(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than the later of--

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

Government Official's Ban of Citizen from Her Facebook Page Violated First Amendment

By Al-Amyn Sumar

A decision from the Eastern District of Virginia released last month addresses "important questions about the constitutional limitations applicable to social media accounts maintained by elected officials." Davison v. Loudon County. The effects of the elected official's actions on the plaintiff in this particular case were "fairly minor," but the implications of the decision are anything but.

Background

The plaintiff, Brian Davison, attended a town hall discussion held jointly by the Loudoun County Board of Supervisors and the County School Board. Davison is a county resident and an active participant in local politics, with a "particular interest" in perceived corruption on the school board. The defendant, Phyllis Randall, is the chair of the Board of Supervisors and took part in the panel discussion.

During the meeting, Davison anonymously submitted a question to the panel, which Randall volunteered to answer. Davison was unhappy with her answer and took to Twitter to criticize her. Then, later in the evening, Davison posted a comment on Randall's official Facebook page that—like his question at the panel discussion—included allegations of corruption. Deciding that the comment was "probably not something [she] wan[ted] to leave" on her page, Randall deleted the entire post. She also banned Davison from her page, because "she was offended by his criticism of her colleagues in the County government." Randall lifted the ban on Davison the following morning, no more than 12 hours later.

The Lawsuit and Decision

Davison, acting *pro se*, brought suit against Randall under 42 U.S.C. § 1983, alleging that she violated his rights to free speech under the United States and Virginia Constitutions. The court agreed.

The threshold question was whether Randall had acted under color of state law. The court concluded she had. Davison's suit raised a novel question: "when is a social media account maintained by a public official considered 'governmental' in nature, and thus subject to constitutional constraints"?

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In this regard, the court found *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003), "instructive." The plaintiff in *Rossignol* was a newspaper that regularly criticized a local sheriff's office. The night before election day, anticipating that the newspaper's issue would criticize the sheriff, and in retaliation for the paper's years of criticism of them in their official capacities, a group of off-duty police officers bought up all the available papers, "effectively taking the paper out of circulation."

The Fourth Circuit held that although the officers were off-duty and not acting pursuant to official duties, their actions possessed the "requisite nexus" with their public office. Their conduct, as the court put it, arose out of "public, not personal, circumstances."

The same was true in Randall's case, for several reasons. The impetus for the creation of the Facebook page was her election to public office, and since creating the page Randall used it as "a tool of governance." She employed the page to address county residents and share information with them. Moreover, Randall used county resources to support the page, most notably by relying upon her chief of staff to create and maintain the page.

The court also emphasized Randall's "efforts to swathe" the page "in the trappings of her office" by including information on it such as her official title and county office contact information. And the act of banning Davison from the Facebook page was motivated by his criticism of her County government colleagues, *i.e.*, "public, not personal, circumstances," by her own admission. Accordingly, based on the totality of the circumstances, Randall acted under color of state law in both maintaining the Facebook page and banning Davison from it.

Courts cannot treat First Amendment violations on social media differently "simply because technology has made it easier to find alternative channels through which to disseminate one's message."

The court then turned to Davison's free speech claims. The claim against Randall in her official capacity was not tenable, because her conduct could not be attributed to the Board of Supervisors. But the claim against her in her individual capacity was successful. At the outset, the court found that the speech in question, Davison's comment on Facebook, was protected under the First Amendment. Though no one could recall the precise content of the comment, it indisputably concerned criticism of official conduct—speech at the very "heart" of the First Amendment.

Next, the court found that Randall opened a public forum for speech by creating the Facebook page. Citing the Supreme Court's recent decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the court noted that "[w]hen one creates a Facebook page, one generally opens a digital space for the exchange of ideas and information." Randall did so here, by "deliberately permitting public comment" on her Facebook page.

Turning to the ban on Davison itself, the court found Randall's conduct to be an act of unconstitutional viewpoint discrimination. (The court declined to decide precisely what kind of "public forum" Davison created with her Facebook page, since viewpoint discrimination is

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"prohibited in all forums.") Randall did not ban Davison pursuant to a "neutral policy or practice" applied in an evenhanded manner; she did so because of his criticism of the conduct of government officials.

And if "the Supreme Court's First Amendment jurisprudence makes anything clear, it is that speech may not be disfavored by the government simply because it offends." In contravening that principle, Randall committed a "cardinal sin."

The court's concluding thoughts are worth highlighting. The consequences of Randall's actions on Davison were, admittedly, "fairly minor." But the court stressed, again citing *Packingham*, that social media has become "a vital platform for speech of all kinds." Courts cannot treat First Amendment violations on social media differently "simply because technology has made it easier to find alternative channels through which to disseminate one's message." To be sure, public officials are not forbidden from moderating comments on their social media websites, or banning users where appropriate; indeed, some degree of moderation is necessary to preserve these places as "useful forums for the exchange of ideas." But banning a person from a digital forum simply on the basis of views about official conduct is simply not consistent with the First Amendment.

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Conflating a Journalist's Criticism with Terrorism

By Richard N. Winfield

Prosecutors in Turkey are hard at work putting journalists in jail for publishing articles critical of the regime of President Recep Tayyip Erdogan, citing their criticism as evidence of sympathy and support for organizers of the failed coup attempt of July 2016.

Dozens of journalists and independent media outlets now find themselves facing trumped-up criminal terrorism charges for having engaged in the simple exercise of expressing an opinion or publishing articles unflattering to the government.

I recently attended the Istanbul trial of seven journalists, authors, and editors who had been detained for nine months, observing the proceedings along with a dozen other representatives of human rights and free press non-governmental organizations. Prosecutors focused on the Altan brothers, Ahmet, 67, and Mehmet, 64, who are leading Turkish journalists and public intellectuals. Their writings and speeches critical of President Erdogan and the ruling AKP party are widely known and distributed in Turkey.

Dozens of journalists and independent media outlets now find themselves facing trumped-up criminal terrorism charges for having engaged in the simple exercise of expressing an opinion.

Emblematic of the government's attempt to tenuously connect protected speech with actual criminal activity, the core of the case against Ahmet Altan appears to be that he had appeared on a television program where he reiterated his criticisms of the government and predicted that President Erdogan and his party would be voted out of office in elections within two years.

The program aired on July 14, 2016. On July 15, 2016, rogue elements of the military staged a violent coup. Out of this circumstantial chronology, an entire theory of prosecution was born and in May 2017, prosecutors issued a 247-page indictment against the Altans and their five co-defendants under anti-terrorism and criminal statutes. Prosecutors charged that Ahmet Altan's televised speech on July 14, 2016 sent "subliminal messages" announcing and supporting the coup. According to the indictment, these and other public statements attempted to “destroy the constitutional order,” “destroy the Turkish Grand National Assembly,” and “destroy the government,” thus "committing a crime in support of a terrorist organization.”

Significantly, the UN Special Rapporteur on human rights cited the case against the Altans as an example where “prosecutors regularly accuse individuals of unprovable – and impossible to defend against allegations. The Altans are now facing up to three consecutive life sentences.

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But their spirits have remained high. As his trial commenced on June 19, 2017, Ahmet Altan addressed the courtroom by video link from prison, refusing to recant his criticisms of President Erdogan and stating, "I am not the kind of man will act in cowardice and squander the many decades behind me for the sake of a few years ahead."

After five days of hearings, the trial was postponed to September 2017, at which point the Altans will have spent an entire year in detention.

Unfortunately, it is unlikely that they will be able to prepare their defense adequately even in that time. Pursuant to its declared emergency, the government has enacted broad executive measures to limit access to defense counsel, including restricting attorney-client meetings to one hour a week.

Nor is it at all certain that the Altans will receive a fair trial. Following the state of emergency, the regime launched a purge of significant dimensions, including dismissing and, in many cases, detaining, thousands of judges and prosecutors viewed as insufficiently pro-Erdogan. All told, the regime sacked about one-fourth of the Turkish judiciary in a matter of weeks. Recently, a judge and a prosecutor were summarily dismissed after dropping a criminal case against 21 journalists.

At this moment in time, judicial independence and freedom of expression in Turkey have ceased to exist.

In addition, with the failed coup attempt behind them, the regime still moved quickly to declare an emergency and officially derogate from its obligations under two international human rights conventions it had signed, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Both treaties protect fair trial and freedom of expression rights.

At this moment in time, judicial independence and freedom of expression in Turkey have ceased to exist. It is in this context that journalists such as the Altan brothers and others are fighting for their basic rights to fair trials and independent thought. For our part as members of an international community committed to the rule of law and a free and independent press, we can and must continue to send the message to Turkey that it cannot use a legal veneer to cover up authoritarianism and brutal repression. These trials are not fair, these courts are not independent, and no one is fooled by the attempt to pretend otherwise.

Turkey's abandonment of the rule of law deserves even greater exposure in the press and condemnation by civil society. The West, hopefully led by the U.S. Congress, should step up the pressure on Ankara by levying economic sanctions and by exercising more muscular diplomacy.

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The Safety and Security of Reporters

By David J. Bodney

For journalists, it is more dangerous covering world events now than at any time in recent memory. The Committee to Protect Journalists reports that 1,249 journalists have been killed since 1992, including 21 killed so far in 2017. These are the confirmed, work-related deaths in direct reprisal for the reporter's efforts, in crossfire during combat situations or while carrying out a dangerous assignment. One could offer a host of explanations, but two principal characteristics of the current situation stand out: (1) the abundance and lethality of non-state actors, and (2) the technological sophistication of terrorist groups. For these reasons, media lawyers are called upon with increasing frequency to help keep reporters safe.

To be sure, there are lawyers, especially in-house counsel, whose depth of experience in these matters exceeds my own. To complicate matters, details of safety and security do not lend themselves to "full disclosure," even in a publication whose audience is limited to the media defense bar. Still, after focusing on the safety and security of journalists at length for a good many years, I offer these thoughts for your consideration when the issues arise.

1. *Get Help*

As early and often as necessary – before, during and after the assignment – seek out persons with experience and expertise. Here are a few suggestions:

a. consider hiring a security consultant to train the team;

b. retain local support on the ground (sometimes referred to as "fixers") who can help the journalists safely navigate in foreign cultures;

c. consult U.S. counsel, as necessary, to ensure compliance with all applicable laws;

d. engage counsel in the foreign jurisdiction who can provide legal assistance, especially in emergency situations, and keep their cell numbers close at hand;

e. call upon members of the newsroom who know the country and may have lived or worked there to help assess the security situation;

f. hire the best, most trusted translator available;

g. establish relationships with persons who can facilitate extractions, if necessary, for medical and other emergencies; and

h. after the assignment, consider engaging an expert on the effects of post-traumatic stress to diagnose and treat members of team as appropriate.

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2. *Hostile Environment Training*

A number of security firms provide hostile environment training for journalists who will be exposing themselves to high-risk situations. Training for all members of the traveling team and their supervising editors is advisable. (Their lawyers may find it helpful to take the training, too.) A refresher or introductory course in first aid can save lives in the field.

3. *Protocols*

Any news organization that sends its journalists into harm's way would benefit from having protocols that are followed rigorously by every member of the team. For example, those protocols may address some or all of the following issues:

a. a "checklist" that anticipates essential safety and security issues for any high-risk assignment. Ideally, the checklist should be completed before the team assembles in person and discusses the security protocols for the specific assignment. It should not be one that is completed merely by rote but rather a document that requires each team member to think carefully about safety and security issues implicated by the assignment;

b. the existence of a current proof-of-life form for every team member;

c. clear mandates that govern how the team will proceed when any member expresses serious reservations about the risks of contemplated next steps in the field;

d. precise rules governing the frequency with which the team will check in with its contact inside the newsroom during any high-risk assignment, including the importance of timely reporting any injury to the team or its sources; and

e. an action plan for responding to a serious problem in the field. When journalists are kidnapped, killed or attacked, time is of the essence. Protocols can help facilitate appropriate communications with next of kin, staff and other media. An action plan can reduce the risks that post-incident missteps will actually worsen the situation.

4. *Pre-Departure Security Briefing*

Before sending journalists into seriously risky situations, management should consider requiring all team members to participate in a security briefing at which the assignment's journalistic and security concerns are discussed. Ideally, all reporters who will be traveling to a hostile environment, their editors and the security consultant should participate in this briefing. They should have at their fingertips not only the protocols but the completed checklists and

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other memoranda relating to safety and security preparedness. Before departure, the team needs to be properly outfitted, and to understand the risks and rewards of the assignment. At the pre-departure security briefing, they should be encouraged to ask questions, and a balancing of story ideas and attendant security risks may come into sharper relief. Following the meeting, it may be useful to prepare a memorandum for management and all team members that clearly identifies the risks, rewards and essential security measures in place before departure.

5. *The Ownership Editor*

When a news organization decides to deploy reporters into dangerous situations, the appointment of an "ownership" editor for the assignment can be vital. While several persons in the newsroom may be aware of and responsible for certain aspects of the story, and there may be a "crisis management team" in place at headquarters, it may prove helpful to have a single editor who "owns" the story. This editor should be briefed on all security aspects of the assignment, understand the effort's risks and rewards, and be available around the clock to take the team's calls while they're in the field. (One former top editor told me he always carried in his pocket the names and phone numbers of the reporters' next of kin and a trusted government source for the duration of any high-risk assignment.)

6. *The Team*

The right balance of experience and personalities is worth considering carefully for any reporting assignment in hostile terrain. The unique cultural and other sensitivities of foreign countries make these considerations vital. To assemble a healthy complement of talent for war and other hostile environment coverage, management should think critically about having the right mix.

7. *Social Media*

As terrorist organizations have shown their skill and sophistication in exploiting social media, newsrooms should consider adopting protocols on the use of social media before, during and after the assignment. With today's emphasis on 24/7 coverage and multi-platform journalism, reporters may be tempted to upload images and information about their travels that could put them, their colleagues and sources at risk. For example, ready Internet access to the name or photo of a local “fixer” working on the project could make the individual or his or her family a target. News organizations may want to remove the team's photos and other personal details from their websites before travel into high-risk terrain, and to prohibit the posting of some images and details while on assignment.

8. *Digital Security*

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Some hostile powers may allow reporters to cover the news within their borders, but they nevertheless will closely monitor the activities of journalists working for American media. In some jurisdictions, the government routinely tracks foreign correspondents, whether by GPS or otherwise. Accordingly, it may be necessary to ensure that your communications are encrypted, and that your team on the ground is properly equipped for the mission. Some organizations may prefer to use disposable phones. Some assignments require other security devices and measures to protect reporters, their sources and work product. These issues should be addressed by the right mix of management, information technology experts and other trusted advisors well before takeoff.

9. *Insurance, Liability and Related Concerns*

Before deploying a team of journalists into possible harm's way, it is essential to review the company's insurance policy and confirm its sufficiency and validity. Apart from provisions basic to nearly all forms of coverage, some policies may cover ransom, and key members of the organization should have a clear understanding of its ransom policy before the team's departure. In addition, the organization may want to ask whether any non-American citizens, or any non-full-time-employee journalists or translators, will be working on the assignment. If so, it may be advisable to ask whether they are or should be covered by insurance, and to think about written and clearly understood protocols for protecting them on assignment, too.

10. *After-Action Reports and Protocols*

When team members return from high-risk reporting sojourns, they may have specific concerns about safety and security issues that arose on assignment. If so, management may want to encourage them to raise their concerns, reconvene the team that attended the pre-departure security briefing and consider further steps to reduce the risk of harm on future assignments.

One further consideration merits note. Not long ago, foreign assignments were typically seen as comfortable postings, to say the least. However, recent events in Western nations – and indeed here at home – suggest a broadening of the definition of "hostile environment" for safety and security purposes. Political conventions, demonstrations, police shootings, protest marches and other potentially violent incidents present unique risks to reporters. The most ambitious yet inexperienced journalists, lacking a refined sense of danger in the field, may be the most vulnerable. To keep reporters safe, it makes sense to cultivate a heightened sense of security awareness in our newsrooms, and to educate all of our journalists who take to the field in potentially dangerous situations, foreign and domestic.

Mr. Bodney is the Co-Chair of the Media and Entertainment Law Group at Ballard Spahr LLP and the Immediate Past Chair of the ABA's Forum on Communications Law.

Ten Questions to a Media Lawyer

Charles Sims

Charles Sims, formerly a partner at Proskauer Rose LLP, is now Counsel to the Media Freedom and Information Access Clinic at Yale Law School. If you'd like to participate in this ongoing series, let us know: medialaw@medialaw.org.

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

My interest in first amendment law was set by a summer working for the ACLU in San Francisco, and confirmed by clerking for the Chief Judge of the District of Rhode Island, Raymond Pettine, who Robert Kennedy had urged on Lyndon Johnson. As the only district judge in the state, he had a large First amendment docket. He carried the Constitution with him always, and told me that Burt Neuborne was the best attorney he'd ever seen in court. That led to a fellowship at the ACLU and a nine-stint there, chiefly on first amendment (and national security) issues, as well as working on other constitutional matters. I worked first with Bruce Ennis, then ACLU legal director, and then with Burt Neuborne, legal director after Bruce moved to Washington DC. The two of them were superb lawyers and mentors. After working on the H-Bomb case for the editors of The Progressive, I was hooked. When our two young sons created a need to grow our income beyond what the ACLU could supply, I joined Proskauer because a group of its partners represented the kinds of clients (publishers, broadcasters, media entities generally) I wanted to work with. (Basically, nine years out of law school, I still had no idea what a widget was, or why thinking about them would be interesting.)

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

My previous position, as a partner at Proskauer, ended with retirement to optional service in December 2016 job, and I'm surprised to have failed at retirement so thoroughly by starting a new career. I was asked in late June if I'd be interested in joining David Schulz at the Media Freedom and Information Access clinic at Yale Law School, which I'd graduated from. The

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answer was yes – it took me about 5 minutes to decide – and after spending a day a week up at Yale for most of the summer, I'll be in the thick of it by early September. What I like most is the two-sided opportunity – to work with eager young law students at the start of their careers, and on matters for our clients, mostly investigative reporters who need legal help to gather facts that the executive branch of government, or courts, are trying to deny to them.

Sims with Rhode Island federal court Judge Raymond Pettine at a clerk's reunion. "Too bad Laura Handman isn't in the shot – she followed me," he wrote in an email.

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

Over-confidently telling Simon & Schuster – through two surprising losses – that it would easily prevail on its challenge to New York's Son of Sam law, which would have precluded any publisher paying Malcolm X (or Saint Augustine) for their memoirs. After losses in the Southern District and the Second Circuit, my assurance that the Supreme Court would certainly grant a cert petition and reverse were met with intense skepticism, and cert. was almost not sought. Luckily it was, and the unanimous decision by the Court that the law violated the first amendment went a long way to redeeming my credibility and restoring some confidence in my judgment.

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

I've been lucky enough to argue three cases in the Supreme Court, each an unforgettable experience, and two of them when I was very junior. *Patsy v. Board of Regents*, in 1982, established that the Court would not impose an exhaustion of judicial remedies requirement in Section 1983 cases. *United States v. Albertini* was a first amendment loss, but on much narrower grounds than the government was seeking, and Justice O'Connor's decision essentially left the case as a military base victory for the Defense Department rather than as a first amendment loss of general applicability. Most recently, I persuaded the Court to grant cert in *Reed Elsevier v. Muchnick*, a case in which publishers and databases were seeking to reinstate the settlement agreement resolving the right of publishers to license their contents to databases litigated in the wake of *New York Times Co. v. Tasini*. The Second Circuit had vacated the settlement *sua sponte* on the ground that courts had no jurisdiction to approve copyright settlements that impacted works in which copyright had not been registered. We won big; every member of the court rejected that approach, which no party had even argued,

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and the decision was a large victory for publishers and databases in 2010. The settlement is still on track, although still unconsummated.

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

A very large four-foot square oil painting of the Greek Island of Sifnos, on which I lived for a while in 1972 while I was deciding whether to pursue a career as a writer or to accept one of the law school offers which I'd collected before heading off to teach in Athens for a year. The painting reminds me of that struggle, and offers a Greek island respite in late afternoons. I met the artist (Swiss) on my first journey to Sifnos – his too – and 45 years later, he lives in Connecticut, and we find time to get together on the island every other year or so.

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

The New York Times, followed by the Washington Post and the Guardian. By noon I've looked at Kevin Drum's blog on Mother jones, the Washington Monthly, and Vox.

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

Neither of our sons wanted to pursue a legal career, and so I haven't had the need to think hard about it. George Freeman's comments on the issue in the first of these exercises seemed right to me. I do think that a profession where the hours of one's life are referred to as "inventory" may not provide an ideal work-life balance.

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

You need to be the best lawyer you can be, and getting that training is essential. The demand for media lawyers will change and may shrink, but the demand for excellent lawyers is unlikely to diminish.

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

I'd have written, or headed off to graduate school in History, English, or American Studies.

10. What issue keeps you up at night

How to manage 3 or 4 days weekly in New Haven while living in New York City.