Treatment of Journalists:
Friends, Enemies and the Erosion of Press Freedoms

Friday, February 1, 2019 | 12:30 pm to 2:00 pm

Program Description
What is the impact of President Trump’s “Public Enemy No. 1” labelling? Is this rhetoric connected to the increase in arrests and detainment of journalists and in physical violence against journalists we have seen globally and in the US in recent years? How can we better protect journalists -- as well as their sources and sensitive data? Are there new rules for covering protests, crossing borders and in general dealing with hostile environments when pursuing and reporting the truth? What about the increasing intimidation and threats journalists face on social media -- Where are the lines? When are they crossed? What can be done?

Moderator
Natalie Spears, Partner Dentons | Chicago, IL

Speakers
- Jason Conti, Executive Vice President and General Counsel | Dow Jones & Company | New York, NY
- Runa Sandvik, Senior Director of Information Security | The New York Times | New York, NY
- Frank Smyth, Executive Director, Global Journalist Security and former Senior Advisor, Journalist Security for the Committee to Protect Journalists | Washington, D.C.
- Brian Stelter, Senior Media Correspondent for CNN and Host of Reliable Sources | New York, NY

Program Materials
1. Reports and Recommendations on Press Harassment in the United States
2. An International Problem
3. Attacks on US Newsrooms/Safety Measures
4. “How to Protect Yourself When Covering a Protest”
5. “How should a news organization respond if one of its journalists is arrested?”
6. Relevant Legal Principles
**Program Time**

90 minutes

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<td>Introduction by Natalie Spears of Panelists</td>
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<td>Review of statistics and reports on treatment of journalists and heightened anti-press rhetoric since President Trump took office, including documented increases in physical attacks on journalists, arbitrary arrests of journalists by law enforcement, verbal assaults against the media by politicians, and online attacks on journalists. Panelists will also offer their experiences and perspectives on the impact of Trump’s war on the press both in the US and internationally.</td>
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<td>Moderated Panel discussion on legal issues as well as protections and recommendations to address: (1) physical attacks and arrests of journalists at protests and demonstrations, political rallies, public events; (2) harassment of journalists online and trolling; (3) the need for heightened newsroom security and safety measures; (4) retaliation against journalists by law enforcement and public officials, and lawsuits aimed at restitution. (Approx. 15 minutes per topic)</td>
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Attacks on the news media in the Trump era have rapidly escalated from rhetoric to action: journalists are increasingly subject to threats and harassment, both online and in person, and have even lost their lives in tragic incidents like the Annapolis *Capital Journal* newsroom shooting. Even before the 2016 election, concern was rising about law enforcement’s heavy-handed treatment (and in some cases arrest) of journalists covering public demonstrations. Globally, the UN and European governmental organizations have for some time been calling attention to an increase in threats to journalists’ safety and freedom to do their jobs. What follows is an overview of the literature documenting these problems -- and offering practical responses and recommendations -- including reports by U.S. and international press freedom organizations and NGOs, and a brief summary of pertinent legal principles and developments in the United States.

1. **Reports and recommendations on press harassment in the United States**

In January 2018, “a delegation of global press freedom organizations,” organized by the Committee to Protect Journalists (CPJ), “undertook an unprecedented mission to the US, in response to concerns about threats to journalists and heightened anti-press rhetoric in the year since Trump took office”. The group’s report aptly summarized the state of affairs:

> In recent years, press freedom organizations have become increasingly concerned by the challenges faced by the media in the United States (US). These challenges include: record numbers of prosecutions against whistleblowers; the restriction of public information, on the grounds of national security; the direct stigmatization of media workers by politicians; and physical attacks and arbitrary arrests of journalists by law enforcement officials....

> The physical safety of journalists covering protests or major events is essential for press freedom. We received reports of journalists being arrested and even assaulted by law enforcement officials at a local and state level. Law enforcement officials have also refused to recognize the rights of journalists to report freely on events of public interest. This lack of understanding of journalists’ rights and examples of open hostility towards the media are particular issues of concern....

> There has been a change in the political landscape in which media workers have found themselves, particularly over the past two years. The rhetoric that Trump and his administration have used to disparage and discredit the media, before and after the 2016 election, is of grave concern. Political leaders’ words....
have ramifications beyond the immediate news cycle. It appears that members of the public and other local authority or political figures have felt emboldened by the media strategy of the current administration and journalists have found themselves subject to increasing abuse, harassment, and threats, particularly online.


And, it has been noted, while “President Donald Trump’s attacks on the media are usually centered on national outlets like CNN and The New York Times, the attitudes unleashed have filtered down to journalists on the street covering news in local communities across the country.” David Bauder, Anger toward media spreads into local communities, Wash. Post (Oct. 29, 2018). For example, “[v]ideo journalist Joshua Replogle of The Associated Press was filming flooding from Hurricane Florence in North Carolina’s rural Bladen County when a nearby man knocked over his camera and began punching him in the face. His friends muttered, ‘fake news.’ So far no charges have been filed…. [A] man purposely crashed a pick-up truck into the side of a Dallas television station, a Miami reporter and a photographer were physically attacked while doing a live shot and a North Carolina crew had its power cable cut while covering a demonstration.” Id.

In addition to the CPJ report, several other press freedom organizations have issued reports and findings on the threats to American journalists in the current environment.

a. Special Report, It’s Not Just Trump: US Media Freedom Fraying at the Edges (Index on Censorship, May 2017)\(^1\)

The UK-based Index on Censorship’s study of threats to media freedom in the United States “researched over 150 publicly reported incidents involving journalists”; it found “widespread and low-level animosity that feeds into the everyday working lives of the nation’s journalists, bloggers and media professionals” and that “threats to US press freedom go well beyond the Oval Office…. Journalists are targeted in several ways: from social media trolling to harassment by law enforcement to over-the-top public criticism by those in the highest office.” Id., pp. 2-3.

Among the conclusions: “Frontline police services – as well as journalists – should be clear on the rights of protesters and those covering demonstrations, rallies and other public events and receive regular training in this area. It is also vital that journalists are aware of these rights when covering such events.” Id., p. 14. “Harassment and crimes against journalists that go beyond protections offered by the First Amendment – whether online or off – must be investigated and prosecuted vigorously to prevent the establishment of a culture of impunity.” Id.

\(^1\) A copy of this Report is attached.

The RCFP conducted a review of incidents threatening press freedom, documented in the U.S. Press Freedom Tracker\(^3\), which “strives to document the number of times journalists in the United States were arrested, assaulted, subjected to equipment searches or seizures, or detained at the border”:

2017 was a year of civil unrest in the United States…. nearly half of all press freedom incidents occurring at protests (58 cases out of a total of 122). Police arrested journalists at least thirty-four times, and 85 percent of those arrests occurred at protests, where police often used a controversial “kettling” technique to arrest people en masse, including bystanders and journalists. Ninety percent of these arrests at protests occurred in one of three places: at the Inauguration Day protest in Washington, D.C., at the Standing Rock Indian Reservation in North Dakota, or in St. Louis, Missouri. Reflecting broader trends in the industry, most of the journalists arrested were freelancers, while only a handful of them came from established news organizations.

The rising tide of hostility toward the press coincided with 45 physical attacks on journalists…. The majority of the assaults on journalists this year (nearly 70 percent) occurred at protests. Of those, police officers were implicated in nearly 30 percent of the assaults (the majority of which occurred in St. Louis), with protesters responsible for the remainder. As protesters no longer rely on journalists to spread their message and, at the same time, fear law enforcement will use the media’s video footage against them, journalists have become targets. These assaults demonstrate the need for training law enforcement on how to protect journalists and for training journalists on how they can reduce their risk of harm.

There were at least 15 cases where law enforcement seized and in some cases even searched a journalist’s equipment, such as cellphones and cameras. Eighty percent of these cases occurred when journalists were arrested while covering protests. Such searches also frequently overlapped with border stops of journalists, which is consistent with the government’s reportedly fast-growing practice of searching travelers’ electronic devices at the U.S. border without a warrant. The tracker recorded five such border stops.

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\(^2\) A copy of this Report is attached.

\(^3\) “The U.S. Press Freedom Tracker is a database of press freedom incidents in the United States — everything from arrests of journalists and the seizure of their equipment to interrogations at the U.S. border and physical attacks. The Press Freedom Tracker documents incidents across the country, involving national, state and local authorities.” [https://pressfreedomtracker.us/](https://pressfreedomtracker.us/)
The news media also faced an unprecedented number of verbal attacks from public officials in 2017, including at the highest levels of government. President Donald J. Trump responded to critical coverage of his administration by repeatedly calling the news media the “enemy of the people,” “truly dishonest people,” and “fake news.”

Id., p. 4.

c. **Online Harassment of Journalists: Attack of the Trolls (Reporters Without Borders, 2018)**

Reporters Without Borders (RSF) issued a report “on the latest danger for journalists – threats and insults on social networks that are designed to intimidate them into silence. The sources of these threats and insults may be ordinary ‘trolls’ (individuals or communities of individuals hiding behind their screens) or armies of online mercenaries. Harassing journalists has never been as easy as it is now. Freedom of expression and bots are being used to curtail the freedom to inform.” Id., p. 3.

Being targeted by hate speech after the publication of an article is now routine for many journalists. Women journalists are also one of the leading targets of trolls. In a study of thousands of tweets, the British think-tank Demos found that journalism was one of the categories in which women received more insults than men. ‘Slut,’ ‘rape’ and ‘whore’ were among the insulting words most frequently used. The aggression includes sending explicit photos, questionable ‘jokes,’ misogynistic comments, the use of nicknames, and doctored photos. Non-consensual pornography is used as a tool to intimidate women journalists. [Id., pp. 7-8]...

With their repeated attacks on journalists, politicians such as Donald Trump have given free rein to those who feed the hatred of journalists, offline and online. This type of behaviour clearly encourages online harassment. In July 2017, CNN journalist Andrew Kaczynski published an article about a video of the American president engaged in a wrestling match with an opponent who bore the CNN logo. Trump supporters with large numbers of followers on the networks then posted negative comments about Kaczynski. Shortly thereafter, personal data about him was posted online: his address, his

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5 In a recent survey, 139 of 921 female journalists reported “[i]nsults or criticism published online,’ and ninety-one reported threats of violence against them. The effect of such harassment goes far beyond the personal impact on the journalists, who are ‘concerned for their personal security and in some instances [become] depressed and experience[ ] psychological trauma.’ Some women adopted pseudonyms, and some dropped stories out of fear for their own safety, while others stopped reporting from certain regions or moved away, and sometimes left journalism entirely.” Emma Marshak, Online Harassment: A Legislative Solution, 54 Harv. J. on Legis. 503, 509-10 (Summer 2017).
personal phone number and information about those close to him. His parents and his wife received some 50 threats over the phone in the days that followed. [Id., pp. 16-17].

Excerpts from RSF Recommendations:

- “Strengthen laws authorizing prosecution for online harassment of journalists. Enforce these laws strictly. Governments must systematically investigate online harassment cases and prosecute and convict their perpetrators.”

- “Strengthen the responsibility of online platforms in regard to content shared on their networks. Online platforms must not be given the power to control or censor this content. The system of platform responsibility must be linked to the effects of their activities on the quality of public debate.”

- “Online platforms must be transparent concerning their rules for moderating online content. They must strengthen the public nature and the transparency of their actions against online harassment. And they must establish alert systems focused on hate content.”

- “They must ensure that these rules are not turned into methods to silence journalists. All alerts concerning potentially illicit content must be subject to careful analysis. The platforms must be able to distinguish abusive alerts, designed solely to muffle upsetting opinions, from alerts over genuinely abusive content.”

- “Establish a victim-centred emergency alert system for journalists who are targeted by online threats and attacks.”

d. **Online Harassment Field Manual (PEN America, 2018)**

PEN America maintains a website discussing online harassment of journalists and other writers, offering recommendations and providing resources for dealing with this problem:

There is now a growing recognition that online harassment can affect its targets’ freedom to express themselves, their livelihoods, and their mental and physical health. It is also clear that online harassment can extend to the offline world, especially for those who receive direct, specific threats of sexual violence, bodily harm, and even death, and who have their personal information published without their consent (known as “doxing”).

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6 “Threats to press freedom in the country of the First Amendment have become so frequent that in August 2017 RSF joined a coalition of more than 20 organizations in launching a monitoring tool on US press freedom called the U.S. Press Freedom Tracker.” Id., p. 17.

7 See [https://onlineharassmentfieldmanual.pen.org/](https://onlineharassmentfieldmanual.pen.org/)
As an organization of writers, PEN America is particularly concerned about the ways in which online harassment affects writers' work. Our 2017 Online Harassment Survey of over 230 journalists and writers found that 67 percent of respondents had experienced a severe reaction to being targeted by online harassment, including refraining from publishing their work, permanently deleting their social media accounts, and/or fearing for their safety or the safety of their loved ones.

The boundary line between harassment and combative but legitimate debate can sometimes be murky. While threats, doxing, and cyberstalking are often unlawful, other types of content that may be experienced as offensive, intimidating, or abusive are protected by the First Amendment. The parameters of permissible speech on social media can and have been narrowed by online platforms that implement their own community rules. Such rules can serve the legitimate purpose of rendering such forums open and welcoming to all comers and preventing threats, doxing, and other forms of noxious speech from drowning out genuine dialogue. As a free speech organization, PEN America is leery of calling on private companies to police speech, recognizing that the ubiquitous role of these platforms in our discourse can mean that viewpoints that are frowned upon or rejected can be effectively silenced. There are situations in which political opinions, religious views, and ideas about social life may be voiced in a manner that is deeply offensive or hurtful to others but which do not rise to the level of harassment that should be banned or suppressed. Combatting genuine harassment while maintaining robust protection for free speech, even speech that offends, is a task that requires careful thought, judgement, and engagement with a wide variety of stakeholders.

Excerpts from PEN Recommendations:

- “Social media companies must improve their policies regarding online harassment, including reconceptualizing procedures for reviewing cases of alleged online abuse, creating appropriate penalties for offenders who commit abusive behavior, being more transparent about their internal processes, and offering an appeals process for users who have been punished.”

- “Employers and publishers of writers—including newsrooms, publishing houses, and digital publications—can do more to support writers who experience online harassment by creating policies and procedures to help employees and freelancers during episodes of harassment.”

8 See https://onlineharassmentfieldmanual.pen.org/about-this-field-manual/
2. **An international problem**

As the Committee to Protect Journalists recently noted in a special report, “[f]resh waves of repression in China, Egypt, and Saudi Arabia sustained the global crackdown on press freedom in 2018 for the third consecutive year. In its annual global survey, the Committee to Protect Journalists found at least 251 journalists in jail in relation to their work.... The past three years have recorded the highest number of jailed journalists since CPJ began keeping track, with consecutive records set in 2016 and 2017....The number imprisoned on charges of false news rose to 28 globally, compared with nine just two years ago.... The increase comes amid heightened global rhetoric about “fake news,” of which U.S. President Donald Trump is the leading voice.” Elana Beiser, Hundreds of journalists jailed globally becomes the new normal (Comm. to Protect Journalists, Dec. 13, 2018). 9


   “Physical attacks and threats of violence or harm against journalists and members of their family represent an extreme form of censorship. Intimidation and harassment also take many other forms which deprive journalists of safety or security and may lead to habitual self-censorship of the media, which restricts freedom of expression in the society. Unfortunately, in OSCE participating States the threat of criminal charges which may lead to a prison sentence has all too often been used to silence journalists, and has stopped them from doing their work. Journalists have in many cases faced arbitrary arrest on what later were shown to be spurious charges; yet the criminal investigations and prosecutions against them have led to detention or prison sentences on account of their work as journalists.” *Id.*, p. 25. “Politicians and officials should not abuse their status by speaking in a derogatory or inflammatory way about journalists or the media. Such language, when used by leading public figures, can encourage extremists to view journalists as targets to be silenced or attacked.” *Id.*, p. 29.

**Excerpts from “Key issues and recommendations for the safety of journalists”:**

**Street demonstrations, protests and public events**

- “Issue: Journalists and photographers covering public protests or gatherings have suffered arbitrary arrest and mistreatment at the hands of police and security forces; in some cases they suffered physical injury and loss or damage to equipment while working or while in custody; police surveillance and monitoring of media workers at public protests may be intimidating and hinder their legitimate work.”

- “Good practice: Police do not detain, arrest or use violence against media that perform their proper role by covering all aspects of the political process, as well as protests and other events in public places. Law-enforcement officials allow media coverage of street demonstrations and similar events, respect press identification such as press cards, vests

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and armbands, and maintain channels of dialogue with media to reduce the risk of disputes. Even short-term detention of members of the media presents a form of harassment and intimidation.”

- “Recommendation: Police forces and journalists’ organizations conclude agreements on media guidelines for the police and give training to officers to ensure understanding and respect for the guidelines.”

Threats and acts of violence against journalists

- “Issue: Threats and acts of violence against journalists have continued and in some parts even increased in the OSCE area in recent years. Threats made through social media or by telephone, e-mail or mail have often been followed by physical assaults, including murders.”

- “Good practice: State authorities investigate reports of threats promptly and thoroughly, and take appropriate steps to protect the person or persons threatened. Designate crimes involving attacks against journalists as ‘aggravated offences’, which may attract more severe penalties.”

b. Recommendation of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors (Council of Europe April 2016)

“[M]ember states are required to put in place comprehensive legislative frameworks for the protection of the physical and moral integrity of journalists and other media actors. Appropriate criminal law provisions should be adopted to deter the commission of offences and all crimes against journalists should be effectively investigated to prevent impunity.”

Excerpts from Appendix to Recommendation of Committee of Ministers -- Guidelines:

- “Member States should encourage the establishment of, and support the operation of, early-warning and rapid-response mechanisms, such as hotlines, online platforms or 24-hour emergency contact points, by media organisations or civil society, to ensure that journalists and other media actors have immediate access to protective measures when they are threatened.”

- “Member States should take into account the specific nature and democratic value of the role played by journalists and other media actors in particular contexts, such as in times of crisis, during election periods, at public demonstrations and in conflict zones. In these contexts in particular, it is important for law enforcement authorities to respect the role of journalists and other media actors covering demonstrations and other events. Press or union cards, relevant accreditation and journalistic insignia should be accepted by State

10 See https://www.coe.int/en/web/freedom-expression/safety-of-journalists
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authorities as journalistic credentials, and where it is not possible for journalists or other media actors to produce professional documentation, every possible effort should be made by State authorities to ascertain their status. Dialogue between State authorities and journalists’ organisations is moreover encouraged in order to avoid friction or clashes between police and members of the media.”

- “State officials and public figures should not undermine or attack the integrity of journalists and other media actors, for example on the basis of their gender or ethnic identity, or by accusing them of disseminating propaganda, and thereby jeopardise their safety. Nor should they require, coerce or pressurise, by way of violence, threats, financial penalties or inducements or other measures, journalists and other media actors to derogate from accepted journalistic standards and professional ethics by engaging in the dissemination of propaganda or disinformation. State officials and public figures should publicly and unequivocally condemn all instances of threats and violence against journalists and other media actors, irrespective of the source of those threats and acts of violence.”

c. **State of Democracy, Human Rights and the Rule of Law, Report by the Secretary General (Council of Europe 2017)**

“Journalists and other media actors face censorship, political and economic pressure, intimidation, job insecurity, misuse of defamation laws as well as physical attacks, as acknowledged by the Parliamentary Assembly of the Council of Europe in its recent resolution on attacks against journalists and media freedom in Europe. Impunity for offences against journalists fuels recidivism and has a chilling effect on media freedom.” *Id.*, pp. 44-45.

d. **UN Plan of Action on the Safety of Journalists and the Issue of Impunity (UNESCO 2012)**

“The scale and number of attacks on the media around the world - a vast majority of which committed with impunity - have contributed to the high level of personal risk that journalists and media workers face in carrying out their job. As the ultimate form of censorship, every five days a journalist is killed for bringing information to the public…. The UN Plan of Action on the Safety of Journalists and the Issue of Impunity is a systematic UN-wide plan to work toward a free and safe environment for journalists and media workers, including social media producers of public interest journalism, with a view to strengthen peace, democracy, and development worldwide. It covers both conflict and non-conflict situations.” *Id.*, pp. 1, 3.

The high level of personal risk was vividly brought home by the murder of Saudi journalist Jamal Khashoggi; “The killing of Jamal Khashoggi reminds us of the need to fight for press freedom, which is

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essential to democracy. Accountability for these crimes is non-negotiable.” UNESCO Director-General firmly condemns the killing of Saudi Journalist Jamal Khashoggi (Oct. 20, 2018).

3. **Attacks on US newsrooms/safety measures**


a. **Examples**

- A Michigan man was arrested after allegedly making 22 threatening calls to CNN’s Atlanta offices on January 9 and 10, 2018; the threats included “Fake news. I’m coming to gun you all down. … I am on my way right now to gun the fuckin’ CNN cast down”. See [https://www.cnn.com/2018/01/22/us/michigan-man-arrested-cnn-threats/index.html](https://www.cnn.com/2018/01/22/us/michigan-man-arrested-cnn-threats/index.html)

- On June 28, 2018, a gunman blasted his way into the Capital Gazette newsroom in Annapolis, Md. with a shotgun, killing five people and injuring two others. The gunman had a “yearslong legal dispute with The Capital over a 2011 column that detailed his harassment of a former high school classmate and had represented himself in the proceedings.”

- A California man was arrested on federal charges after allegedly making threatening calls to the Boston Globe between Aug. 10 and 22, 2018 “after the newspaper’s editorial page called on media outlets to unite in opposition to Trump’s angry rhetoric against the press, including repeated references to reporters as ‘the enemy of the people’”; among the caller’s threats were “You’re the enemy of the people, and we’re going to kill every [expletive] one of you … as long as you keep attacking the president, the duly elected president of the

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14 Similarly, “[w]hile one-person crews have become more popular for television stations looking to cut costs,” given the current climate and recent incidents, “the Radio Television Digital News Association recommends that their use be curtailed in certain times and places, said Dan Shelley, RTDNA executive director.” David Bauder, Anger toward media spreads into local communities, *Wash. Post* (Oct. 29, 2018).


United States, in the continuation of your treasonous and seditious acts, I will continue to threat, harass, and annoy the Boston Globe.”

- On October 24, 2018, a pipe bomb sent to CNN’s New York offices in the Time Warner Building was discovered in the mailroom; it was identical to devices sent to former president Barack Obama, former secretary of state Hillary Clinton, and other government officials. A supporter of President Trump was later charged with the crimes, indicted by a federal grand jury on 30 counts, including use of a weapon of mass destruction; interstate transportation and receipt of explosives; and use of explosives to commit a felony.

- On October 29, 2018, another suspicious package addressed to the CNN Center in Atlanta was intercepted at a downtown Atlanta post office.

b. Resources/recommendations

- The American Society of Newspaper Editors and other organizations have come out with suggested emergency policies, active shooter tips, and post-event policies. See ASNE-APME Newsroom Safety Best Practices.

- “In light of recent events,” the National Press Photographers Association’s Safety and Security Task Force “has put together a help sheet about suspicious activity and packages.”

- “It’s not cheap or feasible for all newsrooms to incorporate things like bulletproof glass, armed guards and safe rooms in their offices. But with a small investment, outlets can make big changes to their security protocol — which could come in handy during potential attacks.” Daniel Funke, It’s time for newsrooms to reevaluate their security measures (Poynter, June 29, 2018).

  o Have a secure door that locks.
  o Update policies about visitors, vendors and other tenants.
  o Install cameras at each entrance to your newsroom.

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- Have multi-purpose, accessible emergency exits.
- Schedule an active shooter training session or drill.
- Consider installing panic buttons.
- Create a digital threat reporting policy.

4. **“How to Protect Yourself When Covering a Protest”** (Reporter’s Committee for Freedom of the Press)

**Before the protest:**

1. Do your homework ahead of time. Identify potential threats and prepare for them.

2. Find a lawyer who will be available while you are reporting. Keep the phone number for a local criminal lawyer and bail bondsman handy (e.g., on a business card or written on your arm so you do not have to unlock your phone in the presence of police) and make sure the lawyer will be available to take your call. Contact the Reporters Committee’s hotline for assistance in finding an attorney.

3. Research the location of the protest and nearby police precincts. Give the phone numbers for those precincts to your attorney, who can call there to find you if you become unresponsive to phone calls or texts, in the event you are arrested.

4. Identify who may be adversarial to the press. If it may be protesters, stand apart from the crowd and closer to police, clearly identifying yourself as press. If you are concerned about police, stay closer to the crowd.

5. Research riot control tactics in the area and bring personal protective equipment as appropriate. Check with local police to make sure your equipment is permitted, at least for journalists (e.g., if you expect pepper spray or tear gas, bring a full-face gas mask; if you expect rubber bullets, bring body armor, helmets, and a trauma kit).

6. Plan for kettling. If you anticipate kettling, bring your attorney’s phone number so you can report it and so your attorney can contact the police to try to get you out of the kettle. Bring water, snacks, a medical kit, and additional layers of clothing in case the weather changes.

7. Team up with another reporter. Reporting alone is dangerous, particularly if you are operating a camera or video camera and are observing your surroundings from behind a viewfinder.

**At the protest:**
1. Bring a government-issued ID and cash. This can speed up processing if you are arrested and will enable you to pay for a bail bond.

2. Wear press credentials prominently. Although not required, this can help you avoid arrest, though in certain rare cases, police have targeted journalists, as they did in St. Louis....

3. Be aware of the situation and avoid breaking the law. Set the timer on your phone to go off every 15 minutes to remind you to look around, identify exits, assess police interactions with protesters, determine whether the situation is escalating, and whether you may be doing something illegal, such as trespassing on private property. This is especially important for photographers and videographers whose view is often limited.

4. If police issue a dispersal order or give any other directives, promptly comply and prominently display your press credentials. If you encounter a problem, contact your attorney.

5. If police stop you, explain that you are covering the protest as a journalist and show your press credentials. If you are arrested, contact your attorney and, if possible, give your notes or film to another journalist for safekeeping.

6. If police ask to search or seize your equipment, you do not have to consent. The Fourth Amendment protects you from unreasonable searches and seizures, and the Privacy Protection Act of 1980 restricts law enforcement from searching for and seizing a journalist's work product and documentary materials. Rehearse your response in advance (e.g., explain that your equipment and its contents belong to your company and that if the police want to access it, they must first contact the company's attorney).


5. “How should a news organization respond if one of its journalists is arrested?” (Columbia Journalism Review)

Should the organization cover or otherwise amplify the arrest and underlying incident? What should the organization’s editors do? Should the arrested reporter tweet about his or her experience? Jonathan Peters, When a journalist is arrested covering a protest, what should the news outlet do? Colum. J. Rev. (Oct. 2, 2017). 23

Excerpts from comments by media lawyers and news executives:

- Develop a plan in advance

• “[I]t is important to reach out to the police and others in government in advance of a protest, establish a line of communication, try to understand their concerns, and—when it works right—have a mechanism for quickly resolving any problem.”

• “Have a legal game plan. Know in advance which excellent local lawyer will be ready to take your late-night call, what the procedure is to make bail, whether the journalist is prepared for an uncomfortable legal battle, and whether the newsroom is willing to provide them and their family with every resource needed.”

Report and amplify

• “It’s important to report on [an arrest], highlight it, and use it as a vehicle to educate the public about First Amendment rights.”

• “Report on an arrest. Tweet about it. But have another journalist do the main reporting. Cover it the way you would any other story that involved an employee as a participant. And then editorialize like hell about it.”

Hold the police accountable

• “If you get arrested, don’t try to stop the arrest by arguing with the officer, but always be sure to clearly identify yourself as a journalist and make clear that you were covering a news story. Even if that doesn’t help at the scene, it could help later when others review the officer’s actions, and it could certainly help if you later bring a civil rights suit over the incident.”

• “Police departments that cross the line should be held accountable. Many departments are just now becoming aware that the First Amendment protects the right of photographers to record the activities of the police in public places, because some courageous journalists have been willing to step forward and bring constitutional claims when there have been sham arrests.”

6. Relevant legal principles

   a. Applying constitutional protections for newsgathering to actions of law enforcement

      i. Right to film police activity in public

      “Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded....” Houchins v. KQED, 438 U.S. 1, 10-11 (1978). However, “[t]here is an undoubted right to gather news ‘from any source by means within the law.’” Id. at 11 (quoting Branzburg v. Hayes, 408 U.S. 665, 681-82 (1972)). “[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.” Branzburg, 408 U.S. at 681. In particular,
The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected.... By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes.

American Civil Liberties Union of Ill. v. Alvarez, 679 F.3d 583, 595-96 (7th Cir. 2012).

“Based on these principles, numerous jurisdictions have held that the First Amendment affords individuals the right to photograph and film police officers in public places.” State v. Russo, 407 P.3d 137, 147 (Hawaiʻi 2017) (citing, e.g., Alvarez; Glik v. Cunniffe, 655 F.3d 78, 82-83 (1st Cir. 2011); Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017) (“We agree with every circuit that has ruled on this question: Each has concluded that the First Amendment protects the right to record the police”)); Ramos v. Flowers, 56 A.3d 869, 878-81 (N.J. Super. App. Div. 2012).

ii. Police may impose reasonable time, place and manner restrictions

That said, this right “is subject to reasonable restrictions as to the time, place, and manner of the photography or recording.... Such restrictions may be necessary to ensure that law enforcement officials are capable of carrying out their duties and maintaining the safety of both the general public and of the individual conducting the photography or videography.” State v. Russo, 407 P.3d at 149. “If issued, police orders pertaining to the time, place, or manner of filming must be narrowly tailored to mitigate the actual danger or risk posed by the recording and leave open ample alternative channels to engage in the protected activity, consistent with established principles of First Amendment jurisprudence.” Id.; Gericke v. Begin, 753 F.3d 1, 7-8 (1st Cir. 2014).

“[T]he police may take all reasonable steps to maintain safety and control, secure crime scenes and accident sites, and protect the integrity and confidentiality of investigations”; thus, “[w]hile an officer surely cannot issue a ‘move on’ order to a person because he is recording, the police may order bystanders to disperse for reasons related to public safety and order and other legitimate law-enforcement needs.” Alvarez, 679 F.3d at 607.

“[T]he right to record police activity in a public space is not without limits.... For instance, it may not apply in particularly dangerous situations, if the recording interferes with the police activity, if it is surreptitious, if it is done by the subject of the police activity, or if the police activity is part of an undercover investigation.” Higginbotham v. City of New York, 105 F. Supp. 3d 369, 381 (S.D.N.Y. 2015); compare Ramos v. Flowers, 56 A.3d at 881 ("there was certainly nothing new or novel about Ramos’s filming of police activity.... a reasonable police officer in 2006 could not have believed he had the
absolute right to preclude Ramos from videotaping any gang activities or any interaction of the police with gang members for the purposes of making a documentary film on that topic” with Chavez v. City of Oakland, 414 F. App’x 939, 940 (9th Cir. 2011) (newspaper reporter had no First Amendment right to exit his car on freeway to take photographs of accident).

iii. Retaliatory arrest and prosecution in violation of First Amendment

“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.” Lacey v. Maricopa County, 693 F.3d 896, 916 (9th Cir. 2012) (prosecutor’s “motions for arrest warrants, contempt findings, and fines show that he meant the New Times to fear them as valid. ... In the circumstances of this case, to state that ‘[a]rresting someone in retaliation for their exercise of free speech rights’ is sufficient to chill speech is an understatement”); Addison v. City of Baker City, No. 17-35552, 2018 WL 6016879, *1, ___ F. App’x ___ (9th Cir. Nov. 16, 2018) (city police chief allegedly “engaged in a campaign of harassment over a period of years against” journalist who wrote a column critical of police, “which included contacting two of [journalist’s] employers, ... manipulating [his] local law enforcement ‘fact file’ for the purpose of frightening [his] employers, and directing police officers to cite and ticket” him; affirming denial of defendant’s summary judgment motion).

Where “the substance of the complaint is ... that state officials are using or threatening to use prosecutions, regardless of their outcome, as instrumentalities for the suppression of speech” the prosecutions may be the subject of injunctive relief under section 1983; where “a significant chilling effect on free speech is created by a bad faith prosecution, the prosecution will thus as a matter of law cause irreparable injury regardless of its outcome, and the federal courts cannot abstain from issuing an injunction. Speech is an evanescent thing. To be effective it must be timely. And that, in essence, is why a mere prosecution may itself destroy it....” Sheridan v. Garrison, 415 F.2d 699, 706 (5th Cir. 1969) (television journalists who ran critical story on district attorney brought section 1983 claim to enjoin district attorney from continuing retaliatory prosecution of them for bribery and intimidation of witnesses; held, claim was not barred by the Anti-injunction Act).24

There are different formulations for the elements of a First Amendment retaliation claim. In the Ninth Circuit, the claim requires “that (1) the officer’s conduct would chill a person of ordinary firmness from future First Amendment activity; and (2) the officer’s desire to chill speech was a but-for cause of the challenged conduct”; being arrested or threatened with arrest is enough to show the likelihood of a First Amendment chill. Ford v. City of Yakima, 706 F.3d 1188, 1193 (9th Cir. 2013). In the Second Circuit, a plaintiff must show: “(1) he has a right protected by the First Amendment; (2) the defendant’s actions were motivated or substantially caused by his exercise of that right; and (3) the defendant’s actions caused him some injury.” Dorsett v. Cty. of Nassau, 732 F.3d 157, 160 (2d Cir. 2013). “Chilled speech is not the sine qua non of a First Amendment claim”; a plaintiff may show “either that his speech has been

24 Also, qualified immunity protects government officials only from claims for damages and does not bar injunctive relief in section 1983 cases. See, e.g., Pearson v. Callahan, 555 U.S. 223, 242 (2009); Wood v. Strickland, 420 U.S. 308, 314 n. 6 (1975).
adversely affected by the government retaliation or that he has suffered some other concrete harm.” *Id.* (emphasis in original).

There is also some uncertainty as to whether the plaintiff must show the absence of probable cause or arrest or prosecution. In *Hartman v. Moore*, 547 U.S. 250 (2006), the plaintiff claimed that postal inspectors violated his First Amendment rights when they allegedly instigated a prosecution in retaliation for his criticisms of the Postal Service; the Court held that retaliatory prosecution plaintiffs must show the absence of probable cause for the underlying charge. 547 U.S. at 265-66.

However, the Court distinguished *Hartman* in *Lozman v. City of Riviera Beach, Fla.*, 138 S.Ct. 1945 (2018), where plaintiff alleged that city, through its city council members, had him arrested at a meeting in retaliation for criticizing a development project. The Court commented that “there are substantial arguments that *Hartman’s* framework is inapt in retaliatory arrest cases,” where “there is a risk that some police officers may exploit the arrest power as a means of suppressing speech” -- but did not decide that issue. *Id.* at 1953. Instead, the Court found plaintiff’s claim was “far afield from the typical retaliatory arrest claim,” in that he did not sue the arresting officer, only the city, alleging an “official municipal policy” of intimidation. “An official retaliatory policy is a particularly troubling and potent form of retaliation, for a policy can be long term and pervasive, unlike an ad hoc, on-the-spot decision by an individual officer”; under those circumstance, a plaintiff “need not prove the absence of probable cause.... The Court need not, and does not, address the elements required to prove a retaliatory arrest claim in other contexts.” *Id.* at 1954-55.

In *Eberhard v. Calif. Highway Patrol*, No. 3:14-cv-01910-JD, 2015 WL 6871750, 44 Media L. Rep. 1283 (N.D. Cal. Nov. 9, 2015), journalist reporting on a controversial highway construction project alleged that the California Highway Patrol and its officers “targeted him for harassment for covering the project story,” including a “physical encounter” and an arrest for trespassing (charges for which were never filed). The court held plaintiff’s First Amendment retaliation claim would go to trial. “Even if an arrest is supported by probable cause, a federal claim is stated when the officer’s motivation was to retaliate against the exercise of First Amendment rights. In our circuit, ‘an individual has a right “to be free from police action motivated by retaliatory animus but for which there was probable cause.”’” *Id.* at *6 (quoting *Ford*, 706 F.3d at 1193). *See also Addison v. City of Baker City*, 2018 WL 6016879, at*2 (“Whether there has been First Amendment retaliation does not depend on whether Chief Lohner’s actions were lawful or permissible, but rather on whether a citizen’s protected speech was a ‘substantial or motivating factor’ for his actions”) (citing *Lacey*, 693 F.3d at 916).

Other Circuits hold that “[t]he existence of probable cause will defeat a First Amendment claim that is premised on the allegation that defendants prosecuted a plaintiff out of a retaliatory motive, in an attempt to silence her.” *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012). “An individual does not have a right under the First Amendment to be free from a criminal prosecution supported by probable cause, even if that prosecution is in reality an unsuccessful attempt to deter or silence criticism of the government.” *Id.* (internal quotations omitted). *Accord Allen v. Cisneros*, 815 F.3d 239, 244-45 (5th Cir. 2016) (“even where a citizen believes that he has been subject to a retaliatory detention or arrest, if
there was reasonable suspicion or probable cause for an officer to seize the citizen, ‘the objectives of law enforcement take primacy over the citizen’s right to avoid retaliation’”) (quoting Keenan v. Tejeda, 290 F.3d 252, 261-62 (5th Cir. 2002)).

In Ortega v. U.S. Dept. of Homeland Security, No. 1:18-cv-00508, 2018 WL 4222822 (W.D. La. July 6, 2018), a Salvadoran journalist entered the United States illegally in 2006 and was subject to an in absentia removal order; he was arrested in Memphis in 2018 “for disorderly conduct and obstructing a highway during a protest”. Those charges were dropped but he was promptly transferred to custody of Immigration and Customs Enforcement (“ICE”). After unsuccessfully attempting to reopen the removal order, he filed a habeas petition complaining that the actions of the Memphis police and ICE were “in retaliation for his exercise of his First Amendment right to free speech, through critical reporting on DHS, ICE, and local law enforcement activities....” Rejecting that argument, the district court held:

A retaliation claim is only applicable when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.... ICE did not have Ortega arrested and detained in retaliation for his statements in the press. ICE had independent probable cause to arrest Ortega that was unrelated to the MPD’s arrest of Ortega. Ortega cannot show that, but for his critical reporting on immigration matters, he would not have been arrested and detained by ICE.

Id. at *3 (citing Allen, 815 F.3d at 244-45 and Hartman, 547 U.S. at 256), report and recommendation adopted in Ortega v. U.S. Dept. of Homeland Security, No. 1:18-cv-00508, 2018 WL 4211864 (W.D. La. Sept. 4, 2018) (finding Supreme Court decision in Lozman “is in no way instructive in this case where Duran Ortega was arrested on his final order of removal. Both the law and common sense dictate that there is no basis upon which to find a retaliatory arrest or prosecution”).

Higginbotham v. City of New York denied a motion to dismiss the First Amendment retaliation complaint of a photojournalist arrested while videotaping the Occupy Wall Street protests from on top of a phone booth; the complaint alleged that plaintiff was “taping ... an arrest that resulted in a significant injury to the person being arrested” when he was ordered off the phone booth. ... Coupled with the lack of probable cause ... this makes it plausible that the defendants were attempting to punish him for filming that arrest, images of which might reflect badly on the NYPD.” 105 F. Supp. 3d at 381-82.

However, Pluma v. City of New York, No. 13 Civ. 2017(LAP), 2015 WL 1623828 (S.D.N.Y. Mar. 31, 2015) dismissed a similar claim that police retaliated against plaintiff’s actions as a “citizen journalist” at the Occupy protests; plaintiff “clearly alleges a concrete injury caused by the officers’ pushing and deploying pepper spray,” but it was “unclear” whether “filming an arrest and filming the commotion with the barricade” was protected activity in the circumstances. “Even granting that Plaintiff engaged in protected activity, however, the Complaint does not allege a causal connection between that activity and the deployment of pepper spray. ... the only allegations about the officers’ motivation for pushing
the barricade and deploying pepper spray relates to Occupy Wall Street protest activity, not attempts to film the police.” *Id.* at *7-8.25

And ultimately, after discovery, summary judgment dismissing the journalist’s First Amendment retaliation claim was entered and affirmed in Higginbotham, on grounds that there was probable cause to arrest him for “reckless endangerment” under New York law, which was wholly independent of any improper motive to violate his First Amendment rights. *Higginbotham v. Sylvester*, 218 F.Supp.3d 238 (S.D.N.Y. 2016), aff’d, 2018 WL 3559116 (2d Cir. 2018) (noting that Supreme Court in *Lozman* “left open” whether lack of probable cause must be shown where “defendants are individual police officers, rather than a municipality,” but in any event a reasonable fact finder could not find that plaintiff’s “exercise of his First Amendment right to video police activities was the ‘but-for’ cause of his arrest”).

**iv. Wrongful arrest of journalists for disorderly conduct and similar charges**

“The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest.” *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (internal quotations omitted). However, journalists have successfully challenged arrests for “disorderly conduct” under section 1983 and the Fourth Amendment when the conduct alleged implicates exercise of First Amendment rights.

“Although a person’s language and defiance of authority may contribute to the perception that he is being disorderly within the meaning of” a disorderly conduct statute, “it is well-settled that the law ‘only reach[es] conduct ‘which involves no lawful exercise of a First Amendment right.’’” *Iacobucci v. Boulter*, No. Civ. A. 94-10531-PBS, 1997 WL 258494, *6 (D. Mass. Mar. 26, 1997), aff’d, 193 F.3d 14 (1st Cir. 1999) (citations omitted). *See also Houston v. Hill*, 482 U.S. 451, 461 (1987). (“[T]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state”).

In light of journalist’s “clearly-established Fourth Amendment right not to be unlawfully arrested, the settled law defining disorderly conduct so as to exclude protected First Amendment activities, and state law establishing a citizen’s right to videotape public meetings,” the court in *Iacobucci* held “no objectively reasonable police officer” could believe there was probable cause to arrest journalist for disorderly conduct in taping a public meeting of a historic resources commission. 1997 WL 258494 at *6.

In *Garcia v. Montgomery Cty., Md.*, 145 F.Supp.3d 492 (D. Md. 2015), a photojournalist videotaping police as they arrested two other people was arrested for disorderly conduct. He was later found not guilty of that offense, and sued under section 1983 for violation of his First and Fourth Amendment

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25 *See also Galarza v. Monti*, No. 16-cv-5989 (JGK), 2018 WL 3745664, *7 (S.D.N.Y. Aug. 6, 2018)(“plaintiff’s speech in calling Officer Monti ‘ridiculous’ is not the speech ... that the plaintiff alleges was silenced by the arrest ... There is no evidence that the plaintiff’s First Amendment activity -- vending in Times Square -- was a motivating factor in Officer Monti’s decision to arrest him. The arrest occurred only after Officer Monti discovered that there was an outstanding warrant for the plaintiff’s arrest”); *Salvia v. Fell*, 14-cv-237, 2016 WL 1274620, *12 (W.D. Wis. Mar. 31, 2016) (“defendants did not arrest Salvia for taking pictures of the Solidarity Sing Along, nor for acting in some other way unique to being a journalist; they arrested him for intentionally refusing to leave an unlawful event”).
rights in connection with the arrest. The court held that a reasonable jury could conclude that arresting plaintiff for disorderly conduct lacked probable cause in violation of his Fourth Amendment rights, “either because [he] was not, in fact, disruptive in any way, or because the arrest was impermissibly based on the content of [his] speech.” Id. at 519. Compare Chavez v. City of Oakland, 414 F. App’x at 941 (reporter had no Fourth Amendment claim where probable cause existed for two violations of Vehicle Code -- Fire Department vehicle had to merge around reporter’s parked car to reach accident scene, and he refused to comply with officer’s directives to return to his car and leave the scene of the accident).

b. Harassment/incitement directed at journalists and First Amendment implications

As explained in PEN America’s Online Harassment Field Manual,

[One] reason it can be difficult to bring a criminal case against an online abuser is that the First Amendment to the U.S. Constitution is the basis for some of the strongest speech protections in the world. Expressions of hate or disparagement toward individuals and groups are not generally punishable by law unless they fall into a category of speech that is not protected by the First Amendment. Unprotected categories include extortion, perjury, defamation, false advertising, true threats (threats that “a reasonable person would interpret as a real and serious communication of an intent to inflict harm”), and fighting words (words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”). The latter two have been defined narrowly in U.S. case law....

Most states have laws covering some aspects of cyber abuse, whether related to improper use of devices (illegal hacking and surveillance, for example) or harassing behaviors like cyberstalking and nonconsensual pornography. Many state laws about offline stalking and harassment have been amended to include language addressing the use of electronic forms of communication to perpetrate harassment....

In order for federal law enforcement to become involved in a cybercrime, communication across state lines must be involved (meaning the person harassing or stalking you is in another state). As with state law, some federal laws regarding stalking and harassment have been amended to include language addressing the use of electronic forms of communication. (The federal stalking statute, for example, has been amended to include the use of “any interactive computer service or electronic communication service . . . to engage in a course of conduct that . . . causes, attempts to cause, or would be
reasonably expected to cause substantial emotional distress” to the targeted person or persons.)

The Federal stalking statute provides, in relevant part, that whoever

...with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to a person [or that person’s spouse, partner or family member]; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person [or that person’s spouse, partner or family member],... [is guilty of a felony and subject to fine and imprisonment].


In U.S. v. Moreland, 207 F.Supp.3d 1222 (N.D. Okla. 2016) defendant was indicted under section 2261A for directing hundreds of threatening communications to a “journalist and author working in the Washington, DC area, ... through e-mails, social media, and deliveries to [her] office.” While “many referenced political topics ... several other communications contained references to violence....” The court rejected defendant’s constitutional challenges to the statute, holding that “the First Amendment permits legal proscriptions of true threats, which the Supreme Court has said ‘encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals’”; and that “§ 2261A(2) expressly includes an element of intent to intimidate....” ld. at 1228. “[T]he statute does not criminalize a defendant’s mere transmission of communications that could be perceived by anyone as merely annoying or insulting” but instead requires proof that the communications “caused, attempted to cause, or were reasonably expected to cause substantial emotional distress, and that such transmissions were made with the intent to intimidate, harass, or injure.” ld. at 1229 (italics in original).

In one notable case of online harassment, supporters of President Trump sent one of his critics, the journalist and author Kurt Eichenwald, videos that trigger seizures (Eichenwald has epilepsy). One such individual, using the Twitter handle “@jew_goldstein,” replied to one of Eichenwald’s tweets with a post containing an animated strobe image (accompanied by the message “YOU DESERVE A SEIZURE FOR YOUR POSTS”) that caused Eichenwald to suffer a seizure. A criminal investigation was opened and the operator of the Twitter account was charged by Texas prosecutors with aggravated assault with a deadly

26 See https://onlineharassmentfieldmanual.pen.org/legal-considerations/when-to-report-online-harassment-to-law-enforcement/

Another statute, 18 U.S.C. § 875(c) makes it a crime to transmit in interstate commerce “any communication containing any threat ... to injure the person of another.” (The cases discussed above involving threats to CNN and the Boston Globe resulted in criminal charges under section 875(c)).

In Elonis v. U.S., 135 S. Ct. 2001 (2015), the defendant was charged under section 875(c) for making multiple threats on his Facebook page in the form of rap lyrics, including to murder his wife, shoot up a kindergarten, and kill the FBI agents who came to his house to investigate. The jury at his trial was instructed “that the Government need prove only that a reasonable person would regard Elonis’s communications as threats,” and the Court held that was error. “Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state…Under Section 875(c), ‘wrongdoing must be conscious to be criminal.’” The Court found that defendant’s “knowledge that the communication will be viewed as a threat” would satisfy the statutory requirements, but declined to consider if recklessness would be sufficient. Id. at 2012-13.

The Court did not consider any First Amendment issues. It has previously held that “the First Amendment ... permits a State to ban a ‘true threat,’” which “encompass[es] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Virginia v. Black, 538 U.S. 343, 359-60 (2003) (citing Watts v. U.S., 394 U.S. 705, 708 (1969) (“political hyperbole” is not a true threat)).

However, as explained in a recent law review article,

...the current set of state laws, which were mostly developed in the 1990s, generally lack the vocabulary and framework to address criminal behavior that occurs in cyberspace rather than physical space. Furthermore, while all laws governing speech must respect the First Amendment, the “true threat” doctrine, an exception permitting prosecution, has been applied inconsistently in the wake of Elonis v. United States.... Half of the victims of online

29 The organization Working to Halt Online Abuse (“WHOA”) maintains a list of current and pending state cyberstalking-laws, noting that currently there are 45 cyberstalking (and related) laws on the books. (http://www.haltabuse.org/resources/laws/index.shtml). See also Cyberbullying Research Center, Bullying Laws Across America (https://cyberbullying.org/bullying-laws).
harassment do not know the perpetrators. A successful prosecution requires the investment of law enforcement time and resources, such as subpoenas, to track the usernames and accounts down from IP address to internet provider to physical address. Once the perpetrator has been located..., the perpetrator will often be in a different state and jurisdiction from the victim. Successful prosecutions are therefore extremely rare.

Emma Marshak, Online Harassment: A Legislative Solution, 54 Harv. J. on Legis. 503, 504-505 (Summer 2017).

The author concludes that “the patchwork of laws regulating online threats and harassment especially inhibits prosecution of unfamiliar perpetrators” and proposes a common model statute that will “standardize the approach to online threats and harassment across jurisdictions, increase efficiency through the use of uniform training materials, and improve cooperation and coordination between multiple law enforcement agencies.” Id. at 505-506. For example, “[a] person is guilty of the crime of online harassment in the first degree” under the model statute if

1. The person intended, knew, or consciously disregarded a substantial and unjustifiable risk that the words or conduct described in subsection (2) would place a person in reasonable fear of death, serious bodily injury, or sexual assault;

2. The person used electronic communication, anonymously or otherwise, to threaten to sexually assault, or cause death or serious bodily injury to another person or member of that person’s family or household; and

3. The act(s) were either:
   i. Part of a pattern of conduct or series of two or more acts within a period of time; or
   ii. Sufficiently grave that a single act suffices to place a reasonable person in imminent fear of death, serious bodily injury, or sexual assault.

Id. at 532, Appx. A. “The accused may be prosecuted for all acts against a victim in any county in which any single act described in subsection (2) was committed, or where the actor or victim resides.” Id.

The mens rea requirement in this model statute is recklessness, which is lower than the intent required by the existing federal cyberstalking statute; however, the federal statute has a lower threshold for what qualifies as an act (i.e., any course of conduct that would be reasonably expected to cause substantial emotional distress). “The model statute proposed here has more complicated act requirements, in order to remain squarely in the ‘true threat’ exception to the First Amendment.” Id. at 524.
The First Amendment’s potency was made clear in *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018); plaintiffs, protestors attacked by audience members at a Trump campaign rally, brought state tort claims, including incitement to riot, against the then-presidential candidate and his campaign committee. On defendants’ interlocutory appeal from denial of their motion to dismiss, the Sixth Circuit held plaintiffs “failed to state a viable claim for incitement to riot” and “any doubt about this conclusion is wholly dispelled by consideration of the constitutional protection Trump’s speech enjoys under the First Amendment.” *Id.* at 609. “Under the *Brandenburg* test, only speech that explicitly or implicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment,” and the alleged speech (“get ‘em out of here”) did not meet that standard. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). “‘Speech is powerful.’ … Yet, as a nation, we have chosen to protect unrefined, disagreeable, and even hurtful speech to ensure that we do not stifle public debate.” *Id.* at 613 (quoting *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011)).

**c. First Amendment litigation against Trump Administration**


PEN America’s suit complains of “official acts by the President of the United States, Donald J. Trump, intended to stifle exercise of the constitutional protections of free speech and a free press,” including “credible public threats to use his government powers against news organizations and journalists who have reported on his statements, actions, and policies in ways he does not welcome,” seeking an order “(a) declaring that Defendant Trump’s retaliatory acts violate the First Amendment, and (b) enjoining Defendant Trump from directing any officer, employee, agency, or other agent or instrumentality of the United States government to take any action against any person or entity in retaliation for speech that the President or his Administration do not like.”


In this highly publicized case arising from the administration’s revocation of CNN White House correspondent Jim Acosta’s White House credentials, CNN and Acosta sued for violation of their First Amendment free press and Fifth Amendment due process rights; the district court granted the plaintiffs’ motion for a temporary restraining order on due process grounds.

In the wake of that decision, “[t]he White House then said it planned to revoke the pass once again after the judge’s temporary order expired, but reversed course and decided to allow Acosta back into the briefing room. In a letter restoring the pass, the White House announced new rules for press briefings, limiting reporters to one question unless the official being questioned agrees to entertain follow-ups, and requiring reporters to ‘yield’ when their questions have been ‘allowed and asked.’” CNN agreed to dismiss the action without prejudice. See Neal Katyal and Bruce Brown, CNN v Trump might be over, but the dangers are just beginning: New White House rules governing the press corps threaten the First Amendment, *Politico* (Dec. 4, 2018).