

The Government Law Center at Albany Law School Presents
2023 Fair Trial/Free Press Conference:

Local Media, the Law, and Alleged Police Misconduct

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Hypothetical Scenario

Blaine Scoop, a crime reporter for the Daily Bugle, a community newspaper serving the Town of Scarborough, New York, was startled by the abrupt and indecipherable squawking of the police scanner in the newsroom. Scoop had long relied on the scanner as a source of information about police activity in responding to crime or accident scenes, but she couldn't make out what was going down that day. Mayor Jesse White, at the request of the Scarborough Police Department, had persuaded the Town Board recently to adopt an ordinance encrypting all police scanner information. Journalists and others in the public could obtain transcripts of the scanner traffic, the mayor asserted, if they filed requests under the Freedom of Information Law and paid for the transcription or audio copies. Mayor White called the encryption of police scanners "a legitimate time, place, and manner restriction."

As social media began pulsating with reports that Scarborough Police had shot someone at a local grocery store parking lot, reporter Scoop rushed to the scene with Jamie Image, a videographer for the Daily Bugle. But by the time they arrived, a cadre of Scarborough police officers had restricted the press and public to a cordoned-off area a block away from the grocery store, from which vantage point nothing could be seen. However, police were allowing residents of the restricted zone to pass through to their homes. Scoop convinced a homeowner near the grocery to let the two journalists ride in his car through the police lines.

Once inside the barriers, Scoop and Image stealthily maneuvered their way closer to the crime scene, all the while trying to avoid calling police attention to their presence, and managed to capture visual images of what appeared to be a dead body on the ground. Before they could retreat undetected, however, a uniformed officer noticed their presence and snapped handcuffs before detaining them in the back seat of a police cruiser. The officer seized their videocam and cell phones, which also contained some images of the scene — although before the cop confiscated her phone, Scoop managed to call the Daily Bugle's media counsel, Finley Gable, to see if any legal avenues were available to retrieve their cameras and avoid incarceration. The journalists were taken to police headquarters and kept in a locked area for three hours before they were released; their cameras were returned to them with all the images remaining.

At a press conference the next day, Scarborough Police Chief Alex Blue confirmed that Officer Martin Davis, a 20-year veteran of the force, who is Caucasian, had

discharged his service firearm while attempting to apprehend Kim Smith, a 16-year-old African-American student at Scarborough High School, thereby causing Smith's death. Blue said police had acted properly in detaining the journalists, because they had disregarded police orders to remain outside the crime scene perimeter, but also said they hadn't been arrested "because Scarborough police support freedom of information." He promised to turn over body camera footage once it had been fully analyzed by police, but hedged that it was needed for law enforcement purposes and wouldn't be available for a while.

Journalists were more successful in obtaining civilian images of the scene: Cellphone footage from bystanders posted on social media depicted an unarmed Smith crumbling to the ground while running away from the grocery store's entrance, apparently having been shot in the back. As the footage gained wider circulation on social media, and then in the Daily Bugle and media outlets nationwide, the community found itself in an uproar, and local civil rights leaders demanded police reform along with increased transparency and accountability.

Determined to get to the bottom of the tragic fatal shooting incident, Reporter Scoop called a source in the Police Department, Officer Casey Meely, who Scoop had cultivated as an off-the-record source over many years. Scoop and Meely agreed to meet at an out-of-the-way watering hole that evening. After a few beers, and after receiving a promise of source confidentiality from Scoop, Officer Meely opined that Officer Martin Davis was a "bad apple" on the force, distrusted by his colleagues and having a lengthy history of on-the-job misconduct. Further, Officer Meely disclosed that Officer Davis had been arrested on a serious domestic assault charge a few years earlier. When Davis' wife refused to cooperate, however, the District Attorney dropped the prosecution, and the arrest report was sealed.

The next day, Scoop filed FOIL requests with both the Scarborough Police Department and the District Attorney's office for the arrest records pertaining to Officer Davis' domestic violence charge. Those requests were immediately denied because the records were sealed. Notwithstanding the absence of any police or prosecution records to document the domestic violence charge, Scoop's editors told her to begin to flesh out a story — based on the barroom conversation with Meely, and secure in the knowledge that the information had been acquired from a reliable official source — that would report Davis had been previously arrested for attempting to strangle his wife. To obtain more background, Scoop submitted a second FOIL request to the Scarborough Police Department for Davis' personnel file, dating to the start of his employment. Scoop's request was denied on grounds that the June 2020 repeal of Civil Rights Law § 50-a, which formerly prohibited FOIL disclosure of police personnel records, did not apply retroactively and, further, did not authorize public access to unsubstantiated or dormant complaints of misconduct.

Frustrated at the lack of available information, Scoop turned to the Daily Bugle's legal counsel, Attorney Gable, to try to dislodge Davis' arrest and personnel records, as well as for advice on what she could report based on the information imparted during her liquid discussion with Officer Meely, her confidential police source. Meanwhile, Scoop got another police source to confirm off-the-record that there was an extensive history of misconduct in Davis' personnel file, including complaints of excessive use of force against criminal suspects. When Scoop reached Davis' wife by phone to inquire about the domestic abuse incident, she denied its occurrence and said "I have nothing to say to you," and hung up.

After presentation of the case to a grand jury, Officer Davis was indicted for Kim Smith's murder. As the trial date became closer, Reporter Scoop found herself at her home computer one evening when she received an email from an anonymous source she did not recognize. Upon opening the email's video attachment, Scoop learned it contained police body cam footage of an unrelated previous incident that showed Davis directing a full-force kick — much like a football placekicker — to the chin of a handcuffed suspect who was kneeling on the ground when the blow was delivered. This took place in the presence of several patrol officers who witnessed the suspect's head snap back violently; they subsequently administered emergency first aid to the suspect's shattered jaw.

Excited by the find and aware of its tremendous news value in what had become a competitive news environment, Scoop posted the bombshell information to the Daily Bugle's website right away, without consulting with the newspaper's editors or Attorney Gable. Davis' enterprising defense lawyer, Johnnie Cockerell, filed an emergency motion for a restraining order demanding immediate removal of the body cam footage from the newspaper's website and enjoining its further dissemination on the ground that it was necessary to protect his client's right to a fair trial. Attorney Cockerell also threatened the Daily Bugle with a defamation lawsuit if it published anything about the domestic abuse incident purportedly involving Officer Davis.

The much-anticipated trial date finally arrived, and community attention was riveted on the proceeding. Local and national media were on hand as supporters of the Smith family clustered on one side of the entrance to Scarborough County Court, while partisans of Officer Davis — including representatives from the police officers' union, the Infamous Boys, and the Pledge Takers — thronged on the other side. Scarborough Police Department members bedecked in full riot gear occupied the middle ground on the courthouse steps, while a police helicopter hovering overhead maintained vigilance over the uneasy assemblage.

While Scoop was present in court for the beginning of jury selection, Attorney Cockerell moved to exclude the press and public by closing the courtroom for the entire duration of voir dire, while also requesting the sealing of juror questionnaires

and the empanelment of an anonymous jury. Judge Jackie Wisdom, presiding in *People v. Davis*, cited the recent trial of Officer Derek Chauvin in Minneapolis, who was convicted of murdering George Floyd, in granting Davis the defense motion while expressing concerns over doxing,¹ threats to juror privacy and safety, and the pervasive social media pressure that might be brought to bear on the jurors to decide the case a certain way if their names were made known to the public.

Further, and again citing the protective measures undertaken in the Chauvin case, Judge Wisdom issued an order prohibiting the press from in any way contacting or speaking with any jurors — even those who consented to be interviewed — until six months after a verdict had been rendered. Scoop had always found that voluntary post-verdict interviews were extremely helpful in informing the Daily Bugle’s readers about criminal trial outcomes, particularly in controversial cases, and contacted Attorney Gable to see if the First Amendment tolerated these sweeping restrictions on public access to jurors and the jury selection process.

¹ The act of doxing (or doxxing) is to publicly identify or publish private information about someone, especially as a form of punishment or revenge.