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*Libel, Slander, and
Related Problems*

Fifth Edition

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VOLUME 1

Robert D. Sack

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In Memory of

PETER BACSÁK
1939–1979

D. ROBERT OWEN
1930–1981

ROBERT S. POTTER
1920–1988

P. CAMERON DEVORE
1932–2008

. . . *I pray you, in your letters,
when you shall these unlucky deeds relate,
Speak of me as I am; nothing extenuate,
Nor set down ought in malice. . . .*

—*Othello*, Act V, sc. ii.

About the Author

Robert D. Sack has since 1998 been a Judge of the United States Court of Appeals for the Second Circuit. He took senior status on August 6, 2009. During his thirty-three years in practice, he specialized in national and international press law. He was a frequent lecturer and writer on press law topics and participated in the Practising Law Institute's Communications Law programs from their inception in 1973. He was co-author, with P. Cameron DeVore, of *Advertising and Commercial Speech: A First Amendment Guide* (PLI 1999). His articles include *Protection of Opinion Under the First Amendment: Reflections on Alfred Hill*, "Defamation and Privacy Under the First Amendment," which was published in the 100th Anniversary issue of the *Columbia Law Review*, 100 Colum. L. Rev. 294 (2000), and *New York Times Co. v. Sullivan—50-Year Afterwords*, 66 Ala. L. Rev. 273 (2014). On May 1, 2008, Judge Sack was awarded the Federal Bar Council's Learned Hand Medal for excellence in federal jurisprudence.

Judge Sack was an officer and director of the William F. Kerby and Robert S. Potter Fund, which assisted in funding the legal defense of journalists abroad, and a member of the advisory boards of the Bureau of National Affairs' *Media Law Reporter* and the ABA Forum Committee's *Communications Lawyer*. He is a member of the Board of Visitors of Columbia Law School, was a member of the Board of Trustees of Columbia University Seminars on Media and Society, and was Chairman of the National Council on Crime and Delinquency. He has since 2001 been a Lecturer in Law and Adjunct Professor at Columbia Law School. He was Columbia Law School's commencement speaker in 2007. He was Adjunct Professor of Political Science and Special Guest Lecturer at the University of Rochester in 2012 and a Distinguished Visiting Jurist at the University of Chicago Law School in 2013. He is a member of the American Bar Association, the New York City Bar Association (Chair, Communications Law Committee, 1986–89), and the American Judicature Society. He is a Fellow of the American Bar Foundation.

After graduating from the University of Rochester in 1960 and Columbia Law School in 1963, Judge Sack clerked for United States District Judge Arthur S. Lane, in the District of New Jersey. He later became an associate and then partner at Patterson, Belknap, Webb & Tyler (1964–1986) and a partner at Gibson, Dunn & Crutcher (1986–1998), both in New York City. In 1974, he served as a Senior Associate Special Counsel to the United States House of Representatives Impeachment Inquiry Staff.

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Preface

“These are troubled times.”

U.S. District Judge Murray Gurfein, Southern District of New York, in *United States v. New York Times Co.*—“The Pentagon Papers Case”¹

This may either be a particularly propitious or a remarkably ill-chosen time to issue a new edition of this treatise. In the rather sleepy field of American defamation and invasion of privacy law, with the Supreme Court and Congress engaged in other matters, recent changes in the law have tended to be modest.²

But in light of current political events and technological developments, the beast may be reawakening. Evidence for that includes the apparently increasing “weaponization” of libel and privacy litigation;³

-
1. *United States v. N.Y. Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y.) (Murray Gurfein, J.), *remanded*, 444 F.2d 544 (2d Cir.), *rev'd and remanded*, 403 U.S. 713 (1971) (per curiam). Judge Gurfein continued: “There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form. . . . It is one of the marked traits of our national life that distinguish us from other nations under different forms of government.” *Id.*
 2. What modest changes there have been in the last quarter century have largely been linked to the emergence and increasing dominance of digital media. In the Introduction to the Fourth Edition of this work (reprinted below), I addressed the impact of the new digital media on libel, slander, and related torts, expressing “the view that the law of defamation, invasion of privacy, and related torts will not require substantial change in order to address the revolution wrought by the advent of the internet and other new media of communications.” In light of recent events likely spawned in part by the ripening of new technology and in part by political events, I have little confidence that that will continue to be true.
 3. See Adam Liptak, *Fearing Trump, Bar Association Stifles Report Calling Him a “Libel Bully,”* N.Y. TIMES, Oct. 24, 2016, at A7; Alan Yuhas, *Peter Thiel Justifies Suit Bankrupting Gawker, Claiming to Defend Journalism*, GUARDIAN, Aug. 15, 2016, www.theguardian.com/technology/2016/aug/15/peter-thiel-gawker-bankruptcy-lawsuit-hulk-hogan-sextape (last visited Dec. 18, 2016):

Tech billionaire Peter Thiel defended his decision to finance a lawsuit that bankrupt Gawker Media . . . , saying the news site was willing “to exploit the internet without moral limits” and “did something beyond the pale” by publishing a former wrestler’s sex tape.

talk of lowering the legal bar for libel plaintiffs;⁴ “fake news,”⁵ which at least in theory is particularly vulnerable to legal attack;⁶ the likely growing use of the “public disclosure of private facts” tort as a theory by which to seek to recover for statements that are harmful because

Thiel funded a lawsuit by retired wrestler Terry Bollea, better known as Hulk Hogan, that ended . . . with a jury’s order that Gawker pay \$140m in damages. In June, the media organization filed for bankruptcy and put itself up for auction

4. See Sidney Ember, *Can Libel Laws Be Changed Under Trump?*, N.Y. TIMES, Nov. 14, 2016, at B6; Callum Borchers, *Donald Trump Vowed to “Open Up” Libel Laws to Make Suing the Media Easier. Can He Do That?*, WASH. POST, Feb. 2, 2016, www.washingtonpost.com/news/the-fix/wp/2016/02/26/donald-trump-vows-to-open-up-libel-laws-to-make-suing-the-media-easier-heres-how-he-could-do-it/?utm_term=.76ae43c82f99 (last visited Dec. 27, 2016); Bradford Richardson, *Trump Wants to “Open Up” Libel Laws to Sue Media Outlets*, THE HILL, Feb. 26 2016, <http://thehill.com/blogs/ballot-box/presidential-races/270956-trump-threatens-to-open-up-libel-laws-to-sue-newspapers> (last visited Dec. 18, 2016).
5. See Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES, Jan. 18, 2017, www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html (“President Obama thought the fake news phenomenon significant enough to mention it as a threat to democracy in his farewell speech ‘Increasingly,’ he said, ‘we become so secure in our bubbles that we start accepting only information, whether it’s true or not, that fits our opinions’”); see also Faye Flam, *Can You Spot Fake News? Don’t Be So Sure*, BLOOMBERGVIEW, Dec. 29, 2016, www.bloomberg.com/view/articles/2016-12-29/can-you-spot-fake-news-don-t-be-so-sure (last visited Dec. 30, 2016) (“[F]ake news was rampant in 2016. No, busloads of paid protesters didn’t descend on Texas in November, but more than 350,000 people shared ‘news’ that they did. Made-up stories outperformed the real stuff on Facebook, with dozens of dubious websites springing up to meet the demand. Pakistan’s defense minister fell for fake news. So did America’s next national security adviser. No wonder PolitiFact named fake news its ‘Lie of the Year.’”); Andrew Higgins, Mike McIntire, Gabriel J.X. Dance, *Inside a Fake News Sausage Factory: “This Is All About Income”*, N.Y. TIMES, Nov. 25, 2016, at A1; Cecila Kang, *Fake News Onslaught Targets Pizzeria As Nest of Child-Trafficking*, N.Y. TIMES, Nov. 22, 2016, at B1.
6. It seems self-evident that to be “fake news” the communication in issue must be both “fake”—that is, invented and disseminated with the intention of fooling the recipient into believing it is genuine—and “news,” see, e.g., OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/news> (last visited Jan. 14, 2017) (defining “news” as “[n]ewly received or noteworthy information, especially about recent events”). In any event, the graphic term should be used with care. First, it is apparently being employed by many to refer to virtually any public communication that the person using the term accuses of having been falsified for political purposes. Second, at least if the progenitor of fake *defamatory* news is known, the “news” is likely to be actionable because, virtually by definition, it meets the high *Sullivan* bar of having been published with “actual malice,” that is, “subjective awareness of probable falsity.” *Gertz v. Robert Welch, Inc.*, 418 U.S.

they are embarrassing to a person, but not actionable as defamation because they are true;⁷ and what seems to be the increasingly crippled notion of truth itself.⁸ It may be that any or all of those phenomena, combined with the continuing rapid evolution of communications

323, 334 n.6 (1974) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). Meanwhile, defamation plaintiffs and their counsel are therefore likely to overuse the term by referring to any communication in any media upon which they are bringing a defamation suit as “fake news.” See, e.g., R. Robin McDonald, *Lawyer in Ramsey Libel Case Calls Out CBS for Fake News*, N.Y.L.J., Dec. 30, 2016, at 2. And, of course, “fake news,” used as an epithet, will be hurled by some to describe news reports that they either think are false, or simply wish were not true.

7. As of this writing, the most widely discussed example is doubtless the Gawker Media litigation. See, e.g., Yuhas, *supra* note 3; *Gawker Media LLC v. Bollea*, 170 So. 3d 125 (Fla. Dist. Ct. App. 2015). There, in a privacy action, a Florida state jury awarded Bollea (a/k/a/ Hulk Hogan) some \$140,000,000 against *Gawker* and its co-defendants for publishing online a video recording of the plaintiff having consensual sex with a woman not his wife. Author Jeffrey Toobin, comparing that action to a parallel suit in federal court, commented:

For decades, the news media benefitted from the deference paid by courts to the judgments of newspapers editors [as to what is “newsworthy” and therefore protected from liability as a public disclosure of private facts]. The judge in federal court treated Gawker’s editors as if they were running a newspaper, and he declined to second-guess them about what constitutes the news. The jury in state court did the opposite. The question now is whether the law, instead of treating every publication as a newspaper, will start to treat all publications as Web sites—with the same skepticism and hostility displayed by the [state court] jury . . .

Jeffrey Toobin, *When Truth Is Not Enough*, NEW YORKER, DEC. 19 & 26, 2016, at 96, 106.

8. “After much discussion, debate, and research, the Oxford Dictionaries Word of the Year 2016 is *post-truth*—an adjective defined as ‘relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.’” Oxford Dictionaries, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Jan. 14, 2017) (emphasis in original); Shane, *supra* note 5 (“‘Increasingly,’ [Barack Obama] said, ‘we become so secure in our bubbles that we start accepting only information, whether it’s true or not, that fits our opinions’”); Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES, Dec. 7, 2016, at A1; Farhad Manjoo, *How the Internet Is Loosening Our Grip on the Truth*, N.Y. TIMES, Nov. 2, 2016, at B1; Cass R. Sunstein, *What Really Makes People Queasy About Engineered Foods*, BLOOMBERG VIEW, May 26, 2016, www.bloomberg.com/view/articles/2016-05-25/what-really-makes-people-queasy-about-gmos (“Democrats pride themselves on their commitment to science. Citing climate change, they contend that they are the party of truth, while Republicans are ‘denialists.’ But with respect to genetically modified organisms, many Democrats seem indifferent to science, and to be practicing a denialism of their own—perhaps more so than Republicans.”).

media and technology, will give rise to changes in tort law related to speech. It is too soon to tell.

Despite the deeply rooted notion that “the best test for truth” is acceptance “in the competition of the market,”⁹ perhaps the “marketplace of ideas” is now—indeed, maybe it always has been¹⁰—best understood as a myth and not a literal truth.¹¹ But it would be no less important for that. The belief that we must act *as though* there is a democratic marketplace to be guarded lies at the heart of our First Amendment jurisprudence. It was, for example, prominent in the foundation stone for the modern law of defamation—the Supreme Court’s decision in *New York Times Co. v. Sullivan*¹²—and thus played a role in the development of the law we spend the next many hundreds of pages discussing. It has proved highly beneficial insofar as it has worked to protect individual and institutional freedom of expression.

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9. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J.); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.).
 10. Judge Hand recognized long ago that “[t]o many,” the notion of a marketplace of ideas “is, and always will be, folly.” *Associated Press*, 52 F. Supp. at 372. Even if there were such a marketplace in the era of Holmes, Brandeis, and Hand, it may not have survived intact into the Age of the Internet.
 11. I am of the view that both literally false and literally true stories may become myths: Does it matter, for example, whether there was a real young man named David who slew a real giant named Goliath with a slingshot? In either event, it is now a myth, and useful for that. This is not, however, the place nor am I the person to attempt to enlarge upon the subject.
 12. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964). Justice Brennan began this discussion as follows: “The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is, and always will be, folly; but we have staked upon it our all.’” *Id.* at 270 (quoting *Associated Press*, 52 F. Supp. at 372). Brennan went on to quote Justice Brandeis in *Whitney v. California*, 274 U.S. at 375–76, for a similar proposition, but omitted perhaps the most famous exposition of the theory, which appeared in Justice Holmes’s earlier “Great Dissent” in *Abrams*:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that *the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

Preface

The pre-digital age was dominated by mass media. Readers of the *New York Times*, the *Wall Street Journal*, or the *New York Post*; and viewers of CBS, Fox, or PBS news, were exposed to much with which they were previously unfamiliar or about which they were likely to disagree. Each “truth” deemed newsworthy by these media was conveyed to thousands upon thousands of readers, watchers, or listeners; and each was reasonably likely to be further spread by their repetition in other mass media. Thus having been widely disseminated, the asserted and often conflicting versions of “truths” relating to public matters and their consequences were then discussed in uncountable venues by private individuals exposed directly or indirectly to the assertion in question. It seems to me that the notion of a marketplace of ideas is not so much reflected in the raw number of sources of news, but more in this subsequent extended conversation and debate among countless members of the public who had thus been exposed, directly or indirectly, to the assertions at issue.

That which we have traditionally thought of as a “marketplace” is plainly in trouble. The power of the institutional press, whatever its faults, has in modern times been central to the way that “market” works. But the hardiness and influence of that press seems to be widely if not universally on the wane.¹³ Financial troubles, caused or exacerbated by the rise of digital news, may be one source of this decline.

Information and what purports to be news are, instead, increasingly disseminated by a splintered array of digital, often home-made, media to cells of people who already agree with one another about what is being told them and its truth. Such media are fertile grounds for “confirmation bias.”¹⁴ Subsequent discussion of what they report no doubt ensues, but it tends to be limited to those already persuaded. Their notions of what is true echo; they do not compete.¹⁵ If there is little serious interaction among people with different views on important issues, it is not literally or figuratively a “marketplace of ideas”;

13. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP, Sept. 14, 2016, www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx (last visited Jan. 14, 2016).

14. Jason Zweig, *How to Ignore the Yes-Man in Your Head*, WALL ST. J., Nov. 9, 2009, www.wsj.com/articles/SB10001424052748703811604574533680037778184 (“In short, your own mind acts like a compulsive yes-man who echoes whatever you want to believe. Psychologists call this mental gremlin the ‘confirmation bias.’”).

15. See, e.g., Farhad Manjoo, *How Netflix Is Deepening Our Cultural Echo Chambers*, N.Y. TIMES, Jan. 12, 2017, at B1 (“Polls show that many of us have burrowed into our own echo chambers of information. In a recent Pew Research Center survey, 81 percent of respondents said that partisans not only differed about policies, but also about ‘basic facts.’”).

it is a Tower of Babel. A Tower of Babel seems to me to be virtually useless in the search for better ideas or a better society, government, or institutions.

If that is so, what effect has it on constitutional and other legal protection for the freedom of the press? If the marketplace metaphor is informed in part by the goal of enabling informed, vigorous debate, as the *Sullivan* Court suggested, what might or should the effect of its weakening be on its protection? If the *New York Times* no longer plays the role in public discourse and the dissemination of information and opinion that it did in 1960s, is the rule of *Sullivan* any the less wise or necessary?

Despite evidence of the lessened role of the traditional press in the endeavor, we should not understate its continuing importance. Whatever their strengths and weaknesses, the established media, delivered on paper or otherwise, still play a substantial role in reporting and commenting on the news. If the classic institutional press is less robust now than it once was, the response surely cannot be less protection, but perhaps in some respects recognition of the need for more so it can continue to serve. Meanwhile, the newer media may become more important, but because they are different, they may require different protections of their own.¹⁶ “[T]his difficult and dynamic time of political ferment is one in which it is critically important that [the nation] recommit to the project of crafting our media law carefully, and with close attention to how best to calibrate our multiple values.”¹⁷

The use of agencies of government, in the form of judges and juries in defamation suits, instead of the public, in deciding what is “true” is also unsettling. There is, of course, the so-called “chilling effect” on speakers and writers arising from their need to defend against defamation suits, and perhaps to pay for having written something a judge or jury later says was not so. But it is also problematic for an official, government-determined-and-enforced “truth” to be declared by judges and jurors who have preconceived notions of what is likely to be true based on information from “truth bubbles” of their own urged on them by lawyers who are expert not necessarily in the truth of the matter, but in the art of persuasion.

My subject is the law, not politics, sociology, the media, or modern communications technology. But no author, I suspect, can write comprehensively and authoritatively on any of these topics at this

16. See, e.g., section 7:3.2, *infra* (The Internet: Section 230 of the Communications Decency Act).

17. Private correspondence with Prof. Benjamin C. Zipursky of Fordham Law School (Mar. 3, 2017) (in the author’s possession). [Professor Zipursky’s quotation and this footnote added March 2017.]

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time. On the day after Christmas 2016, as I was preparing to write these remarks, I fetched a thin, holiday-edition *New York Times* (stock markets closed; no *Wall Street Journal*) from outside our apartment door. It contained no fewer than three articles addressing, in different contexts, news related to or commentaries on current notions of truth and the political process.¹⁸ More the day after; more the day after that. Relevant events of today overwhelm the news of yesterday. Perhaps as recent political upheavals recede, developments will slow to the point where we can examine and evaluate them to anticipate their likely effect on the law treated in these volumes. But not yet.

“What then shall we do?” What then *can* we do? Speaking as a lawyer commenting on “Libel, Slander, and Related Problems,” little more, I think, than watch and wait to see whether these developments spur changes in the related fields of law. And we must keep in mind for whatever may come of it, that in the law that we are seeking to explain, so-called “truth,” the very existence of which appears to be under fire, is, legally, at the heart of the matter.¹⁹

Thanks to PLI and my superlative editor Keith Voelker and his colleagues for their work on this edition (and indeed previous editions) of the work; to Dave Heller, Deputy Director of the Media Law Resource Center, and the Center and its Executive Director George Freeman, for Dave’s contribution of material with respect to European and English law in chapter 15; to Chad Milton for his continuing contribution to chapter 17 on Insurance, a topic about which anything I may have ever known, I have forgotten; and to Professor Benjamin C. Zipursky of Fordham Law School for his review of a late draft of this preface. Thanks too to my assistant Ann Pisacano, and my law clerks

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18. See Jeremy W. Peters, *Wielding Claims of “Fake News,” Conservatives Take Aim at Mainstream Media*, N.Y. TIMES, Dec. 26, 2016, at A11; Jim Rutenberg, *Lessons from 2016 for the News Media, As the Ground Shifts*, N.Y. TIMES, Dec. 26, 2016, at B1; David Streitfeld, *For Fact-Checking Website Snopes, a Bigger Role Brings More Attacks*, N.Y. TIMES, Dec. 26, 2016, at B1.
 19. See chapter 3, *infra*, devoted to the subject. My view set forth there: “The limitations of human perception, human memory, and human communication can make certainty as to truth impossible, even with the best intentions. And the best intentions are not always present. Although there is a truth, a ‘what actually happened,’ as to whether there was a shot from the ‘grassy knoll,’ whether Bruno Hauptmann murdered the Lindbergh child, or whether aliens have been kidnapping earthlings, despite strong certainty by those taking each side of the issue, the truth is persistently elusive.” *Id.* at section 3:12.

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Jordana Confino, Joel Johnson, and Alex Parkinson for their support. Thanks to all of those mentioned in prefatory material for previous versions of this work reprinted below (especially Sandra S. Baron), who were crucial in putting together earlier versions of it.

And no work of this weight (literally!) is possible without substantial assistance from many people, some of whom I have not likely met and whose names I do not know—who designed the cover, put together the tables of cases, or lugged boxes of the work onto and off of trucks . . . somewhere. Thank you.

And as always, thanks to Anne!

ROBERT D. SACK
January 18, 2017

Preface to the Fourth Edition

My father was born and raised in Gloversville, New York, a small city not too far from Albany, New York, and not too near any other sizeable center of population. Its principal industry at the time is not hard to guess, given its name. Not long before the first edition of this treatise was published, he, my mother, my family and I made a pilgrimage to his home town.

On a bright day in May, we stopped at the Jewish cemetery, on a small hill in a pretty part of town, where the remains of his parents and their generation and a generation before them are interred. As we walked by the graves, my father would say a little about this one—a deaf cousin whose German Shepherd awakened her to the return of her son from service in World War II—and those over there, parents and children who died together in a fiery crash on the road to New York City.

My father's extended family lived their lives mostly in modest frame houses down nearer the glove factories, the FJ&G railroad, and Cayadutta Creek, known to my father's generation as "stink creek" because of the fragrance it acquired from upstream tanneries. My father mused that as the years passed, it seemed to him as though all the people he knew when he was growing up had, one by one, simply moved from down by the factories up to the sunny green garden in which we stood.

I am struck by this image as I add my dear friend Cam DeVore to the list of those to whom this work is dedicated. All four were colleagues at one time in one way or another: Peter Bacsák, the Hungarian refugee of 1956, who, speaking no English, nonetheless made his way to America, Princeton, and eventually the New York practice of law; Bob Owen, West Texas preacher's son, Civil Rights Division hero of the 1960s, and my fox-hole buddy in the 1970s at Patterson Belknap; Bob Potter, Patterson Belknap patrician, progressive, devoted family man, trusted advisor, the mentor who introduced me to the *Wall Street Journal* and its reporters and editors, and thereby my life's work for more than thirty years. And now Cam—Seattle's great contributor to First Amendment law and its practice; to his family, community and his firm; and to his friends, of whom I am grateful to have been one.

They were all alive when I began work on this book some decades ago. They are no longer with us. Over the years and editions, one by one, like my father's folks, moving from town up to the nearby hill,

they have moved from acknowledged supporters of this enterprise to the Dedication Page. To the four of them, with love, admiration, and gratitude, this Fourth Edition is dedicated.

I also extend my thanks to many who have contributed to this edition and its previous incarnations—especially to

- PLI’s Keith Voelker, my caring, careful, extraordinary editor, for new editions and updates alike, for at least the past fifteen years; any mistakes that appear in the pages that follow are mine; most assuredly they are not his;
- Chad E. Milton, a partner at ThinkRisk Underwriting Agency, LLC, for his revision of chapter 17, Insurance Policies;
- Jeanne Fromer, Professor of Law, Fordham Law School, and former Law Clerk, for her vastly helpful review of and comments on the material below that addresses the impact of the new electronic media on defamation and privacy law, and vice versa;
- Laura Handman and Rob Balin, of Davis Wright Tremaine—“Cam’s Firm”—for their extensive contribution to section 15:4, Enforcement of Foreign Judgments; “Libel Tourism”;
- Kelli L. Sager, also of Davis Wright, for her last-minute help in finding last-minute citations;
- Sandra S. Baron, for her contributions to the Second Edition, and for much helpful material from the Media Law Resource Center, of which she is the Executive Director;
- My former law firms, Patterson Belknap Webb & Tyler, and Gibson, Dunn & Crutcher, whose generosity allowed me the time and resources for the first three editions;
- Jack Weiss, who was, and David Schulz, who is, my co-teacher; and our students over the past ten years at our Columbia Law School seminar, “The First Amendment and the Institutional Press,” all of whom have provided or permitted most of such fresh insights as may be found in this edition;

and mostly to

- Anne, who has, day in and day out for many years, been the most ardent supporter of mine and of this continuing project, patiently nearby as (sometimes in the oddest of places, from above the Arctic Circle to the Straits of Magellan, from Copenhagen to Capetown) I compulsively grab my laptop in

Preface to the Fourth Edition

order to do “just a little more work” on “The Book.” No Anne,
no Fourth Edition. My love and my thanks.

ROBERT D. SACK
New York, New York
April 4, 2010

Preface to the Third Edition

When I, with considerable support from younger colleagues at Patterson, Belknap, Webb and Tyler, first created this work in 1980, we had to begin from the beginning several centuries ago and an ocean away, and research ourselves to the year of the book. Beginning in 1991, to update the book, Sandra Baron and I played catch-up again, although not on so grand a scale: eleven years or so of the evolution of defamation and privacy law.

Since 1994, by contrast, I have been forced by the pressure of yearly supplements to stay astride of developments. The result has been a little more time spent on reflection while preparing the third edition of this work over that period of time and a little less coming from behind. I have always envied and aspired to a notion embodied in the title of a slender if estimable work by Professor Benjamin Kaplan: *An Unhurried View of Copyright*. This, the third edition of *Libel, Slander, and Related Problems*, is not yet "An Unhurried View of Defamation Law," but perhaps we are making progress.

Preparation of the text of this edition, and the research that went into it, ceased for all intents and purposes during the summer of 1998. I mention this for the usual purpose of warning readers that whatever may have happened to defamation and privacy law between then and now is not reflected in the unsupplemented version of these volumes. More important, perhaps, I wish my readers to be aware that this edition was completed before I took the bench. Although I have always tried to be fair-minded about the law as it is described in these pages, it remains the work of a person whose history and experience is that of a lawyer for the institutional press.

I republish below the prefaces and acknowledgments to the first two editions because the efforts of the people mentioned there remain largely embraced in this one. In particular, Sandra Baron's contributions as co-author of the second edition were essential.

I wish also to thank:

William Cubberley, Keith Voelker, and their colleagues at the Practising Law Institute and PLI Press, whose commitment to this project and work devoted to it, both over the years and in the past few months, have been exemplary.

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My former colleagues at Gibson, Dunn & Crutcher and Patterson, Belknap, Webb & Tyler, without whose support of the efforts that underlie all three editions, none would have been possible.

And, as always, Anne.

ROBERT D. SACK
New York, New York
April 15, 1999

Preface to the Second Edition

It is not quite accurate to refer to this as the second edition of *Libel, Slander, and Related Problems*, first published in 1980. That work, rather, has served as a first draft for this one. More than thirteen years of legal developments, personal experience, and reflection have substantially distanced this work from its parent.

Although there has been a torrent of case law and other material on the subject of defamation and privacy generated in the interim, the course through which it has surged has remained remarkably the same. The major developments in the Supreme Court have been *Hepps's*¹ shifting of the burden of proof as to truth or falsity to the plaintiffs in most private-figure cases, the limitation by the *Dun & Bradstreet*² Court of *Gertz's* reach in restricting recoverable damages, and, depending on one's view as to whether it has had an overall effect on protection for statements of opinion, perhaps *Milkovich's*³ elimination of per se immunity for such expression. None of this has been revolutionary.

The principal question that faced us in pulling together this volume was whether we should burden the reader with extensive citations to recent case law. We decided to do so for two reasons. First, we thought the citations would be useful; there is nothing like a case in point as a starting place for research. The more relevant case law set forth, the more likely the case in point will be here.

Just as important, though, we concede that we both approach this topic with similar backgrounds: We are lawyers who have devoted our careers to defending the press. Despite a genuine effort to be objective, it is indeed unlikely that the views expressed here are wholly uncolored by our history. But the cases say what they say. The reader's ability to review the complete case support for our assertions should enable him or her to compensate for whatever bias of ours has crept in.

We have provided parallel citations for the *Media Law Reporter*, volumes 2 through 21. (Volume 1, valuable though it is, is a selection of historically significant cases. It is not truly a "reporter.") An

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1. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775, 12 Media L. Rep. (BNA) 1977 (1986).
 2. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763, 11 Media L. Rep. (BNA) 2417 (1985).
 3. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 Media L. Rep. (BNA) 2009 (1990).

extraordinarily high proportion of the cases in this field over the last fifteen-plus years are published there. Official citations to the cases may be found in a helpful index-volume covering the first fifteen volumes, and the individual indexes for each of the succeeding volumes. A remarkable amount of research into the law of defamation may be done using no more than these three-and-a-half shelf-feet of blue volumes. The American law of defamation itself owes a great debt to Cindy Bolbach, who has tended the *Media Law Reporter* from its inception.

There is, of course, a wealth of other material that is helpful to the lawyer seeking information about the subjects covered in this volume. A few books:

Prosser & Keeton on Torts (5th ed. 1984) and the *Restatement (Second) of Torts* (1977), although aging, remain important, authoritative sources. Bruce Sanford (*Libel and Privacy*) and Rodney Smolla (*Law of Defamation*) have written up-to-date, first-rate treatises on these topics. Professor David Elder has created at least three relevant volumes: *The Law of Privacy*, *The Fair Report Privilege*, and, most recently, *Defamation: A Lawyer's Guide*.

The 1977 book by Laurence Eldredge, who helped shape the second *Restatement*, also called *The Law of Defamation*, is particularly good on common-law libel themes. And J.T. McCarthy has written a highly regarded book on privacy issues: *The Rights of Publicity and Privacy*.

The English law of libel is excellently and concisely treated in Geoffrey Robertson and Andrew Nicol's broader work, *Media Law*; it can be obtained as a Penguin paperback. *Gatley on Libel and Slander* is the venerable bible on the subject, having reached at least its eighth edition. C. Duncan and B. Neill, *Defamation*, is excellent and rather more accessible. And what isn't in those volumes is doubtless in a recent treatise, A. Carter-Ruck, *Libel and Slander*. Canadian libel law, meanwhile, is treated by, among others, J. Porter and D. Potts, *Canadian Libel Practice*.

There is, of course, a substantial lag between research for and distribution of any book. For the information of readers, the research for this book ended in mid 1993.

We would like to thank:

- The partners of Gibson, Dunn & Crutcher, whose support and gracious sharing of their staff and facilities made the book possible.
- Ann Wisniewski, whose tireless attention to the manuscript in its thousands of versions, variations, and revisions was heroic, and to the members of Gibson, Dunn & Crutcher's word processing department for long night-hours of devotion to the cause.

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- Steven Raber and Sharon Lai, Gibson, Dunn & Crutcher's New York librarians, and their staff, whose assistance was unstinting, efficient, courteous . . . and essential.
- Bill Cubberley, Keith Voelker, and June McDonald, three of many at the Practising Law Institute, the product of whose diligence, encouragement, enthusiasm, and professionalism you hold in your hands.
- Cam DeVore, Bruce Johnson, Marshall Nelson, and Dan Waggoner, of Davis, Wright, Tremaine, for lending their time and expertise in reviewing and commenting on portions of the manuscript.
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- Marjorie Coleman, whose research, and kindness in making it available to us, was invaluable.
- Henry Kaufman and the Libel Defense Resource Center, whose annual fifty-state survey of media law is as irreplaceable as it is handy to have around, and from whose information Appendix 1 was developed.
- The people at Media/Professional Insurance, Inc., on whose research and information chapter 15 is based.
- The American Law Institute, for permission to use the references in the text to the *Restatement (Second) of Torts* © 1977.
- Countless reporters, editors, producers, authors, publishers, viewers, readers, and people who simply have spoken or been spoken about, written or been written about, and have thereby asked us to ask ourselves what it all means.
- And last, first, and always, Greg, Anne, Ted, Ben, David, Suzanne, and Deborah for their support, understanding, forbearance and patience, without which there would be . . . nothing.

We offer this work to our colleagues in the hope that it will be useful.

ROBERT D. SACK
SANDRA S. BARON
New York, New York
February 1, 1994

Preface to the First Edition

The law of defamation is supposed to provide vindication and redress for injury to reputation. As a system for doing so, the law works badly.

In some circumstances, a defamatory falsehood can inflict more pain, more cruelty and more certainty, than an iron maiden. Yet, when a defamation of even the worst sort is uttered, whatever the effect on the reputation of its target, the “system” for protection of reputation is often impotent. The offending statement may be made by a Senator or Representative in the well of either House. It may be written by a federal official in the course of his duties or by state officials in the course of theirs. It may be uttered by a judge during a trial, or it may represent the overzealous advocacy of an attorney, the ignorance of a juror, or the perjury of a witness. If said in any of those contexts, it may be repeated by the print and electronic media from coast to coast.

If the target is a public official or a public figure, the statement may be emblazoned in headlines and be wholly erroneous because of the failure of its publisher to exercise due care, or any care at all. If he is not a public person it may result from unavoidable error, no less outrageously defamatory for that. It may be true. It may be false, but in light of the circumstances not demonstrably so. Or the victim may be unable to afford the time, energy, or money required to pursue a remedy; perhaps he is simply unwilling to engage in proceedings whose results are at best problematical and at worst will serve but to underscore and republish precisely that which he wishes to expunge.

In each case, despite the unquestioned injury to reputation, under the American law of defamation, the web of privileges, defenses, and practical hurdles would probably preclude relief. Under such circumstances, a relative handful of suits for libel or slander are successful. The few plaintiffs who succeed resemble the remnants of an army platoon caught in an enemy crossfire. Their awards stand witness to their good luck, not to their virtue, their skill, or the justice of their cause. It is difficult to perceive the law of defamation, in this light, as a real “system” for protection of reputation at all.

At the same time, there is no doubt that the law of defamation acts as a clog upon the free communication of ideas and information. The “twin torts” of libel and slander operate directly and routinely to control and to tax pure expression and thereby pose severe dangers

to expressional freedoms. Necessarily, a system that attempts to root out and compensate for falsity adversely affects the flow of information that is not false.

What is most disturbing is that the law falls most harshly on the less affluent publisher, and on the author who is almost never affluent at all. Its effect is spelled out by author and reporter Jonathan Kwitny in a postscript to his book about the Mafia entitled *Vicious Circles* (Norton 1979). Kwitny says:

One reason for the delay in publication of this book particularly deserves the reader's attention. A terrible chill has been thrown over the free flow of information in this country by libel laws, by the lack of any consistent court standards of what it's permissible to print (even if one concedes that judges should be able to *decide* what it's permissible to print), and by the power of anyone to threaten a well intentioned journalist and his publisher with financial ruin.

* * *

This book was turned down by a major publishing house for the frankly acknowledged reason that the house is reluctant to print works that might attract nuisance libel claims. Other houses have shown evidence of similar fears, and other authors have run into similar problems. Journalistic books must be written under onerous contractual terms, which are standard in book publishing . . . These terms place upon an author, with his meager resources, the implausible burden of indemnifying a large publishing corporation against the vagaries and unfairness of the law.

* * *

The real losers, of course, are not the journalists, who will keep at it. The losers are the American people. The crooked or acquiescent public officials, businessmen, mobsters, and others who plunder our wealth have found a way through the courts to hobble those who would help the public find out what's going on.

The amount of information lost to the public because of this "chill" is anyone's guess. But the loss is as real as though presses had been smashed and books had been burned.

If the long arm of the law of defamation fell with some regularity or predictability, at least it could be said that the "chill" has the effect of producing more "responsible" authors and publishers. This is probably not the case. One article or broadcast among tens of thousands will result in a lawsuit. The outcome of such litigation, when it does occur, is at best unpredictable, and, given the network of privileges and defenses, barely rational. The chance nature of suits and recovery casts a "chill" that is either arbitrary, unfair, or both. It falls upon those

who either cannot afford a lawsuit and judgment or who for some other reason are apprehensive about engaging in litigation. At least until now, the wealthy, the poor, and the reckless seem to have been relatively unaffected. Whether the defamation laws may be justified on the grounds of the marginally greater care which may be exercised by a few is certainly doubtful.

There are two obvious approaches to this dilemma, to liberalize the law or to make it stricter. Neither is particularly appealing.

Justices Black and Douglas, of course, proposed the virtual elimination of most libel and slander law on constitutional grounds. It is a view with few adherents. Whatever the advantages of doing away with all "chill" by abandoning the right to bring suit for "mere expression," the possibility of effecting such a revolution is so slight that it is hardly worth considering.

The other course is to make the law more stringent. It is, for example, at least imaginable that a system of strict accountability for defamation could be employed. But the obstacles that would be encountered in attempting to institute one seem insurmountable. A stricter system would be inconsistent with the Constitution and its interpretation. The elimination or constriction of privilege would be inconsistent with the judicial and legislative weighing over the course of many years of the needs for protection of reputation against the needs for the ability to speak with safety. It would be at odds with the American tradition of rough and tumble debate on public matters. In the final analysis, it is doubtful whether many of us would want such a system.

Having thus dismissed the law of defamation as at once too strict and too liberal to be useful to anyone, I find myself at the embarkation point of a book about defamation. As my partner, then aged four, reportedly replied to a neighbor inquiring how he liked his newly arrived baby sister, "We've got her, I guess we gotta keep her." I feel rather the same way about the law of defamation.

The facility with which lawyers toss around conceptually difficult words is often alarming. There is a massive gray building on Constitution Avenue in Washington. Signs in front of it bear the legend "Department of Justice." Who but a lawyer or a fugitive from 1984 would call the department of law the "Department of Justice"? If other signs in Washington were erected by lawyers, the Smithsonian Institution would be called the "Department of Science," the Library of Congress would be the "Department of Truth," and the National Gallery would be the "Department of Beauty."

The law of defamation is filled with such legends. Terms like "truth," "fair," "idea," "opinion," "fact," "actual," "knowledge," and the like abound. Lawyers and judges use them as though they know what they mean, but the subtleties and ambiguities that inhere in

them are a constant source of difficulty. The reader should be forewarned. Justice Powell's statements in *Gertz*, to choose but one example, that "[u]nder the First Amendment there is no such thing as a false idea" and that in most cases plaintiffs are confined to recovery for "actual" injury, are neither as simple nor as easy of application as might first appear. As we shall see.

My biases should be set forth before going further. Although I have attempted in the pages that follow (chapter 14 excepted) to set forth conflicting opinions and theories impartially and fairly, the fact remains that I have spent most of my professional life laboring on the side of the press. Rarely, if ever, is it possible to erase all vestiges of a point of view. I have nonetheless attempted to state both sides of unresolved issues. Even insofar as I have been unsuccessful, the authorities cited should enable the reader to obtain elsewhere whatever may be lacking in the text. Lawyers, by trade, tend to be totally impartial only when they are totally uninformed.

The law in this area changes rapidly. Any published work will, at least to some extent, be out of date at the moment of publication. This book cannot possibly be more than a snapshot of the law of libel and slander at a particular moment in time.*

In using this work and bringing it up to date, two publications are particularly helpful. The Bureau of National Affairs publishes the weekly *Media Law Reporter*; it provides most cases relevant to libel and slander problems in full text and with relative currency. And each year since 1973 the Practising Law Institute handbook for its annual November review of Communications Law (J.C. Goodale, Chairman) has contained an outline of recent developments in the area. Since 1977 the outline has been the work of John B. McCrory; it has been superb and is virtually indispensable.

ROBERT D. SACK
June 16, 1980

* Research for it ground to a halt toward the end of 1979; some lower-court cases cited herein may have suffered a cruel fate at the hands of appellate courts thereafter that the more recent citechecking by PLI in February and March of 1980 may not have caught.

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R.D.S.

Note on Citations to Lexis and Westlaw

When the author began research for this work in 1979, he had access, through his firm's library, to Lexis services but not to Westlaw's. He therefore relied on Lexis exclusively for computerized legal research. His expertise in use of such research, such as it was, has also been developed relying on Lexis. As a result, for more than thirty-five years, citations in this work to cases that are not officially published, that is, that are not collected in citable books, have borne Lexis citations only.

We understand that some lawyers have ready access to, or are literate in, only one of the two services. (There may be other means of obtaining and citing the case law, but they are not commonly used in what we read.) As a consumer of opinions and briefs that often use only Lexis or Westlaw citations, the author has become rather sensitive to the inconvenience that employing only one can visit on the reader. This Fifth Edition therefore bears parallel citations to both—at least insofar as the author was able to find both. As a bow in the direction of Lexis upon whose service the author has relied for all these years, the Lexis citations precede the Westlaw citations.

We hope the addition of the Westlaw citations will make these volumes more useful.

R.D.S.

January 2, 2017

Introduction

Impact of the New Digital Media on Libel, Slander, and Related Torts

As will become clear in the pages that follow, the author is of the view that the law of defamation, invasion of privacy, and related torts will not require substantial change in order to address the revolution wrought by the advent of the Internet and other new media of communications. The relative continuity of the law before and after radio and television became ubiquitous, as discussed in the case law to which extensive reference is made in this book, suggests that no radical change is now at hand. But proliferation of the new electronic media and the consequent difficulties of differentiating between the media and nonmedia will likely lead the courts away from the use of such distinctions in defamation and related law.

In the law of defamation, the question whether media and non-media defendants are to be treated differently has been raised with some frequency—in determining, for example, whether the Constitution places the burden of proof as to falsity on the plaintiff;¹ whether the protection for opinion arising out of the Supreme Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*² applies;³ whether the requirements for imposition of liability by public plaintiffs established in *New York Times Co. v. Sullivan*⁴ is applicable;⁵ whether there is a requirement of proof of "fault" under *Gertz*⁶ in non-public-plaintiff cases;⁷ and the ability of a defendant to rely on the privilege for republication of "fair reports" of judicial proceedings.⁸ Where such a distinction is made, the media defendant is typically accorded broader protection, presumably because of its role in rendering news, information, and opinion widely and publicly available.

Although the media/nonmedia distinction, and the decision whether to make it, has haunted defamation law for decades, it has become increasingly problematic in the age of Internet sites, email

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1. See section 3:3.2[B][1], *infra*.
 2. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 12 Media L. Rep. (BNA) 1977 (1986).
 3. See section 4:2.4[C], *infra*.
 4. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
 5. See section 5:3.10, *infra*.
 6. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).
 7. See section 6:5, *infra*.
 8. See section 7:3.5[B][4], *infra*.

messages, weblogs, Twitter, YouTube, Facebook, and the rest. Whether they should be treated differently from other defendants generally, and from the classic “institutional press” in particular, has become a more pressing question.

In the author’s experience, advocates for the institutional press are not often inclined to emphasize the need for special legal protections.⁹ The reasons include:

- A judgment that it is bad advocacy for a lawyer to argue that his or her client is “special” and not required to obey legal restrictions and obligations imposed on others,¹⁰ and the concomitant view that it is more persuasive to argue in favor of relatively broad protection for a relatively broad range of speakers.
- Increased recognition, in light of the rise of new electronic media, that speakers not traditionally considered members of the media may further the same individual and societal goals that traditional media can, and for which traditional media receive protection.
- Concern that in light of the blurring of the lines between traditional media and others, it may be unwise to ask the government, the judiciary emphatically included, to make the judgment, somewhat subjective perhaps, as to whether a particular defendant is to be treated as “media” or not.

Although the Supreme Court has not been altogether consistent in its view, in the 1980s six Justices expressed the view that constitutional principles cannot tolerate a press/nonpress distinction in defamation cases.¹¹ The Court’s disinclination was reflected in other applications of the First Amendment.¹²

9. For a classic treatment of the arguments for and against enhanced legal protection for “the press,” compare Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563 (1979), with Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595 (1979).

10. “There is an understandable, admirable repugnance in America to the assertion of any right to special, favorable treatment. Aversion to privilege is rooted deep within our history and our psyche. It is [we] at our best. Consistent with this tradition, respected members of the press have themselves denied claim to any special status, constitutional or otherwise.” Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 633 (1979) (footnote omitted).

11. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783–84, 11 Media L. Rep. (BNA) 2417 (1985) (Brennan, J., dissenting).

12. See, e.g., *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 801, 3 Media L. Rep. (BNA) 2105 (1978) (opinion of Burger, C.J., commenting on the dangers of

Because of this general preference for avoiding the distinction and the increasing difficulty of making one, the author expects that the substantive law of defamation and privacy law will shy away from it. Perhaps even the law's fundamental differentiation between the written and spoken word recognized in the title of this work—that between libel and slander—may be at risk in part as a result of the broadening and blurring of the identity of those who perform the traditional news gathering and dissemination function.¹³

To be sure, the new electronic media are having an effect on defamation litigation. The availability of the Internet has raised questions with respect to the liability of Internet service providers for facilitating defamation or invasion of privacy by others,¹⁴ maintaining the anonymity of the authors of Internet communications,¹⁵ jurisdiction in one state over an Internet publication originating in another,¹⁶ and the related area of so-called “libel tourism”—the obtaining of a defamation judgment based on an Internet publication in a defamation-friendly foreign jurisdiction combined with a subsequent attempt to collect on that judgment in U.S. courts.¹⁷

On the whole, however, the author expects the *substantive* law of defamation and the tort of invasion of privacy to maintain its continuity. There is little apparent reason for serious structural change.

Necessary Distinctions Between Media and Nonmedia

Even though media/nonmedia distinctions are now more difficult to make, they are not impossible or entirely unnecessary. In contexts usually somewhat removed from defamation and invasion of privacy,¹⁸ the distinction remains not only viable but crucial.¹⁹ This is most clearly evident where the media as an institution is depended upon for its “checking value,” that is, its value as watchdog regarding the doings

“including some entities within the ‘institutional press’ while excluding others”); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (opinion of White, J., referring to the “practical and conceptual difficulties of a high order” in determining who would be entitled to a press privilege to protect sources).

13. See sections 2:3 and 2:8, *infra*.

14. See section 7:3.2, *infra*.

15. See section 14:4, *infra*.

16. See section 15:1.3[C][5], *infra*.

17. See section 15:4, *infra*.

18. The most notable exception is attempts during discovery in defamation and privacy to determine the identity of the defendant's confidential sources and gain access to other unpublished material. See section 14:3, *infra*.

19. See, among many examples, N.Y. CIV. RIGHTS LAW § 79-h(b), which limits “confidential news” protection to traditional media, *viz.*:

of government and its officials.²⁰ The most familiar example is statutory and judge-recognized protection of sources used in the gathering and dissemination of news and other information. Attempting to provide equal protection for *everyone's* sources—allowing persons sending email messages, family intermeddlers, and the not altogether mythical back-fence gossip to withhold the identity of confidential sources, for example—would likely end up with protection for no one. Some differentiation is required.

But the new digital media require new efforts to refine the relevant definitions. It is not enough, if ever it was, to draw the line between classic institutional media—the *Washington Post*, CBS, PBS, *Time* magazine—and all other communicators. Different treatment must be based on the particular function that the defendant is or is not fulfilling when making the communication in question—not on the defendant's identity.²¹

professional journalist[s] or newscaster[s] presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public . . . for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity. . . .

Id.

20. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

21. This is not a new thought spawned by the advent of new electronic media.

Any individual with a photocopier may lay claim to protection under the free press guarantee. If the Coca Cola Company decides to publish a newspaper, its rights as press in that connection must be assured. Conversely, if Time, Inc., despite its label as "institutional press," decides to make, bottle and sell soft drinks, it could not and would not seriously assert any special free press rights in that endeavor. . . .

[E]ven if we avoid granting privileges to particular people, particular roles require specific protection if they are to be properly performed for the benefit of society at large. The ability of a doctor to withhold evidence about certain communications with a patient, and the

Introduction

The Privacy Protection Act of 1980²² addressed this problem, albeit in a somewhat primitive way. It provided: “[I]t shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication. . . .”²³ The words “similar form of public communication” might be broad enough to cover some, if not all, new electronic media.

Employing a more sophisticated approach, a 2009 shield bill reported out of a Senate committee provides protection for confidential sources of information to persons defined in the following way:

- (A) . . . a person who—
 - (i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by—
 - (I) conducting interviews;
 - (II) making direct observation of events; or
 - (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;
 - (ii) has such intent at the inception of the process of gathering the news or information sought; and

privilege of a policeman upon occasion to ignore speeding laws and traffic lights are not guaranteed to physicians or law officers because of their uniforms or their degrees. Neither are such privileges bestowed as an expression of public gratitude. They are offered because, in the public judgment expressed through law, the privileges are necessary to enable the effective performance of functions essential to the public.

Similarly the press has a particular service to perform. . . .

Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 633–34 (1979) (footnote omitted).

22. 42 U.S.C. § 2000aa *et seq.*

23. *Id.* § 2000aa(a).

- (iii) obtains the news or information sought in order to disseminate the news or information by means of print (including newspapers, books, wire services, news agencies, or magazines), broadcasting (including dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means.
- (B) includes a supervisor, employer, parent company, subsidiary, or affiliate of such person; and
- (C) [but does not include certain persons affiliated with foreign governments or designated terrorist organizations.]²⁴

24. Free Flow of Information Act of 2009, 111th Cong., 1st Sess. S. 448, § 10 (2), text as of December 26, 2009, *available at*, *inter alia*, <http://asne.org/portals/0/Publications/Public/S44811-12-09.pdf> (last visited Dec. 26, 2009).

The definition of covered persons in the bill as originally adopted by the Senate Judiciary Committee on February 13, 2009, was less sophisticated. It read, “(2) Covered Person—the term “covered person”—(A) means a person who is engaged in journalism; (B) includes a supervisor, employer, parent company, subsidiary, or affiliate of a person described in subparagraph (A); and (C) [subject to certain exceptions involving persons affiliated with foreign governments and designated terrorist organizations].” *See* www.govtrack.us/congress/billtext.xpd?bill=s111-448 (last visited 12/26/09).

See also *Kaufman v. Islamic Soc’y of Arlington*, 291 S.W.3d 130, 142, 37 Media L. Rep. (BNA) 2361 (Tex. App. 2009) (holding, for purposes of a statute permitting interlocutory appeal in some circumstances by “a member of the electronic or print media,” that “an internet author’s status as a member of the electronic media should be adjudged by the same principles that courts should use to determine the author’s status under more traditional media”):

Our decision that an internet communicator may qualify as a member of the media under certain circumstances is strengthened by recent developments in federal law. Specifically, a federal statute related to the fee charged to media for federal agencies’ disclosure of public information indicates that such media includes any

person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not

This is a far more nuanced means by which to identify “media” than has typically been employed in defamation and privacy cases, state shield statutes, or protection for confidential matter in the case law or elsewhere.

Identifying who are media will likely continue to provide challenges to both legislators and judges. It is to be expected that the law in this respect will see substantial evolution in response to experience and continued technological change. But whether it will have an appreciable effect on the substantive law of defamation and privacy remains to be seen.

Invasion of Privacy Interests Not Covered by Libel, Slander, or Related Torts

Finally, the limits of the term “invasion of privacy” as used in this work must be emphasized. These volumes are about torts and the constitutional limitations on them. The new digital media have vast implications for the invasion of privacy interests that do not—at least for now—give rise to tort liability. Thus, crucial, complex, and vexing issues involving the possible intrusion on individual privacy interests by governments,²⁵ other entities,²⁶ and individuals, and the protections arising from constitutional provisions other than the First Amendment—particularly the Fourth, Fifth, and Fourteenth—are beyond the scope of this work.²⁷

all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.

5 U.S.C.A. § 552(a)(4)(A)(ii) (West Supp. 2009); *see also Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003) (finding that a publisher of a biweekly electronic newsletter qualified as a media entity).

Kaufman, 291 S.W.3d at 142–43 (emphasis deleted).

25. *See generally* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008).
26. *See*, among a plethora of examples, Miguel Helft, *Critics Say Google Invades Privacy with New Service*, N.Y. TIMES, Feb. 13, 2010, at B1.
27. *See, e.g., United States v. Amodio*, 71 F.3d 1044, 1051 n.1 (2d Cir. 1995) (noting that privacy interests, legally cognizable and otherwise, “antedate and are distinct from the body of law which has come to be associated with the tort of ‘invasion of privacy’”).

