

NEWSGATHERING AND THE LAW

FOURTH EDITION

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NEWSGATHERING AND THE LAW

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Dedications

From C.T.D. to his wife Peggy.

From L.L. to his family, Shelley, Sara and Hilary.

From R.C.L. to his parents, Lorraine and Spencer Swanson;
and Paul Nussbaum, a country lawyer.

From S.D.B., to his family, Susan, Ruby, and Ian.

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Lee Levine is a founding partner of Levine Sullivan Koch & Schulz, L.L.P. and an adjunct professor at the Georgetown University Law Center. Mr. Levine is a past Chair of the American Bar Association's Forum on Communications Law. In the United States Supreme Court, Mr. Levine argued *Harte-Hanks Communications, Inc. v. Connaughton* on behalf of the newspaper defendant, and *Bartnicki v. Vopper* on behalf of the media defendants. He has litigated in the courts of more than 20 states and the District of Columbia and has appeared in most federal courts of appeal. He has testified before committees of both houses of Congress on reporter's shield legislation.

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C. Thomas Dienes

C. Thomas Dienes, co-author of the first three editions of this treatise, is the Lyle T. Alverson Professor Emeritus of Law at George Washington University Law School. He has authored or co-authored nine books and numerous articles on constitutional and communications law. Professor Dienes has provided counsel to *Atlantic Monthly* and *Fast Company* magazines. He is a former General Counsel and legal consultant to *U.S. News and World Report*. He is a co-author of *Constitutional Law: Principles and Policy, Cases and Materials* (LexisNexis 6th ed. 2002).

Preface to the Fourth Edition

When the First Edition of *Newsgathering and the Law* was published in 1997, it spanned less than 800 pages and consumed sixteen chapters. Some fifteen years later, the Fourth Edition weighs in at just under 2000 pages organized in nineteen separate chapters and spread over two volumes. The book's increased heft reflects the frequency with which courts and legislatures have been called upon during those years to generate law addressing the rights and potential liabilities of those who seek to gather information for dissemination to a wider audience. Indeed, that body of law is no longer of interest only to practicing journalists and the lawyers who represent them—it now has a palpable impact on a broad range of “citizen journalists,” bloggers, and others who engage in what has traditionally been described as “newsgathering.” The Fourth Edition represents an attempt to keep pace not only with the evolution of legal doctrine, but also with the technological and economic changes that continue to alter our conception of the journalistic enterprise itself.

The book's initial chapters continue to focus on the First Amendment-based and common law rights of access. They now include analysis of the Supreme Court's decisions in *Skilling v. United States*,¹ which addressed the problem of pretrial publicity; *Presley v. Georgia*,² which reaffirmed the right of access to voir dire; and *Hollingsworth v. Perry*,³ which sheds light on the Court's views with respect to the telecasting of judicial proceedings. These chapters also continue to chronicle the ongoing evolution of the right of access as articulated by numerous decisions of federal and state trial and appellate courts, ranging from access to juror names⁴ to ongoing scrutiny of efforts to seal court dockets,⁵ to the challenges arising from dissemination of news on the Internet. Throughout, but particularly in Chapter 3.04, there is expanded coverage of access to military courts, military tribunals, and proceedings in civilian courts that raise national security issues, including under the Classified Information Procedures Act⁶ and the state secrets doctrine—all areas in which the law of newsgathering continues to develop rapidly. There are also new sections dealing with access to civil commitment proceedings,⁷ and to expunged records.⁸ And, the text addressing cameras in the courtroom has been expanded to include decisions involving the use of modern technology to text, tweet and blog from the courtroom.⁹

¹ 130 S. Ct. 2896 (2010). See Chap. 2.01[2][b].

² 130 S. Ct. 721 (2010) (per curiam). See Chap. 2.02[5].

³ 130 S. Ct. 705 (2010). See Chap. 4.01.

⁴ See *United States v. Wecht*, 537 F.3d 222, 239 (3d Cir. 2008); *United States v. Blagojevich*, 612 F.3d 558 (7th Cir. 2010).

⁵ See Chaps. 2.04, 5, 6, 7.02.

⁶ 18 U.S.C. App. 3, §§ 1 et seq.

⁷ See Chap. 3.03.

⁸ See Chap. 5.03.

⁹ See Chap. 4.04.

Preface to the Fourth Edition

In addition, the Fourth Edition continues to provide timely analysis concerning the access to public meetings and records permitted by federal and state government entities. Every change in presidential administration or state government brings about a change in philosophy toward such access, particularly regarding security and privacy, which increases the number of disputes and judicial decisions addressing the law of access. The Fourth Edition continues the book's national focus on the scope of the access granted by federal and state statutes, as well as the judicial interpretations of such statutes, providing one of the most comprehensive treatments of public access to government information available.

The book's middle chapters, which continue to address criminal and civil liability for newsgathering-related conduct, chronicle significant developments since the Third Edition on a number of fronts. Notably, in the wake of the disclosure of thousands of pages of classified documents on the Wikileaks website, the Fourth Edition examines both the federal courts' most significant explication of the reach of the Espionage Act in *Rosen v. United States*,¹⁰ and the developing case law addressing the extent to which the First Amendment restrains the Government from prohibiting the dissemination of unlawfully acquired information following the Supreme Court's decision in *Bartnicki v. Vopper*.¹¹ By the same token, the Fourth Edition addresses an array legal issues that have arisen most notably in the context of so-called "reality television," including the media's potential liability when it cooperates with law enforcement agencies for the purpose of documenting their activities.¹²

The Fourth Edition's final chapters continue to chronicle the efforts of courts and legislatures, both in the United States and abroad,¹³ to address the propriety of efforts to compel the media to disclose a broad range of information, from the names of confidential sources,¹⁴ to the unpublished fruits of the newsgathering enterprise,¹⁵ to the identities of anonymous posters on Internet websites.¹⁶ This last body of case law has fairly exploded since publication of the Third Edition and now merits a chapter of its own. The authors are greatly indebted to the groundbreaking work of Ashley Kissinger and Katharine Larsen on this subject, an

¹⁰ 445 F. Supp. 2d 602 (E.D. Va. 2006).

¹¹ 532 U.S. 514 (2001). See, e.g., *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007); *Jean v. Massachusetts State Police*, 492 F.3d 24 (1st Cir. 2007).

¹² See, e.g., *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007); *Frederick v. Biography Channel*, 683 F. Supp. 2d 798 (N.D. Ill. 2010); *Condradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008).

¹³ See, e.g., *Financial Times Ltd. v. United Kingdom*, App. No. 821/03, Eur. Ct. H.R. (2009); *R. v. National Post*, [2010] 1 S.C.R. 477, 2010 SCC 16 (Can.); *Globe & Mail v. Canada*, 2010 SCC 41 (Can.).

¹⁴ See, e.g., *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

¹⁵ See, e.g., *Chevron Corp. v. Berlinger*, 2011 U.S. App. LEXIS 629 (2d Cir. Jan. 13, 2011).

¹⁶ See, e.g., *Independent Newspapers, Inc. v. Brodie*, 966 A.2d 432 (Md. 2009); *Mortgage Specialists v. Implode-Explode*, 999 A.2d 184 (N.H. 2010); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. App. 2007).

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expertise that they have selflessly shared with us and, now, with our readers.¹⁷

Finally, the authors of the Fourth Edition cannot overstate the debt they owe to Tom Dienes for allowing us to take the firm foundation he painstakingly built in the first three editions and use it to construct the fourth. Much of Tom's work remains unaltered in the Fourth Edition and most of the rest of these volumes simply reconfirm the insights that he brought to this enterprise from day one. We miss you Tom and we are grateful for the opportunity to have collaborated with you.

¹⁷ See Chap. 19.

Preface to the Third Edition

It has been more than five years since publication of the Second Edition of *Newsgathering and the Law* and, as the increasing size of the annual supplements to it illustrate, the law surrounding the process by which the press acquires information for publication and broadcast has continued to expand at an exponential rate. The Third Edition attempts both to chronicle that expansion and to take note of the many resulting substantive alterations in the legal landscape.

Thus, the book's initial chapters, which are devoted to the First Amendment and common law-based rights of access, reflect the burgeoning case law surrounding press and public access to all manner of judicial proceedings, but also two important issues that have achieved heightened prominence since publication of the Second Edition in 1999. First, the question of public and press access to juvenile proceedings and the records they generate has increasingly occupied the attention of courts and legislatures. Accordingly, in Chapter 7, the Third Edition examines the development of the law of access in this discrete context. Second, the events of September 11, 2001, have had a dramatic impact on the extent to which judicial, administrative and other governmental proceedings relating to international and domestic terrorism remain open to the press and public. The impact of the "War on Terrorism" on the First Amendment and common law-based rights of access are addressed throughout the Third Edition, including in Chapters 1.06, 9.05, and 10.04, the latter of which discusses the conflict between the Third and Sixth Circuits concerning access to immigration removal proceedings that allegedly implicate the national security, a conflict that the Supreme Court chose not to resolve.¹

The book's middle chapters, which address the press's liability for newsgathering-related conduct, have been substantially revised to reflect the continuing maturation of a body of law that was in its infancy when this treatise was first published in 1997. In the newly added Chapter 13, therefore, the Third Edition attempts to distill the substantive doctrines that have emerged in the last decade of extensive litigation surrounding newsgathering liability, doctrines that appear to resonate with the courts regardless of where the newsgathering at issue in a given case takes place (Chapter 14) or the species of newsgathering conduct at issue (Chapter 15). And, in this regard, Chapter 13 assesses as well the impact of the Supreme Court's 2001 decision in *Bartnicki v. Vopper*,² the Court's first opportunity to address the First Amendment's applicability to the press's newsgathering conduct since *Cohen v. Cowles Media Co.*³

Finally, the Third Edition's remaining chapters chronicle the major developments

¹ Compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (recognizing First Amendment-based right of access to specially designated immigration removal proceedings) with *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) (holding there is no First Amendment-based right of access to such proceedings).

² 532 U.S. 514 (2001).

³ 501 U.S. 663 (1991).

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in the law of reporters' privilege that have followed the Seventh Circuit's decision in *McKevitt v. Pallasch*,⁴ and culminated in an apparently unprecedented number of federal appellate decisions affirming contempt citations to journalists who have declined to obey court orders requiring them to identify their confidential sources.⁵ The Supreme Court's denial of *certiorari* in one of those cases, *In re Grand Jury Subpoena (Miller)*,⁶ reflects its continuing reluctance to address either the efficacy or scope of such a privilege, whether grounded in the First Amendment or the common law.

Like its predecessors, the Third Edition is designed to provide a comprehensive resource for those courts, scholars, lawyers and journalists that have the occasion to explore the intersection between the gathering of news and the American legal system, especially the First Amendment.

⁴ 339 F.3d 530 (7th Cir. 2003).

⁵ See, e.g., *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2003).

⁶ 397 F.3d 964 (D.C. Cir.), *cert. denied*, 125 S. Ct. 2977 (2005).

Preface to the Second Edition

When we completed the manuscript of the First Edition of *Newsgathering and the Law* in the Summer of 1996, we contemplated that, if developments in the law warranted the effort, we would prepare a Second Edition five years after its initial publication. Even we, who conceived the notion that the law of newsgathering had become sufficiently discrete and important to warrant its own treatise, did not anticipate the explosion of legal developments over the last three years that has virtually mandated preparation of a Second Edition at this time.

The evolution of legal doctrine distilled in this edition is, of course, ongoing. Thus, while the Second Edition reflects the important changes in the law of newsgathering through the Summer of 1999—from the Supreme Court’s pronouncements in *Wilson v. Layne*¹ and *Hanlon v. Berger*,² to the California Supreme Court’s extraordinary output of decisions over the last year,³ to the virtual creation of a body of precedent addressing news media liability for violation of federal and state wiretapping statutes,⁴ to the Second Circuit’s reconsideration of the journalists’ privilege in *Gonzales v. National Broadcasting Co.*⁵—there will undoubtedly be additional watersheds in the not-too-distant future. Most significantly, this volume was completed before the United States Court of Appeals for the Fourth Circuit had spoken to the media’s liability for fraud, misrepresentation and trespass in newsgathering in *Food Lion, Inc. v. Capital Cities/ABC Inc.*⁶

Nevertheless, we believe that this volume—like its predecessor—will prove to be a comprehensive resource for lawyers and journalists seeking to understand this increasingly complex and dynamic area of the law.

¹ 119 S. Ct. 1692 (1999).

² 119 S. Ct. 1706 (1999) (per curiam).

³ See, e.g., *Sanders v. American Broadcasting Cos.*, 978 P.2d 67 (Cal. 1999) (intrusion and eavesdropping claims arising from hidden camera investigation); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) (intrusion and eavesdropping claims arising from media ride along with emergency rescue helicopter crew); *In re NBC Subsidiary (NBC-TV), Inc. v. Superior Ct.*, 980 P.2d 337 (Cal. 1999) (access to civil trials); *Daily Journal Corp. v. Superior Ct.*, 979 P.2d 982 (Cal. 1999) (access to grand jury records).

⁴ See, e.g., *Boehner v. McDermott*, 1999 U.S. App. LEXIS 23135 (D.C. Cir. Sept. 24, 1999); *Peavy v. New Times, Inc.*, 976 F. Supp. 532 (N.D. Tex. 1997); *Ferrara v. Detroit Free Press, Inc.*, 26 MEDIA L. REP. (BNA) 2355 (E.D. Mich. 1998); *Oliver v. WFAA-TV, Inc.*, 37 F. Supp. 2d 495 (N.D. Tex. 1998).

⁵ 1998 U.S. App. LEXIS 38583 (2d Cir. Aug. 27, 1999).

⁶ 951 F. Supp. 1224 (M.D.N.C. 1996); 951 F. Supp. 1217 (M.D.N.C. 1996).

Acknowledgements for the Fourth Edition

In addition to those we specifically acknowledged in the First, Second and Third Editions, we are indebted to our colleagues at Levine Sullivan Koch & Schulz, L.L.P. and Southwestern Law School. For the Fourth Edition, and the annual supplements that preceded it, we wish to thank Margo Arnold, Rob Arcamona, Kim Atura, Kim Barton, John Begakis, Geoffrey Brounell, Kathleen Cullinan, Laura Dean, Thomas Donnelly, Alex DiBona, Daniel Freeman, Pete Guarneri, Shaina Jones, Ling Wu Kong, Jeffrey Kossoff, Paul Krantz, Scott Lindlaw, Wesley Mullen, Sarah Staveley O'Carroll, Jennifer Pinkerton-Burke, Adam Rappaport, Bridgette Simmons, Patricia Snowden, Col. Dwight Sullivan, USMCR, Lucas Tanglen, Derek Turner, Lauren Ungs, Caitlin Vogus, and Yasmin Youssef for their invaluable contributions.

Additional Acknowledgements from Seth D. Berlin for the Fourth Edition

As someone who greatly admired *Newsgathering and the Law* upon its initial publication and who consults it often in my practice, I was humbled when, in 2005, I was invited to become a co-author and to assume responsibility for Tom Dienes' portions of the enterprise. Especially now that I have had the opportunity to study and update those parts, I have an even deeper appreciation for the magnitude of his accomplishment in preparing the first three editions. His are large shoes to fill on this project, and I am indebted to him for the opportunity to try.

I also am exceedingly grateful to Robert Lind and Lee Levine for welcoming me to the team and for encouraging me as I embarked on this effort. I want to add a special thanks to Lee, with whom I have had the privilege of working on a daily basis for twenty years, for his wise counsel as both mentor and friend. He is a gifted scholar, an exceptionally talented lawyer, and one of the most fundamentally decent people I know.

I also want to thank the rest of my extended family at Levine Sullivan Koch & Schulz. I could not imagine practicing law with a finer group of colleagues. They have my gratitude for their friendship, for the many insights they have shared with me, and for their support during the preparation of this new edition.

I consider myself lucky to practice First Amendment and media law, and to be a part of a tightly-knit bar comprised of like-minded and able lawyers. I am also fortunate to be able to call many of them my friends. I am indebted to them, including the many clients whom I have been privileged to represent over the years, as many of the cases discussed in this publication have been theirs.

Finally, I want to thank my wife, Susan, and my children, Ruby and Ian. They have in many ways embarked on this effort together with me, enduring absences while at the same time serving as a constant source of support. With love, I dedicate my work on this project to them.

Seth D. Berlin

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In addition to those we specifically acknowledged in the First and Second Editions, we are indebted to all of our colleagues at Levine Sullivan Koch & Schulz, L.L.P., the George Washington University School of Law and the Southwestern University School of Law. For the Third Edition, and the annual supplements that preceded it, we are particularly grateful for the masterful work of Seth Berlin, who has graciously agreed to become a co-author of future editions, the substantial contributions of Adam Rappaport, and the significant assistance of Nancy Anfanger, Jamie Ball, Jaison Benjamin, Arik Betesh, Amanda Boehmer, John Blevins, A.J. Brandenstein, Sandra Burch, Jennifer Carr, Rebecca Carvalho, Sarah Castle, Anne Champion, Jill Courtemanche, Sean Crowley, Felicia Dominguez, James Fagen, Molly Farrell, Jason A. Friedhoff, Jacqueline Gaeta, David Gamblin, William A. Garvin, Kian Ghaffari, Jeffrey Glassman, Alex Grigorian, Joshua Gyan, Timothy Hamilton, Gregory Hinton, Ellen Hurley, Kathy Hussmann, Rebecca Ingber, Jennifer Karmonick, Ashley Kerns, Dennis Ladd, Matthew Laviano, Matthew Lindenbaum, Monica Loseman-Barwind, Aarika Mack, Eric Marsteller, Patricia Michitsch, Jonathan Miller, John O'Keefe, Kelley Pate, Robert Pugsley, Adam J. Reinhart, Maria Rivera, Samantha Sherman, Bridgette Simmons, Brad Simon, David Tarica, Kriten Tluchowski, KatieLynn Townsend, Nicole Valera, Lauren S. Voss, Jonathan Willingham, Kimberly Wright and Darcey Zelkos.

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There really is no way to capture in a few sentences the contribution of those who have assisted me in completing my share of this book. Without the assistance of Dean Jack Friendenthal, the administration, the library staff (especially Leslie Lee), and the students of the George Washington University Law School, the research and writing effort would have been far more difficult, if not impossible. Special thanks are due to my research assistants and those student volunteers who gave so generously of their time and skills: Loren P. Ambinder, Kevin M. Goldberg, John M. Kloosterman, Mark M. Kodama, Michael A. Poltnick, John T. Ruskusky and John T. Ryan. My colleagues on the faculty, especially Jerome A. Barron, have always provided a rich source of ideas, commentary and helpful criticism.

Fred Drasner, President and Chief Executive Officer, and Gail Lione, General Counsel, of *U.S. News and World Report*, provided unique opportunities for me to pursue the study of communications law as both an academic and in the world of practice. And my collaboration with Lee Levine and Bob Lind has provided a constant source of stimulation bridging the law school experience and legal practice.

I especially want to acknowledge and express my appreciation to my secretary Angela Shearer, who devoted countless hours, even on weekends and holidays, to assist in the successful completion of this book. Thanks also to the other members of the secretarial staff at the law school, especially Winifred Hercules and Cynthia Webb-Manly, who pitched in to help and to Beverly Calvert, Office Manager, who always sought to accommodate my endless requests for assistance.

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C. Thomas Dienes

This book is, for me, the product of lessons learned during the twenty odd years I have devoted to studying and practicing media law. It has been my hope, from the outset, to combine my affection for the First Amendment with an appreciation for the practical realities of the litigation process that surrounds it. Whether or not this book has successfully accomplished that task, I am personally indebted to the many colleagues, friends, and family who have enabled me to make the effort.

First, and foremost, is my family. My wife and daughters have made do without their husband and father for large parts of many weekends over the last two years. For the most part, they have done so with good grace, humor and affection. For that, I dedicate my share of this work to them.

Next, there are my colleagues, with whom I have had the privilege of working over much of the last two decades, and whose guidance and wisdom are hopefully

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reflected in these pages, I am grateful to them all, but especially to my partners and friends Michael Sullivan, Jim Grossberg, Celeste Phillips, and Betsy Koch. I am also indebted to the media law bar, an unusually generous and talented group of lawyers. A special expression of gratitude is due to my particular heroes among that distinguished group—Cam DeVore, Victor Kovner, and Bob Sack—and to my friends Stuart Pierson, Kelli Sager, and Dan Waggoner.

Of course, there would be no experience to draw upon without the cases and controversies, and those are the product of a wonderful group of clients, each of whom it has been my honor to represent. I am grateful to all of them.

In its initial stages, this book benefited greatly from the work of John Zucker and from my previous collaborations with Monica Langley. It could not have been written without the help of a small army of summer associates at Ross, Dixon & Masback and research assistants at the George Washington University Law School. All of them, but especially Jennifer Mathis, Craig Canetti and Jonathan Burke, have my gratitude. I am especially grateful as well to Tom Dienes for the privilege of collaborating with him on this and other projects, and to Bob Lind for his masterful work on this project. Finally, this book literally could not have been written without the assistance of my secretary Steve Parker, who has my sincere thanks for a job well done.

Lee Levine

Special thanks go to my student research assistants Charles Steenveld, Todd Whiteley, Tim Griggs, Irena Kopelev, Wendy Jaffe and Peter Cole, without whose tremendous efforts this book would not have been completed. I especially offer my heartfelt appreciation and love to my significant other, Ellen R. Hurley, Esq., who not only contributed to the federal meeting law materials, but made numerous personal sacrifices that ensured the completion of this project. Her good humor, intelligence and companionship have provided me with a constant source of fulfillment and inspiration. I also thank Tom Dienes and Lee Levine for providing me with the opportunity to collaborate with them on this book.

One of the benefits of working in academia is the ability to work with gifted colleagues. Three of my faculty colleagues, Michael Frost, James Kushner and Marin Scordato, were of particular help with the preparation of this book. The outstanding assistance provided by the Southwestern University School of Law library staff, Director Linda Whisman, Sharrel Gerlach, Dennis Ladd, David McFadden, Carole Weiner, LeVont Crockett and Tom Hall, made the daunting task of completing this work possible. The efforts of Director Jeannie Nicholson and Martha Fink of the Southwestern University Faculty Support Center, as well as Julia Mason, made the production of this book more efficient and reduced logistical difficulties endemic to such a project.

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Robert C. Lind

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