



# Libel and Privacy Law Primer in the Trump Era

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“Our current libel laws are a sham and a disgrace and do not represent American values or American fairness”

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# FIRST AMENDMENT

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .



# WHAT IS THE PRESS?

- Institutional press
  - Newspapers
  - Television stations
  - Radio stations
- Non-institutional press
  - Bloggers
  - Websites



# WHAT IS THE PRESS?

Is there a distinction between the “institutional press” and others?



# WHAT IS THE PRESS?

A distinction between the institutional press and others is unworkable with “the advent of the Internet and the decline of print and broadcast media . . . becomes far more blurred.”

- Citizens United v. Federal Election Commission



BUT . . .

Indiana journalist privilege law applies to persons

- Connected with or employed by:
  - A newspaper or other periodical issued at regular intervals and having general circulation
  - Connected with a licensed radio or television station who received or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news



BUT . . .

Illinois Reporter Privilege Law defines

- “Reporter” as a person regularly engaged in business of collecting, writing, or editing news for publication through a news medium on a full-time or part time basis
- “News medium” as a newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation, radio or broadcast station or network, and any person engaged in the making of news reels or other motion picture news



## NO LAW ABRIDGING . . .

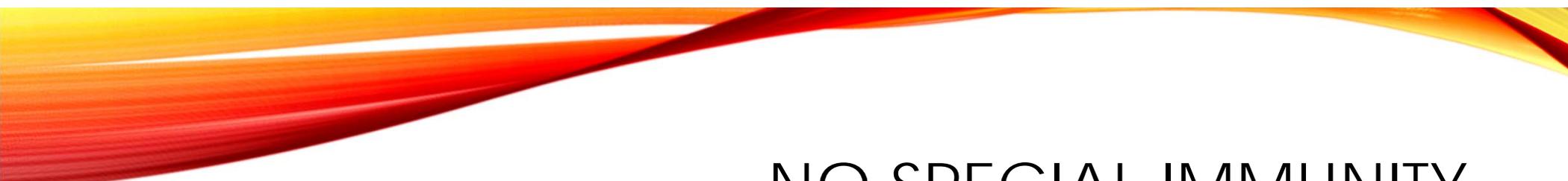
“You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that ‘no law’ does not mean ‘no law’, and I would seek to persuade the Court that that is true.”

- Solicitor General in Pentagon Paper Oral Argument



“Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.”

- New York Times v. U.S.



## NO SPECIAL IMMUNITY

No immunity from laws that apply to others:

- Libel (Defamation)
- Privacy
- Anti-SLAAP
- Copyright
- Trade Secrets
- Computer Fraud and Abuse Act



## DEFAMATION PER SE

Defamation is presumed if you impute

- Commission of criminal offense
- An inability to perform or want of integrity in the discharge of duties or employment
- Lack of ability in trade, profession, or business
- Falsely accusing someone of adultery
- Infection with a loathsome communicable disease



# DEFAMATION PER QUOD

Damages must be proven



Unprivileged publication

Must state fact, not an opinion

- Precise
- Verifiable

Couching it as 'opinion' is not enough

Context of statement

- 
- Statement is viewed from the eyes of an “ordinary reader”
  - Context
  - In Illinois, “innocent construction rule”



Baseball owner said of two broadcasters:

- I don't mind criticism, but they both told a lot of lies. They wanted us to lose. The public could not know the truth about them; they are both liars. They both said things on the air they knew were not true."

- Piersall v. Sportsvision of Chicago



Promotional on air announcement with reporter telling plaintiff:

“Let’s sum this up for a second, the evidence seems to indicated that you’re cheating the city.”

- Schivarelli v. CBS



Headline:

Health board shuts doors of Bandido's  
Inspector finds rats, roaches at local eatery

- Journal-Gazette Co. v. Bandido's



**Donald J. Trump** ✓

@realDonaldTrump

 Follow

Really dumb @CheriJacobus. Begged my people for a job. Turned her down twice and she went hostile. Major loser, zero credibility!

8:01 PM - 5 Feb 2016

  1,740  4,783



## RIGHT TO PRIVACY

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.

- Warren and Brandeis, 1890



## RIGHT TO PRIVACY

- Right to be left alone
- Publicity to private facts
- Intrusion on seclusion
- False light



## RIGHT TO PRIVACY

Not specifically stated in U.S. Constitution  
although some constitutions recognize the right  
to privacy



## RIGHT TO PRIVACY

Giving publicity to a matter concerning a private life if the matter

- Would be highly offensive to a reasonable person
- Is not of legitimate concern to the public



## RIGHT TO PRIVACY

- Chicago Tribune interviewed a mother in the hospital after her son died of gunshot wounds. Took notes of mother talking to dead son and took pictures of dead son.
- Kmart hired private investigators to act as janitors to get information in inventory shrinkage. They also overheard comments and reported to superiors on employee family matters, health problems, and sex lives.



# RIGHT TO PRIVACY

## Intrusion on seclusion

- Unauthorized intrusion or prying into seclusion
- Intrusion is offensive or objectionable to a reasonable person
- Intrusion causes anguish and suffering



## RIGHT TO PRIVACY

- Employee punched holes in ceiling tiles to observe the women's rest room
- Camera placed in medical office to catch a thief also recorded medical examination of patients

But not

- Neighbor focused a camera on neighbor's garage and recorded 24 hours a day



## RIGHT OF PUBLICITY

- Commercial use of image, likeness, voice, etc. without permission
- Formerly known as misappropriation of likeness
- Now usually called the right of publicity
- Allowing use for one purpose may not be sufficient for all purposes



# DOES PRIVACY STILL EXIST?

## Practical obscurity

... we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be inspected to invade the citizen's privacy ... There is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

- U.S. Dept. of Justice v Reporters Committee for Freedom of the Press